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The Istanbul Convention: 
A Radical Feminist Instrument?

Gizem Guney

Thesis submitted for the degree of Doctor of Philosophy

University of Sussex

November 2018
DECLARATION

I hereby declare that this thesis has not, in the same or any other form, been submitted to the University of Sussex or any other university for a degree.

Signed:

Name: Gizem Guney

Date: 6\textsuperscript{th} December 2018
To Mum and Dad
ACKNOWLEDGEMENTS

I realise that to express gratitude and love is even more difficult than to express thoughts. Within the limits of the capability of words, I first want to thank my supervisors, Prof. Susan Millns, Dr. Kimberley Brayson and Dr. Elizabeth Craig for their invaluable support and kindness. Thanks for listening to my mind for such a long time.

Mum and Dad, I am and always will be grateful for your endless love and caring. You have been more concerned with my inner happiness than anything else throughout my life. I came to realise in this process that this is the biggest luxury that I have. My sisters, Gözde and Gökçe, you have been even more sisterly during this Ph.D. Gözde, the baby growing in you gave me light in the very final months of the birth of this thesis.

Selin and Murat, thanks for your unconditional presence and love in my life regardless of where we are.

My dear Ioana and David Clark, the word ‘thanks’ will not do justice, but thanks for your huge help and support, especially during the last few months.

I wish I could mention everybody that I love who has added to this work in one way or another. Lucas, each impossible question that we asked about the world, each dream that we shared for a better place inspired me every single day. Lynne, you have been the warmest part of my home in Brighton, the Great Location House. Haydar, Can, Zak, Joyce, Gill, Tom Hennessey, David Davies and Onur Uraz; I wish I could express how beautiful it has been to have you by my side from the beginning to the end. Thank you.

And my last hearty thanks are to my Daniel Dumoulin, whom I met towards the end of the road, yet made me feel like he was always there. Thank you DD!
ABSTRACT

The feminist critique of international human rights law instruments for their incapacity to address domestic violence against women is well documented. This critique is grounded in the recognition that international human rights laws adopt a liberal construction of rights and fail to take account of the specific and private nature of harms against women. That said, international organisations have begun to hear this critique and a number of steps have been taken to address the problem across international and regional human rights law structures over the last three decades. One such development is the introduction of the Convention on Preventing and Combating Violence against Women Including Domestic Violence (the Istanbul Convention) which was adopted by the Council of Europe in 2011.

This thesis offers a critical analysis of the Istanbul Convention and in particular its capacity to address acts of domestic violence against women. The thesis examines the achievements and failures of the Convention in tackling the issue of domestic violence and situates this analysis within a comparative framework, comparing the new Convention to other human rights tools and instruments used up until the adoption of this new text. The research is firmly grounded in feminist legal theory and methodology and critically evaluates the capacity and the effectiveness of what is an overtly gendered legal instrument to respond to the gendered harm of domestic violence against women.

While much research has been carried out into the application of various strands of feminism to legal problems, this thesis argues that ‘equality approaches’ implicit in different branches of feminist legal theory (i.e. liberal, cultural and postmodern) do not adequately explain or characterize the approach taken by the Istanbul Convention. Alternatively, the thesis applies the ‘dominance’ theory developed by radical feminist Catharine A. MacKinnon to the Convention and argues that a radical feminist approach offers the best way to challenge the liberal construction of rights which has hitherto been inherent in international human rights law. The thesis demonstrates, through analysis of both the form and substance of the Convention, that this instrument is
capable of responding to the radical feminist critique of rights to an extent that has
never been achieved before and that the Convention can be viewed as operationalizing a
shift from a liberal to a radical feminist conceptualisation of domestic violence within
the structure of human rights law.

Following the critique of international human rights law and the presentation of the
Istanbul Convention in a radical feminist light, the thesis examines the particular case of
one member state of the Council of Europe, Turkey, and its journey towards
implementation of the Convention. Turkey is used as a case study in order to
demonstrate the potential and the problems which can arise in the implementation of a
radical feminist instrument such as the Istanbul Convention when the country has
particular entrenched views of gender relations and the family. The thesis goes on to
make recommendations for Turkey in its implementation of the Istanbul Convention in
order to strengthen the dissemination of the radical feminist values inherent in the
Convention and to promote a more substantive form of gender justice in the context of
acts of domestic violence across Europe.
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<tr>
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<th>Full Form</th>
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<tbody>
<tr>
<td>AI</td>
<td>Amnesty International</td>
</tr>
<tr>
<td>ANZJS</td>
<td>ANZ Journal of Surgery</td>
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<tr>
<td>Aust YBIL</td>
<td>Australian Year Book of International Law</td>
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<tr>
<td>Br J Criminol</td>
<td>The British Journal of Criminology</td>
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<tr>
<td>CAHVIO</td>
<td>Ad-Hoc Committee on ‘Preventing and Combating Violence against Women and Domestic Violence</td>
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<tr>
<td>CAT</td>
<td>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</td>
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<tr>
<td>CEDAW</td>
<td>The Convention on the Elimination of All Forms of Discrimination against Women</td>
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<tr>
<td>CERD</td>
<td>International Convention on the Elimination of All Forms of Racial Discrimination</td>
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<tr>
<td>CETS</td>
<td>Council of Europe Treaty Series</td>
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<tr>
<td>CoE</td>
<td>Council of Europe</td>
</tr>
<tr>
<td>CPDC</td>
<td>European Committee on Crime Problems</td>
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<tr>
<td>CPED</td>
<td>International Convention for the Protection of All Persons from Enforced Disappearance</td>
</tr>
<tr>
<td>CRC</td>
<td>Convention on the Rights of Child</td>
</tr>
<tr>
<td>C-REC</td>
<td>University of Sussex Arts, Humanities and Social Sciences Cluster-based Research Ethics Committee</td>
</tr>
<tr>
<td>CRPD</td>
<td>Convention on the Rights of Persons with Disabilities</td>
</tr>
<tr>
<td>CUP</td>
<td>Cambridge University Press</td>
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<tr>
<td>ECHR</td>
<td>Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms</td>
</tr>
<tr>
<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<tr>
<td>ETS</td>
<td>European Treaty Series</td>
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<td>Abbreviation</td>
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<tr>
<td>EU</td>
<td>European Union</td>
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<tr>
<td>EUP</td>
<td>Edinburgh University Press</td>
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<tr>
<td>GREVIO</td>
<td>The Group of Experts on Action against Violence against Women and Domestic Violence</td>
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<tr>
<td>Hofstra L Rev</td>
<td>Hofstra Law Review</td>
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<tr>
<td>HRC</td>
<td>United Nations Human Rights Treaty</td>
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<tr>
<td>HRLR</td>
<td>Human Rights Law Review</td>
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<tr>
<td>HUP</td>
<td>Harvard University Press</td>
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<tr>
<td>I.COM</td>
<td>International Journal of Constitutional Law</td>
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<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<tr>
<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<tr>
<td>ICMW</td>
<td>International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families</td>
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<tr>
<td>İÜHFM</td>
<td>Istanbul University Law Journal</td>
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<tr>
<td>J.CER</td>
<td>Journal of Contemporary European Research</td>
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<tr>
<td>MUP</td>
<td>Manchester University Press</td>
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<tr>
<td>NYU</td>
<td>New York University</td>
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<tr>
<td>OAS</td>
<td>Organization of American States</td>
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<td>OUP</td>
<td>Oxford University Press</td>
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<tr>
<td>PACE</td>
<td>Parliamentary Assembly of the Council of Europe</td>
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<tr>
<td>RES</td>
<td>Resolution</td>
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<tr>
<td>Stan L Rev</td>
<td>The Stanford Law Review</td>
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<tr>
<td>TAAD</td>
<td>Turkey Law &amp; Justice Review</td>
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<tr>
<td>TBB</td>
<td>Union of Turkish Bar Associations</td>
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<tr>
<td>TBBBD</td>
<td>The Journal of the Union of Turkish Bar Associations</td>
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<td>Abbreviation</td>
<td>Full Form</td>
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<tr>
<td>TC</td>
<td>Turkish Republic</td>
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<tr>
<td>Ucla Pac Basin L J</td>
<td>University of California at Los Angeles Pacific Basin Law Journal</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
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<tr>
<td>UNGA</td>
<td>United Nation General Assembly</td>
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<tr>
<td>UNTS</td>
<td>United Nation Treaty Series</td>
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<tr>
<td>US</td>
<td>United States of America</td>
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<td>WHO</td>
<td>World Health Organization</td>
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CHAPTER 1
INTRODUCTION

1. Context and Rationale

This thesis critically examines the recently adopted Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention)\(^1\) in terms of its capacity to address domestic violence against women. It conducts the analysis of the Istanbul Convention in a comparative fashion, positioning the new instrument in opposition to other human rights law measures used up until the adoption of this novel and radical instrument. In adopting a comparative approach, the thesis investigates whether the Istanbul Convention is capable of addressing and remedying the deficiencies of other human rights tools in tackling acts of domestic violence. In terms of approach, the thesis champions the dominance theory developed by radical feminist Catharine A. MacKinnon adopting its conceptualisation of domestic violence as a guideline towards identifying the most effective response in law to gender based violence. Given this context, the main question asked in the thesis is: to what extent does the Istanbul Convention satisfy the radical feminist reading of domestic violence within a human rights law framework?

Domestic violence by male partners against women is only one of the many women’s issues that have been neglected within the international human rights law framework for decades, despite this issue having a tremendous detrimental effect on women’s lives across the world.\(^2\) The failure of international law to address domestic violence can be openly seen by looking at the early international and regional human rights law instruments which do not contain any reference to violence against women.\(^3\) In fact,

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\(^1\) The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (adopted 8 April 2011, entered into force 7 August 2014) CETS 210


\(^3\) Looking at the nine core human rights instruments adopted within the UN framework between 1965 and 2006, none of them has a reference to violence against women. See <https://www.ohchr.org/en/professionalinterest/pages/coreinstruments.aspx> accessed 30 August 2018. This situation is similar in the Council of Europe, see <
even the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which is considered to provide an international bill of women’s rights,\(^4\) keeps silent on the issue of violence against women.\(^5\) In 1990, women’s human rights issues barely found any place in the international human rights agenda and violence against women was almost never addressed in either official or non-governmental human rights documentation and reporting.\(^6\) However, throughout the last thirty years, international networks of feminists have turned to human rights law and utilised it as a tool to broaden the understanding that male violence against women, both in public and private settings, is a human rights violation.\(^7\)

Thanks to the considerable efforts of feminist scholars and activists at both international and national levels, domestic violence against women was first placed on the international agenda in the 1990s as an epidemic and systematic problem. Since then, numerous positive steps have been taken by international and regional judicial/quasi-judicial bodies, in order to integrate the issue into the scope of international human rights law.\(^8\) One of the most crucial products of these efforts was the adoption of the Convention of Belem do Para by the Organization of American States (OAS) in 1994, which was the first legally-binding instrument across the world specifically devoted to the elimination of all forms of violence against women.\(^9\) These steps have contributed to the amelioration of the blindness of the structure of human rights law towards domestic violence, to a certain extent. However, as will be analysed in depth in the third chapter of this thesis, these developments fell short of providing a sufficient basis upon which

\(^4\) (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13
the issue could be addressed effectively. In this context, violence against women, particularly domestic violence, provides a clear illustration of the limited concept of rights under the current framework.  

In the face of this failure of international human rights law with regards to domestic violence against women, there have been comprehensive discussions among scholars and practitioners around the question of what would be the best strategy to pursue in order to make the human rights framework more responsive to the issue of domestic violence. Some argued that the existent human rights mechanism, under which domestic violence was tackled as a form of discrimination, provided a convenient approach, rather than adopting a distinct human rights instrument focused solely on domestic violence against women. In particular, the latter option was perceived as requiring more time and efforts. On the other hand, numerous gender experts and practitioners took the position of integrating the issue into the scope of existing instruments through the right to be free from torture. In fact, various feminist lawyers and Amnesty International argued that violence against women occurring in the private sphere constituted torture, by pointing out the common components in the two phenomena, such as the severity of the harm caused and the intentional nature of the infliction. Rhonda Copelon, for example, advocates the torture approach on the grounds that both domestic violence and torture lead to severe physical and/or mental pain and suffering, which are often

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intentionally inflicted for specified purposes and occur with some form of official involvement. At the other end of the spectrum, several scholars have argued that the formulation of domestic violence as discrimination on the ground of sex is a weak strategy, since domestic violence is not merely a matter of inequality of treatment or torture, but the violation of the specific right to be free from violence. Considering the seriousness and pervasiveness of the problem, it is argued that even though there has been evidence of a gradual development of a norm against male violence within the human rights law framework, the problem should be tackled in a forthright and explicit manner through a new binding treaty with a specific prohibition on domestic violence against women. Although the adoption of the Belem do Para Convention was a significant development and inspired laws and campaigns around anti-violence and gender-awareness, it did not constitute a principle of international law as a regional instrument.

Hence, the Convention on Preventing and Combating Violence against Women and Domestic Violence, promising a new, radical approach, was adopted in the middle on these discussions. It opened for signature on 11th May 2011 in Istanbul, and entered into force on 1st August 2014. Following the tradition of the Council of Europe requiring treaties to be referred to by the name of city in which they were opened for signature, the Convention is commonly called the ‘Istanbul Convention’. The Istanbul Convention is a significant development on behalf of women victims of violence on the grounds of its unique and progressive features. It is the first legally binding instrument within Europe specifically aimed at combating violence against women, including

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14 Copelon, ‘International Human Rights Dimensions of Intimate Violence’ (n 6) 122
17 Meyersfeld, *A Theory of Domestic Violence in International Law* (n 16) 106. It should be stated that the Convention is open to accession by states outside the OAS (as stated in its Article 17) but it has been signed and ratified by only the member states up to date since 1994. For the status of signatures and ratifications, see <http://www.oas.org/en/mesecvi/docs/Signatories-Table-EN.pdf> accessed 2 November 2018. This contributes to the presumptions on its regional nature.
19 Feride Acar, ‘CEDAW’dan İstanbul Sözleşmesine: Kadınların İnsan Hakları ve Kadımlara Karşı Şiddete İlişkin Uluslararası Standartların Evrimi’ in Funda Kaya, Nadire Özdemir and Gülriz Uygur (eds), *Kadına Yönelik Şiddet ve Ev- Içi Şiddet* (Savaş Yaynevi 2014) 67
domestic violence.\textsuperscript{20} Furthermore, the Convention is more international than most regional treaties, since it is open to accession by any country regardless of being a party to the Convention or being a member of the Council of Europe.\textsuperscript{21} It must be underlined that, the Convention of Belem do Para is also open for accession from the states outside OAS.\textsuperscript{22} Neither of these instruments, however, has been signed or ratified yet by any states outside the organisation that they originated from.\textsuperscript{23} On the other hand, both instruments have been ratified by a high volume of states; the Convention of Belem do Para has been widely ratified, with all but two OAS member states being states parties (Canada and the United States of America).\textsuperscript{24} Similarly, the Istanbul Convention has been signed by 45 out of 47 member states of the Council of Europe and has been ratified by 33 of them as of the time of writing.\textsuperscript{25} However, considering that the Istanbul Convention is fairly recent compared to the Convention of Belem do Para, it can be still expected that the Istanbul Convention might acquire greater international support in due course. In this regard, it is also important that the Istanbul Convention has been signed by the European Union in 2017 and this can be considered as an indicator of the widely acknowledged nature of the Istanbul Convention beyond the domestic level.\textsuperscript{26} For these and more reasons, many scholars, journalists and human rights practitioners have described the adoption of the Istanbul Convention as a milestone development and a ‘defining moment’\textsuperscript{27} in the struggle against violence against women.\textsuperscript{28}

\textsuperscript{21} Article 76
\textsuperscript{22} Article 17 of the Convention of Belem do Para (n 9)
\textsuperscript{23} For the list of state parties to the Istanbul Convention, see Council of Europe, Chart of Signatures and Ratifications of Treaty 210 < https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures> accessed 27 August 2019. For the Convention of Belem do Para, see ‘Status of signatures and ratifications of the Convention of Belem do Para’ https://www.oas.org/en/mesecvi/docs/Signatories-Table-EN.pdf accessed 27 August 2019
\textsuperscript{24} ibid
\textsuperscript{25} ibid
\textsuperscript{26} The European Union signed the Convention on 13\textsuperscript{th} June 2017. See the Chart of Signatures and Ratifications (ibid)
Due to the fact that the Istanbul Convention only came into force in 2014, research comparing the efficiency of its measures in the context of domestic violence with developments that had occurred within international human rights law up until then has been limited. However the literature in this regard has been continuously growing.  

This thesis provides one of the first, comprehensive analyses of the Istanbul Convention, with a special focus on the Convention’s approach to domestic violence against women (this being one of numerous types of violence addressed in the Convention, including psychological violence, stalking, physical violence, sexual violence and rape, forced marriage, female genital mutilation, forced abortion and forced sterilisation, and sexual harassment). Throughout the study, the thesis critically examines the ability of the Istanbul Convention to address domestic violence through a comparative analysis of what has been achieved and/or what has failed to be achieved by the other relevant international human rights law instruments. To put it differently, the thesis investigates whether the Istanbul Convention is capable of filling the gaps that remained before its adoption in effectively responding to domestic violence.


30 Article 33
31 Article 34
32 Article 35
33 Article 36
34 Article 37
35 Article 38
36 Article 39
37 Article 40
As the question of capability has a flexible nature in the sense that the answer would depend on the criteria applied, it should be underlined that the thesis takes a feminist lens in analysing this efficiency. A feminist approach, in a broad sense, arises from the assumption that international human rights law is a thoroughly gendered system that prioritises male concerns and fails to address the problems that women face due to the gendered structures of life.38 Although feminism is often referred to as a single and unitary school of thought and the differences between feminist schools are not regarded in some studies analysing the judicial developments in human rights law,39 this study does not take such an approach. This research confirms that different feminist readings of domestic violence within international human rights law would lead to entirely different identifications of, and suggestions for, solutions to the problem. In this regard, the thesis champions the dominance theory developed by Catharine A. MacKinnon within radical feminism, as it is considered to bring the most comprehensive and effective approach to conceptualise domestic violence within international human rights law.40 In fact, as will be discussed in-depth in the following chapter, this study argues that by formulating equality as a matter of power distribution,41 and all forms of violence against women as a manifestation of women’s subordination,42 the dominance theory addresses the group-based and gendered nature of domestic violence in contrast to many other feminist approaches. By bringing a monolithic understanding of violence, it gives a political identity to the issue of domestic violence and therefore invokes the right to equality guarantees in tackling the problem.

38 Hilary Charlesworth, Christine Chinkin and Shelly Wright in Elizabeth Comak and others, ‘What Work of Feminist Legal Scholarship over the Past Twenty Years Has Been Influential or Important to You or Why?’ (2005) 17:1 Journal of Women and the Law 233, 236
In this context, i.e. analysing the Istanbul Convention from a radical feminist lens, this study examines whether the Convention is capable of embodying the radical feminist conceptualisation of violence and whether it can respond effectively to the radical critiques of rights. The thesis asks ‘to what extent is the Istanbul Convention a radical feminist instrument in addressing domestic violence against women?’. This question will be at the centre of the whole thesis, providing the main axis around which the previous human rights framework and the new Istanbul Convention are evaluated with regard to their capacity to end domestic violence against women.

Following on from the theoretical and doctrinal analysis, the thesis goes on to examine the position of one signatory state, Turkey, in its efforts to implement the Convention. Turkey comes to the fore as an interesting and rather particular jurisdiction to be analysed in this context, as a country sweeping between recent controversial legal and political steps towards gender equality, and with a strong outward commitment to the implementation of the Istanbul Convention. Turkey was an active participant in the preparation of the Istanbul Convention and, in fact, was the first country to sign and ratify it. Furthermore, as a consequence of an amendment made in 2004, the Turkish Constitution states that ‘in the case of a conflict between international agreements on fundamental human rights and freedoms duly put into effect and the domestic laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.’ Considering the power that the Constitution gives to the provisions of the Istanbul Convention on the one hand, and concerning the number of gender-based violence incidents in Turkey on the other, Turkey presents a very useful

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44 Turkey signed the Convention on the 11th May 2011, see (n 23).


46 İnci Boyacıoğlu, ‘Dünden Bugüne Türkiye’de Kadına Yönelik Şiddet ve Ulusal Kadın Çalışmaları: Psikolojik Araştırmalara Davet’ (2016) 19 Türk Psikoloji Yazıları 126, 126. According to the research conducted by the Branch Office of Prevention of Violence against Women and Children in 2014, the number of women injured in male-violence cases in 2013 was 36% more than 2012. (Boyacioglu 127). CEDAW Committee in its report on Turkey in 2016 particularly pointed out the discriminatory and offensive statements of high-level representatives of Government towards women who do not adhere to the stereotyped traditional roles. See Committee on the Elimination of Discrimination against Women,
and timely case study. Specifically, looking at the implementation of the Convention in a key member state gives valuable insights into the much-debated issue of whether international human rights law instruments (in this case, the Istanbul Convention) can go beyond rhetorical window-dressing and instead provide a strong guideline for states at a domestic level. Moreover, as this thesis will argue that the Istanbul Convention satisfies the radical feminist concerns in addressing domestic violence, and can therefore be called radical, this analysis will shed light on the types of problems that might arise at a domestic level in the implementation of such a radical feminist instrument. Following its analysis of how Turkey has been implementing the Istanbul Convention to date, the thesis presents recommendations for effective implementation of the Istanbul Convention in line with the radical feminist reading of domestic violence against women.

2. Significance of the Study

In the light of the information above, this thesis contributes to the existing literature in several ways. First and foremost, it provides a comprehensive analysis of the Istanbul Convention and its measures in the special context of domestic violence, in comparison with the international human rights law tools that were used to deal with the issue up until then. As stated above, due to the recent adoption of the Convention, there have not been many comprehensive studies to date, although the availability of literature in this regard has been developing. Secondly, there has not been any extensive research that attempts to conceptualise the Convention as a whole in the light of feminist legal theory. Considering that this thesis does not draw on feminist theories in general (due to the reasons given above), but specifically applies the dominance model developed by MacKinnon within radical feminist theory, this research constitutes a specific and unique approach towards the Convention. It also contributes to the interpretation of radical feminist theory on a specific legal instrument in relation to domestic violence against women. Thirdly, even though Turkish law and practices in the light of the Istanbul Convention have been subject to a couple of studies, all have focused on very specific aspects of the Convention and have not approached the instrument

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47 ‘Concluding Observations on the Seventh Periodic Report on Turkey’ (25 July 2016) CEDAW/C/TUR/CO/7 para 28
48 See (n 29).
49 Peroni (n 25) handles the Convention particularly in the context of post-structuralist feminist approach.
holistically. Furthermore, as the monitoring body of the Istanbul Convention (GREVIO) has recently started its supervisory function on state parties, there is some limited data on the implementation of the Convention at a practical level, and this stands as both a challenge and opportunity for developing a wider research agenda on the effectiveness of the Convention at this time. This thesis uses Turkey as a case study and brings recommendations for the country on the basis that the Turkish legal framework, jurisprudence, politics and administrative steps provide enough scope and evidence for ensuring a comprehensive study on Turkey and its current stance towards the Istanbul Convention.

3. Research Questions

As explained above, this thesis focuses on the question of the extent to which the Istanbul Convention is a radical feminist instrument capable of addressing acts of domestic violence against women.

Alongside this main question, this thesis breaks down the analysis through responses to a series of sub-questions:

- Why is the dominance theory developed by MacKinnon the most efficient approach to conceptualise domestic violence in human rights law?
- How have international human rights law mechanisms failed in their handling of domestic violence against women up until the adoption of the Istanbul Convention?

49 Sehnaz Kiyimaz Bahceci, 'Evaluation Of Istanbul Convention: Its Contributions And Constraints For Elimination of Violence Against Women In Turkey' (Master of Science, Middle East Technical University 2012); Kadriye Bakirci, 'Istanbul Sozlesmesi' (2015) 4 Ankara Barosu Dergisi 133; Nazan Moroglu, 'Kadına Yönelik Şiddetin Önlenmesi, 6284 Sayılı Yasası ve İstanbul Sözleşmesi’’ (2012) Türkiye Barolar Birliği Dergisi 99; Berrin Akbulut, ‘6284 Sayılı Kanunda Siddet ve İstanbul Sözleşmesinin TCK Acısından Degerlendirilmesi’ (2014) 5:16 TAAD 141. The Turkish literature with regards to the Istanbul Convention will be referred to in the sixth chapter of this thesis to a considerable extent. At this point, it should be noted that many of the academic research focus on the Turkish Code enacted after the Istanbul Convention, instead of focusing on the Convention itself.

50 By the time this thesis being submitted, GREVIO has been receiving the first state reports from state parties and has issued its first evaluation reports on some countries, including Albania, Austria, Denmark, Monaco, Montenegro and Turkey. For the timetable of GREVIO country-monitoring, see <https://www.coe.int/en/web/istanbul-convention/timetable> accessed 20 November 2018.
• Is the Istanbul Convention capable of addressing the failures of other human rights law mechanisms in accordance with the radical feminist reading of domestic violence?
• What are the challenges with regards to the implementation of the Convention through the case study of Turkey?
• What can Turkey do to implement the Convention more effectively?

4. Research Methodology and Method

Research method and methodology are two different but related concepts. For the purposes of this research, it is accepted that research ‘method’ mainly refers to the way in that a research project is pursued or, to put it more clearly, what a researcher actually does for the collection of data which is relevant for the research questions posed, i.e. conducting library-based research, including an empirical research and so on. The research ‘methodology’, however, is taken to mean the legal method (theory) that is selected in approaching the themes, questions and suggestions that are involved in the research. In this sense, methodology is closely interlinked with theory.

The methodology employed in this thesis is two-fold. Firstly, it handles the research questions through a doctrinal analysis. In the doctrinal method, essential features of legislation and case-law are examined critically and they are combined together to establish an arguably complete statement of the law on the matter under scrutiny. With the rise of multidisciplinary, interdisciplinary and comparative legal research in recent years, doctrinal research has been subject to criticism by critical legal theorists on the grounds that it is formalistic, inflexible and inward-looking since it is merely dependent on what the law says and how it is implemented, staying within the borders of law itself. For this reason, some have argued that doctrinal research is nothing more than case-law journalism. However, this thesis suggest that doctrinal research is the first essential step in providing a solid foundation for further application of any critical theory or empirical study. It is necessary for a researcher to analyse the status of legal

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52 ibid
54 ibid 7, 9, 17; Mike McConville and Wing Hong Chui, Research Methods for Law (EUP 2017) 1
55 Hutchinson ( n 53) 17
56 ibid 7
doctrine in depth first, before taking another approach (theory) to determine whether the law is working in the way it was expected.\textsuperscript{57} For this reason, the thesis conducts a detailed analysis of the relevant international and national laws, as well as case-law, in order to determine how legal norms currently handle the issue of domestic violence against women. Considering that international law is more decentralised, consensual and of a primitive character in comparison to domestic laws,\textsuperscript{58} to conduct such an organisation of the law and jurisprudence at the international level becomes vital.

Using the information gathered from the doctrinal research, this thesis employs feminist legal theory as the second pillar of methodological approach to obtain meaningful answers to the questions that it poses. The choice of theoretical approach is one of the most essential parts of conducting research, since the theory has a pervasive effect on the way that the key questions are posed and answered.\textsuperscript{59} Since feminist legal theory ensures a critical approach towards the gendered facet of international human rights law by acknowledging that human rights law has failed to address women’s issues, it provides a perspective from which the relationship between human rights law and domestic violence can be evaluated. Moreover, it provides a basis for suggestions to reform the whole system to make it more inclusive for women.\textsuperscript{60}

It is true that all legal feminists are bound together through a common two-tiered purpose. This is firstly to reveal how, where and why international legal rules or practices have failed to account for women’s perspectives under seemingly neutral rules and secondly, to challenge the existing norms and devise a new agenda for corrective strategies for the sake of accommodation of women’s concerns and voices in the field of international law.\textsuperscript{61} Despite this broad agreement amongst feminists on a fundamental level, as briefly stated above, feminist legal theory is not homogeneous in its jurisprudential approach as a single theory or a school of thought. Rather, it is a genre in

\textsuperscript{57} ibid 28
\textsuperscript{58} Stephen Hall, ‘Researching International Law’ in Mike McConville and Wing Hong Chui (eds), Research Methods for Law (EUP 2017) 254
\textsuperscript{59} Hutchinson (n 53) 15; Hervey and others (n 51) 162; Tamara Hervey, Rob Cryer & Bal Sokhi-Bulley, ‘Legal Research Methodologies in European Union & International Law: Research Notes (Part 2)’ (2008) 4:1 JCER 48,49; McConville and Chui (n 54) 3
which different approaches are to be found. Furthermore, much feminist writing resists clear categorisation and many authors cross over into different categories, even within a single piece of writing, and yet, it is still possible to make classifications among feminists on the ground of their approaches and suggestions.

As briefly stated above, this thesis takes the dominance model developed by Catharine A. Mackinnon within radical feminism as the benchmark theoretical approach from beginning to end. The reason for referring to such a specific approach while laying out the theoretical approach of this thesis, i.e. the model developed by MacKinnon, is that radical feminism is itself a very broad branch of feminism in which different sub-approaches bring differing interpretations of gender equality, thus leading to the development of different solutions. Therefore, it is necessary to pinpoint which of these is taken as the baseline for this study.

Most notably, two prominent radical feminist theorists, MacKinnon and Christine A. Littleton, brought two different approaches towards equality; while MacKinnon theorised equality on the theory of dominance of men and subordination of women, Littleton brought forth the model of ‘equality as acceptance’. This thesis takes the former approach and discusses the reasons why it is considered that this model ensures the most efficient reading of domestic violence against women within international human rights law. This is revealed in-length in the following chapter of this thesis, which demonstrates how different feminist approaches have been applied to the context of domestic violence.

In light of the aforementioned explanation, the doctrinal approach and feminist legal theory (specifically the dominance model of radical feminism) constitute two pillars of the research methodology employed in this thesis. Moving to the legal method, this
study is conducted by adopting a library/desktop-based approach towards both primary and secondary sources. In terms of the primary sources, due to the scarcity of cases regarding domestic violence (framed as such), the spectrum of international human rights institutions considered is kept wide so as to include the United Nations (UN) and regional human rights organisations. This thesis considers the most relevant international human rights conventions, and provides deep analysis of the jurisprudence of the UN CEDAW Committee,\textsuperscript{68} the European Court of Human Rights (ECtHR)\textsuperscript{69} and the OAS Inter-American Commission on Human Rights; the relevant General Recommendations, the reports of Special Rapporteurs or Declarations within the UN framework and the relevant Recommendations of the Council of Europe (CoE) are also addressed. For the case of Turkey, relevant laws and case-law arising from its international obligations are analysed. In the context of secondary sources, this study draws on relevant scholarly books, articles, journal articles, international and domestic policy documents, textbooks, government reports, non-governmental organisation and media reports. It does not, therefore, focus just on the law itself but also on the wider context within which the law operates.

It is worth mentioning that an attempt was made to gather data through semi-structured interviews with the members of the monitoring body of the Istanbul Convention, the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) and approval for such a project was obtained from the University of Sussex Arts, Humanities and Social Sciences Cluster-based Research Ethics Committee (C-REC).\textsuperscript{70} Since academic writing about the practical application of the Convention was fairly limited, it was believed that those experts’ views on, expectations of and critiques against the Convention would provide invaluable insight that could not be obtained otherwise. The request for the interviews was scheduled at the 7\textsuperscript{th} meeting of GREVIO by the Secretary of the Council of Europe.\textsuperscript{71} Following the meeting and internal discussions, the Secretary communicated that the researcher could interview the then

\begin{itemize}
\item \textsuperscript{68} UN Committee on the Elimination of Discrimination against Women
\item \textsuperscript{69} The Court supervises the member states to the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS 5
\item \textsuperscript{70} The reference number for the approval is ER/GG237/1..
\item \textsuperscript{71} The communication with the Secretary, Mr Johan Friested was conducted via e-mail from the beginning to the end. The 7th meeting of GREVIO was held in Strasbourg between 19th and 22nd of September 2016.
\end{itemize}
(and current) president of GREVIO, Professor Acar,\textsuperscript{72} who could be interviewed on behalf of all the members. It was underlined that the president would provide clarifications about the actual content of the Istanbul Convention, more information about GREVIO’s positions up until that and an explanation of the country-by-country evaluation process that had just started. The secretary also stated that the president would not be able to say more than this at such an early stage of monitoring.\textsuperscript{73} The initial idea was to find out about personal expectations and critiques -if any- of all of the members. Due to this cautious stance of the Secretariat in limiting the interviews to the president and to only an informative context, only one interview was conducted.\textsuperscript{74} Fortunately, Acar kindly shared her views on the Convention in a broad and critical way, and her insights are referred to where relevant at different stages of the thesis.

5. Research Structure and Outline

Following on from this initial introductory chapter, the second chapter of the thesis lays out different identifications and approaches to the concept of domestic violence and affirms that the area under investigation in this research is domestic violence against women by intimate male partners. The chapter then demonstrates why domestic violence is a gendered problem that disproportionately affects women. Following this clarification, the chapter sets out the main differences in understanding equality between women and men in the four main feminist approaches, i.e. liberal, cultural, radical and post-modern. These differences are then discussed in the special context of domestic violence against women. It is argued that the most promising feminist approach in conceptualising domestic violence within the human rights law framework is the dominance theory developed by MacKinnon within radical feminism, due to its formulation of all forms of violence against women as a matter of discrimination on the basis of sex. It is argued that in this monolithic understanding of violence as a manifestation of the subordination of all women, domestic violence becomes a political problem to be addressed by law. This delivers a strong blow to the liberal construction of rights. Finally, the chapter addresses two prominent critiques against human rights,

\textsuperscript{72}Then president of GREVIO, Prof. Feride Acar, has been re-elected as a president on 13 October 2017. See GREVIO, ‘List of Decisions Adopted at the 12th Meeting (Strasbourg, 9 – 13 October 2017)’ GREVIO/Inf(2017)LD12, para 20

\textsuperscript{73}This was stated in the e-mail received on 28 September 2016.

\textsuperscript{74} Interview with Feride Acar, President of GREVIO and the Retired Professor of the Faculty of Economic and Administrative Sciences in METU (Ankara, Turkey, 18 January 2017)
i.e. those focused on the public/private dichotomy and the individualistic nature of rights from a radical feminist perspective.

The third chapter of the thesis analyses the developments that occurred under the international human rights law framework in the context of addressing domestic violence against women up until the adoption of the Istanbul Convention and identifies the points where these developments fell short. Considering that the Istanbul Convention is open for signature to all countries in the world and there have not been many domestic violence cases lodged before the international judicial/quasi-judicial bodies, the analysis is kept broad, including jurisprudence of the CEDAW Committee, ECHR and the Inter-American Commission on Human Rights. In the light of its analysis, the chapter identifies three key problems and argues that all of these failures combined reveal that the liberal conceptualisation of domestic violence has prevailed within the human rights law structure up to the adoption of the Istanbul Convention.

In the fourth chapter of the thesis, the Istanbul Convention and its provisions in relation to domestic violence against women are put under the spotlight and elaborated upon in a comparative fashion alongside the developments realised within international human rights law structure prior to the adoption of the Istanbul Convention. The chapter argues that the Istanbul Convention manages to address the three gaps identified in the previous chapter so as to construct a shift from a liberal to a radical feminist conceptualisation of domestic violence. The chapter also critically examines the position of the Istanbul Convention in light of the well-discussed tension between cultural relativism and universalism. Finally, the study analyses the monitoring mechanism of the Convention in comparison with that of the UN treaty bodies and points out potential problems and challenges that GREVIO might face.

After indicating a shift from a liberal to a radical feminist approach towards domestic violence within human rights law through the Istanbul Convention, the fifth chapter takes the radical feminist analysis of the Istanbul Convention further, in order to securely justify the conclusion that the Convention is a radical feminist instrument. It examines the Istanbul Convention in terms of two prominent critiques against rights, i.e. the public/private dichotomy and the individualistic nature of rights which are addressed in the second chapter from a radical feminist perspective. The chapter first reiterates what was previously confirmed in the second chapter that these two aspects of rights are
most strongly challenged by radical feminists and particularly MacKinnon. On the basis of this conviction, the chapter contends that the Istanbul Convention is of a radical nature as it challenges these two liberal components of rights to a greater extent than other human rights bodies. The study also scrutinizes the criminalisation approach of the Convention, which comes to the fore in the fourth chapter, and concludes that the criminalisation of domestic violence is in compliance with the radical reading of the problem, as it could be utilised as a power neutraliser between women and men, as well as addressing the gendered nature of the violence.

In the sixth chapter, the focus shifts to Turkey and the Turkish legal framework is used as a case study to examine how the country has been implementing the Istanbul Convention. The chapter also brings recommendations on how the Convention can be implemented more effectively. In doing so, the study keeps the cultural specificities of the country in mind and highlights issues which can lead to the tensions between universalism and cultural relativism. Focusing on Law no. 6284 on the Protection of Family and Prevention of Violence against Women, which was adopted after the ratification of the Istanbul Convention, the thesis identifies the positive steps taken by Turkey to comply with its obligations. Yet the chapter indicates that there are crucial aspects that Turkey has failed to adopt and suggests that this failure constitutes a block to the implementation of the radical aspects of the Istanbul Convention. The chapter also highlights some loopholes in the current Turkish legal framework, which are likely to be used by the government to restrict women’s equality and freedoms by relying on culture and traditional norms. Through an illustrative example of the definition of domestic violence, the study argues that Turkey should locate women’s equality as a priority over any cultural or traditional norms instead of being stuck in the spectrum between the artificial poles of cultural relativism and secular universalism.

Finally, the seventh chapter brings all the previous analysis together and summarises the key points of its argument that the Istanbul Convention constitutes a radical feminist instrument in addressing domestic violence. This is followed by final remarks on potential limitations to the efficiency of the Istanbul Convention and recommendations to Turkey to implement the Convention more effectively and in a more radical feminist light.
CHAPTER 2

THE CONCEPTUALISATION OF DOMESTIC VIOLENCE IN THE LIGHT OF FEMINIST LEGAL THEORY

1. Introduction

As mentioned in the introduction to the thesis, this study analyses the efficiency of the Istanbul Convention in the light of the dominance theory developed by Catharine A. Mackinnon within radical feminism. This chapter explains in depth why this particular approach is the most effective in conceptualising domestic violence within the human rights law structure that addresses the issue. Although feminism is referred to as an umbrella category in many studies that analyse domestic violence, each feminist approach brings a different definition of equality, a different concept of violence and therefore different solutions for the problem in law. In this regard, the chapter critically evaluates four major feminist schools, i.e. liberal, cultural, radical and post-modern feminisms, and their way of conceptualising the issue within the legal sphere in a comparative fashion.

In the light of the analysis of these four feminist approaches, the chapter will argue that the dominance theory poses the strongest critique against the liberal construction of rights. In fact, by defining equality as a matter of power distribution, it aims to integrate all forms of violence including domestic violence into the scope of right to equality guarantees. By taking the view that all women have been historically subordinated in power relations, and by bringing a monolithic understanding of all forms of violence against women as a manifestation of subordination of women, the dominance theory gives a political identity to the problem of domestic violence to be addressed by radical solutions in law. The analysis will reveal why each of the other feminist approaches covered fails to bring the same effect within the legal sphere. It will be argued that, in order to respond to a problem, such as domestic violence, which negatively affects countless lives of women across the world, a legal theory within feminism should aim
By politicising domestic violence in the firmest terms, the dominance theory achieves this purpose.

Before reaching this end, the first part of the chapter demonstrates the approaches used to conceptualise domestic violence before feminist involvement and reveals why gender, more than any other social factors, is the central dynamic that leads to incidents of domestic violence. This is followed by the comparative analysis of feminist legal theories in the context of domestic violence. After concluding that the dominance theory is the most effective approach on the basis of the said grounds, the chapter finally handles the critiques against rights on two points (i.e. the public/private dichotomy and the individualistic nature of rights) from a radical feminist perspective.

2. Domestic Violence as a Gendered Problem

In the literature, violence between intimate partners has been referred to under various expressions: wife battering, violence against wives, intimate partner violence and domestic violence. The latter two terms are essentially gender-neutral, since they do not refer to the sex/gender of the parties to violence, while the former two are obviously inferring a gender-based, yet narrow reading of violence by specifically referring to wives, i.e. excluding any partners outside the marriage. The reason that this study takes the term ‘domestic violence’ is simply due to the fact that the Istanbul Convention uses this expression referring to intimate partner violence. However, it should be stated explicitly that although the term ‘domestic violence’ as employed in this study is gender-neutral in its language so as to include violence against men, the elderly, or boys in domestic settings, this research specifically focuses on domestic violence against

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3 See J Giles-Sims, Wife Battering: A Systems Theory Approach (Guilford Publications 1983)
4 This term is employed by Dobash&Dobash. They define it as persistent direction of physical force against a marital partner or cohabitant. R Emerson Dobash and Russell Dobash, Violence against Wives: A Case against Patriarchy (The Free Press 1979) 14-30
5 For an example, Anita S Anderson and Celia C Lo, ‘Intimate Partner Violence within Law Enforcement Families’ (2011) 26:6 Journal of Interpersonal Violence 1176
6 Buzawa and Buzawa (n 2) 13
7 The term ‘domestic violence’ is referred to in the title of the Istanbul Convention and in numerous occasions in its text. See Article 3(b) of the Convention for the definition of domestic violence.
8 Although the term does not specify women in itself, Featherstone and Trinder argue that it was created and invoked by feminists in 1970 s in order to demonstrate its problematic and structural nature. See Brid
women by male partners. In this regard, what is meant by the term domestic violence in this study is that of men’s violence towards women in intimate relationships.

This study is established on the confirmation that domestic violence is a gendered phenomenon disproportionately affecting women. This has been confirmed by the myriad of comprehensive qualitative research studies across the world. For example, the World Health Organisation declared that more than one third of women worldwide are likely to experience some form of intimate partner violence. In an earlier UN report looking at 10 selected countries, it was pointed out that between 17 and 38 percent of women have been subjected to violence by their male partners and this rate goes up to 60 per cent when moving to African, Latin American and Asian states. Many research reports conducted in the studies of clinical populations and emergency room in the USA revealed that women were vastly overrepresented as domestic violence victims. Even in studies suggesting that men are as likely to be victim of intimate partner abuse as women, it appears that the effects of violence is different on the two sexes, since women are likely to experience considerably higher rates of injury, whilst men are more likely to be involved in cases of repeated violence. Moreover the post-violence stress that women are likely to go through is more severe than in men. In this context, even though domestic violence occurs against men within domesticity, the violence that women and men experience are two different phenomena. These findings commonly found their place in qualitative research arguing that women, regardless of their nationality, race, ethnicity, religion, age, or socio-economic position, are either the victim or a potential victim of gender-based domestic violence.

11 Buzawa&Buzawa underlined the findings of the past National Crime Victimization Survey which indicated that 85% of reported cases of victimisation by intimate partners were against women. See (n 2) 13.
Domestic violence has always occurred, but up until the 1970s, it had not been discussed in-length or conceptualised within law or other disciplines. It can be clearly seen that in the context of understanding domestic violence, there has been a significant shift, particularly due to the growth of feminism in law and other social disciplines in the late 1970s. In fact, in the theorisations of domestic violence prior to the feminist approach, the gendered aspect of the problem had been mostly ignored. In contrast to this, feminists argued that domestic violence is a gendered problem against women and gender was foundational to the incidents of violence beyond any other social factors. This understanding has had a considerable impact on the legal measures with regards to violence, particularly in criminal laws and police responses at a domestic level.

Before feminist involvement, violent acts between intimate partners were first interpreted as a private problem occurring within the relationship and arising out of conflicting abnormal personalities. Such violent behaviours were deemed to be the product of pathological personal disorders or the defective personality types of the partners, and therefore considered to be curable through counselling and by preserving relationships to the maximum possible extent. This was called the ‘psychological approach’, which dominated the conceptualisation of domestic violence in the mid-twentieth century.

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14 Featherstone and Trinder (n 8) 148
16 Yet there have been differences in defining gender and power dynamics among feminists, as will be explained below. At this point, feminism is referred to as a general category, on the basis of one common trend among many of its genres, which considers gender and power inequality it creates between women and men, as the main reason of the occurrence of domestic violence. See Lisa S Price, Feminist Frameworks: Building Theory on Violence against Women (AAKAR 2009) 11; Kersti A Yllö, ‘Through a Feminist Lens: Gender, Power and Violence’ in Richard J Gelles and Donileen R Loseke (eds) Current Controversies on Family Violence (SAGE 1993) 47-62
17 Featherstone and Trinder explains the shift in the special context of the UK, see (n 8) 148. Houston argues that the shift towards criminalisation of domestic violence in the USA was a result of this feminist (particularly radical feminist) approach. See Houston (n 15).
18 Houston (n 15) 221-222
19 ibid; Barnett (n 15) 72
20 Houston (n 15) 221 The psychological approach has been called with different names. For example, Hyde-Nolan and Juliao uses a more specific term which is ‘psychoanalytic theories of family violence’. See Maren E Hyde-Nolan and Tracy Juliao, ‘Theoretical Basis for Family Violence’ in Rose S Fife and Sarina Schrauger (eds), Family Violence: What Health Care Providers Need to Know (Jones&Bartlett Learning 2012) 5
Following this, another approach was developed through a relatively wider consideration by taking into account other social factors; this was broadly called the ‘family violence approach’. In this family violence perspective, it was argued that domestic violence was not such an isolated issue that depended only on the psychological circumstances of partners, but was correlated with the other socio-demographic factors including age, cohabiting status, unemployment, and the socio-economic status of partners. The violence was explained as the combination of more complex components of ‘social forces’, such as structural stress that the partners were subjected to and the socialisation experience of the individuals. This approach was mainly developed by sociologists who looked at national family surveys and found correlations between these factors and the incidents of domestic violence. They argued that those families with a low income, low educational achievement and higher social isolation from their neighbourhood tended to experience domestic violence more. Surprisingly, gender constructions were only one of many social factors to be taken into consideration in explaining the reasons for domestic violence.

In supporting this line of argument, family violence researchers mainly relied on large-scale surveys analysing domestic violence, which indicated that women and men reported similar numbers of physically violent acts as perpetrated by their heterosexual partners. In this context, it was argued that there was ‘gender symmetry’ in the occurrence of intimate partners’ violence. One researcher took this even further by arguing that husband abuse was mistakenly overshadowed by wife abuse. They contended that, to employ single-variable analyses focusing on gender through

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21 Houston (n 15) 221, 227-8; Hyde-Nolan and Juliao (n 20) 5
23 Ibid 655; Houston (n 15) 227; Featherstone and Trinder (n 8) 151
24 Houston (n 15) 227; Anderson (n 22) 655
25 (Houston n 15) 228
28 Suzanne K Steinmetz, ‘The Battered Husband Syndrome’ (1977-8) 2 Victimology 499
patriarchal forces, and overlooking the other social factors on the occurrence of domestic violence, such as income, employment and age, was misleading.29

The family violence approach has been subjected to heavy critiques by feminists who locate gender and power relations at the centre of domestic violence.30 In the face of this clash between the two camps, it should be underlined that some aspects of the family violence research are substantially problematic. First of all, reliance on large-scale surveys is not satisfactory for reaching a conclusion on the gender symmetrical nature of domestic violence, since those surveys mostly ignore the context in which the violence occurs.31 They cannot address the history, motivation and the frequency of violence; they rather merely measure the acts of violence.32 Strauss and Gelles confirmed that their research did not fully take the context of violence into consideration; for example, it was not known what proportion of female violence had been committed in self-defence.33 In these types of surveys, ‘gender’ is only limited to a box whereby the participants mark their sex, and therefore, they cannot provide an analysis on the socially constructed meanings that are attached to women and men; in other words, how gender functions.34 However, in the more comprehensive surveys asking about the nature of violence between partners, it is seen that violent men mostly talk about threats to their masculinity when women disobey their desires, while women point out the normative gender expectations that abusers use to justify their violence.35

Even though there is research proving the correlation between the said social factors and domestic violence,36 there has not been a comprehensive study indicating a consistent link between the said factors and domestic violence, once gender is excluded as a

30 Winstok (n 26) 193; Featherstone and Trinder (n 8) 147
31 Anderson, ‘Gender, Status and Domestic Violence’ (n 22) 656, 656; Debra Umberson and others, ‘Domestic Violence, Personal Control, and Gender’ (1998) 60:2 Journal of Marriage and Family 442, 449
32 Featherstone and Trinder (n 8) 151; Anderson, ‘Theorizing Gender in Intimate Partner Violence Research’ (n 26) 853
33 Murray A Straus and Richard J Gelles, ‘How Violent Are American Families? Estimates from the National Family Violence Resurvey and Other Studies’ in Murray A Straus and Richard J Gelles (Eds) Physical Violence in American Families: Risk Factors And Adaptations To Violence in 8, 145 Families (Transaction Publisher 1990) 95, 96, 104
34 Jakobsen (n 27) 539
35 DeKeseredy and Dragiewicz (n 29) 875
36 Micheal D Smith, ‘Sociodemographic Risk Factors in Wife Abuse: Results From a Survey of Toronto Women’ (1990) 15 Canadian Journal of Sociology 39; Murray A Strauss, Richard J Gelles and Suzanne K Steinmetz, Behind Closed Doors (n 26)
criterion. For example, one researcher found that the link between the educational status of partners and violence within the relationship is weak and inconsistent.\textsuperscript{37} Similarly, conflicting results have been reached in terms of the occupational status of partners and their correlation with domestic violence.\textsuperscript{38} Yet, numerous studies containing a gender lens demonstrate that the chances of male violence increase once they earn less income than their female partners.\textsuperscript{39} In line with this, in their empirical research, Umberson \textit{et al} concluded that men resorting to domestic violence towards their female partners do so once they feel that their control on their partners is threatened.\textsuperscript{40}

Within the scope of this research, it is unnecessary to refer to the each quantitative study that suggests a correlation between males’ lower socio-economic status resulting in a sense of a lack of control and violence that is perpetrated against female partners. At this point, it should suffice to state that these studies legitimise the ‘gender’ focus of feminists in their domestic violence reading. In fact, in answering the question of why low relative income status has more linkage with men’s rather women’s violence, one has to go through the line of the gendered constructions of masculinity and femininity. The dominant cultural depiction of \textit{male} as breadwinners and the providers for family has granted wider rewards to men in general as the power and control holders over women, and when this role is under threat, violence is the way to reconstruct the masculinity.\textsuperscript{41} This explains why women are less inclined to perpetrate violence when they have fewer economical or educational resources. \textit{Femininity} is constructed as the combination of being passive, supportive and nurturing on the basis of the reproductive

\textsuperscript{37} Anderson, ‘Gender, Status and Domestic Violence’ (n 22) 667

\textsuperscript{38} For example, when sex of the heterosexual partners is taken into account, yet femininity and masculinity is ignored, a research indicated that when women’s occupational status is higher than the husband’s, there were higher rates of violence. See Carlton A Hornung, B Claire McCullough and Sugimoto Taichi, ‘Status Relationships in Marriage: Risk Factors in Spouse Abuse’ (1981) 43 Journal of Marriage and Family 675; Craig M Allen and Murray A Straus, ‘Resources, Power, and Husband-Wife Violence’ in Murray A Strauss and Gerald T Hotaling (eds), \textit{The Social Causes of Husband-Wife Violence} (University of Minnesota Press 1990). On the other hand, another research revealed that violence within partners is more likely when the situation is other way around. See Debra S Kalmuss and Murray A Straus, ‘Wife’s Mental Dependency and Wife Abuse’ in Murray A Straus and R J Gelles (eds) \textit{Physical Violence in American Families: Risk Factors and Adaptations to Violence in 8,145 Families} (Transaction Publisher 1990)

\textsuperscript{39} Anderson, ‘Gender, Status and Domestic Violence’ (n 22) 657

\textsuperscript{40} Umberson and others (n 31) 449. Johnson argued that the most severe cases of domestic violence are the ones where men’s extreme need to control women was present. See Michael P Johnson, ‘Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence against Women’ (1995) 57 Journal of Marriage and Family 283.

\textsuperscript{41} Anne Campbell, \textit{Men, Women, And Aggression} (New York: Basic Books 1993); Myra M Ferree, ‘Beyond Separate Spheres: Feminism And Family Research’ (1990) 52: 4 Journal of Marriage and the Family 866
nature of women, and therefore it does not lead women to feel obliged to prove power superiority over men through violence. This being the case, it is not surprising that in the surveys, violent men justify their acts with the failure of women to obey (and therefore challenging male control), whilst women victims mention gendered expectations when explaining the reasons of violence.

In this context, gender arises as a facilitator of power inequality between women and men, and domestic violence should be considered as a simple reflection of this power inequality. Undoubtedly, patriarchy as the most prevalent social structure across transcending cultures provides the ground and the environment for the construction of gender, which elevates men to a power-holding position through male status, and women to a submissive and weaker status through female status. Within this environment, men feel the need to control women sexually and socially, in order to maintain their patriarchal male superiority: when this is under threat, violence is the path taken to prove manhood. By simply being male, men are automatically appointed to a superior position whilst women are downgraded to the subordinate status by simply being women: therefore, there is not much need to explain or rationalise violence by relying on other social factors like family researchers do. As repeatedly argued by feminists and scholars taking a gender perspective, violence against women is not random violence, rather the risk factor is being a woman and the associated gendered definition of being female. This statement is in full agreement with the empirical research that covers various parts of the world and indicates that women are disproportionately the victims of violence, regardless their religion, culture or socio-economic status. As argued before, this gender emphasis is the contribution of the feminist approach to the literature on domestic violence. Despite this commonality on the focus of gender, different branches of feminism develop different legal formulations

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42 Campbell (n 41); Anderson, ‘Gender, Status and Domestic Violence’ (n 22) 658
43 DeKeseredy and Dragiewicz (n 29) 875
44 Dobash and Dobash (n 12); Fraser (n 15)
for equality and domestic violence, and this variety within the legal implications of these approaches is to be examined in the next section.

3. Different Feminist Legal Approaches to Domestic Violence

Feminism, as defined in a broad manner, is both a social movement and an academic approach that aims to ensure gender equality, with a particular focus on inequality against women. As can be seen in this brief definition, feminism holds ‘gender’ at the centre of its discourse. Feminists have drawn a distinction between ‘sex’ and ‘gender’ in their establishment of the concept of who a ‘woman’ is. The sex of women, they accepted, is a matter of biological or bodily difference from men. Gender, on the other hand, is conceived as the culturally constructed spectrum according to which the identity of both women and men is shaped. Feminism perceives the issue of gender as the essence of the organisation of society distributing power to the structure of identities, as well as ways of making sense of reality, including the case of domestic violence as can be seen in the analysis above.

It should be reminded that even though the common aim of feminism is to ensure gender equality in a broad sense, it is neither a monolithic form of opposition nor a discipline seeking to reach certain ends. Many academic research papers handle feminism as of a unitary approach without addressing the different branches, and name ‘feminism’ as an umbrella category. However, under the common aim of achieving equality between women and men, feminism varies in both the definition and formulation of equality, and in the suggested strategies to realise equality, particularly in law. Furthermore, much feminist writing resists clear categorisation. Many authors cross over into different categories, even within a single piece of writing. In spite of

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50 Teresa L Ebert, ‘“Difference” of Postmodern Feminism’ (1991) 53:8 College English 886, 888
51 Ebert (n 50) 888; Baron and Past (n 48) 25; Patricia A Cain, ‘Feminism and the Limits of Equality’ (1990) 24: 803 Georgia Law Review 803, 803-804; Lynne Segal in Featherstone and Trinder (n 8) 149
52 For a critique of this generalisation of feminism in the context of prostitution, see Katie Beran, ‘Revisiting the Prostitution Debate: Uniting Liberal and Radical Feminism in Pursuit of Policy Reform’ (2012) 30 Law & Inequality 19, 23
54 Baron and Past (n 48) 14; Loretta Kensinger, ‘(In)Quest of Liberal Feminism’ (1997) 12:4 Hypatia 178, 179
this flexibility of taxonomy and the obscurity between the borders separating the
categories, feminist legal theory is largely considered to have evolved into waves\textsuperscript{55} and
different genres.\textsuperscript{56} This study aims to focus on four major schools of feminist thought
which are liberal, cultural, radical and post-modernist,\textsuperscript{57} and thus each of their
approaches towards gender equality needs to be analysed in order to determine which
would bring the most efficient legal response in the context of domestic violence.

a. Liberal Feminism

Before proceeding into this branch of feminism, it is important to mention liberalism as
a political philosophy. In fact, liberal feminism has its roots in the liberal political
thought that emerged with the Enlightenment, and has been the dominant political
theory of the nineteenth and twentieth centuries.\textsuperscript{58} In fact, liberal philosophy has formed
the ground of modern laws, including human rights law, as will be demonstrated
below.\textsuperscript{59} Liberalism basically centres around the core notions of autonomy, universally
recognisable individual rights, equal citizenship and democracy.\textsuperscript{60} Liberal feminism
refers to a type of feminism that strikes to achieve equality for women by staying within
the borders of liberal values and structures.\textsuperscript{61} In this context, by relying on the principles
of individual autonomy, choice and equality, liberal feminists argue that women are not
any more or less capable, rational, autonomous or equal than man, and only when this is
recognised and ensured in law, could women be able to attain equality.\textsuperscript{62} In this context,
the equality formulation of liberal feminists turns out to be women’s sameness with men.63

The main concern of liberal feminists has been the practices of status-based discrimination premised on the assumption that women are less capable or rational than men, leading to the deprivation of women from equal access to rights, opportunities or facilities.64 They argue that as long as women have equal access and equal opportunity to rights, they would be capable of pursuing life on the same terms with men. For this reason, the equality understanding that they bring is formal equality,65 which requires the equal treatment of women with men by emphasising the similarities between them, and ignoring the main differences arising out of their biological or social natures.66 As a result of this thinking, liberal feminists have mostly focused on the equality of women in the public sphere, such as equal payment, equal access to education, equal right to vote and so on. In fact, the biggest success of liberal feminism is argued to be the integration of women into the workforce, which traditionally excluded women.67 Within such a formal understanding of equality and social structures, however, liberal feminists have been critical towards states’ different treatment of women in the cases where the historical and structural disadvantages that women experience are evident. They are concerned that it may lead to another form of discrimination and would only strengthen the gendered stereotypes portraying women as vulnerable or weak, and thus requiring special treatment.68 Although some liberal feminists go a bit further by supporting temporary special treatment for women in certain circumstances, the similar treatment of everybody has broadly been the fundamental aim of liberal feminists.69

63 Denise Schaeffer, ‘Feminism and Liberalism Reconsidered: The Case of Catharine MacKinnon’ (2001) 95:3 American Political Science Review 699, 701. Cain calls this sameness as ‘similarly situated’. See Cain (n 51) 831
64 Margaret Davies, 'Unity and Diversity in Feminist Legal Theory' (2007) 2:4 Philosophy Compass 650, 653; Cain (n 51) 831
65 Lacey, ‘Feminist Legal Theory and the Rights of Women’ (n 60) 20
67 Kensinger (n 54) 188; Sunstein (n 55) 827
68 Kensinger (n 54) 185
This reflects how the liberal feminist understanding is based on the confirmation of *state neutrality*, in that as long as a state is neutral towards all individuals of society, it would be promoting equality. This over-emphasis on the similarities between women and men, and the state’s responsibility to remain neutral however, has proven very problematic and unsuccessful in issues where women are visibly different than men on biological or social terms. For example, when it comes to pregnancy, such a reading of similarity has led women to fail in their arguments for maternity leave or reproductive rights. Since men are not entitled to those rights, women being deprived of them would not lead to discrimination.\(^70\) Similarly, in terms of women’s disadvantage due to historical and structural gendered constructions, the state’s simple responsibility to treat everybody similarly (that is, to treat women on the same terms as men) was a weak strategy to overcome the problems.\(^71\) It is true that liberal feminism highlighted the lack of a women’s voice in law, as well as in the issues where women lacked the most fundamental access to rights (such as access to employment and education, the public pursuits, including academic, professional, military and so on during the 1960s).\(^72\) However, when faced with women’s issues stemming primarily from the gendered lines of power distribution beyond direct discrimination or exclusion of women, liberal feminist ideas focusing on the procedural equal treatment of women fell short in bringing an effective legal response.\(^73\)

In applying this liberal reading to the context of domestic violence, it can be argued that the gendered nature of the problem would be almost completely ignored in the conceptualisation of the problem, and in bringing up solutions in law. In fact, the emphasis on similarity between individual women and men in the interpretation of equality would automatically lead liberal feminists to categorise the victims and perpetrators in gender-neutral terms so as to exclude the gendered fact that women are disproportionately victimised in this phenomenon owing to patriarchal structures.\(^74\) In other words, the liberal feminist reading of the equality between sexes would result in seeing no difference in intimate partner violence between women victimised by men

\(^70\) Catherine A Mackinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press 1989) 35
\(^71\) Nicola Lacey in Charlesworth and Chinkin, *The Boundaries of International Law* (n 66) 39
\(^72\) MacKinnon, *Feminism Unmodified* (n 70) 35
\(^73\) Charlesworth and Chinkin call liberalism overall as a procedural theory, but not a substantial, see Nicola Lacey in Charlesworth and Chinkin, *The Boundaries of International Law* (n 66)
\(^74\) Hopkins and Koss (n 69) 699-700
and men victimised by women. Going further, it would not see a difference between violence perpetrated by a stranger to both sexes and gendered intimate violence, due to the fear of marginalising women by treating them differently. All these cases would be categorised as violence and would be addressed equally considering that the harm in question is taken to be same, i.e. the threat to the autonomy and freedom of the victims. Therefore, what a state would need to ensure is that the laws and practices that apply to women victims of intimate partner violence are applied, in the same way to the male victims of female partner violence and strangers, as they are all violence. However, as revealed above, domestic violence is a truly gendered problem whereby women are being victimised simply due to being women and therefore, the violence that women and men are going through are two entirely different experiences. At this point, it should be emphasised that this is not to say that liberal feminists would ignore or disagree with the gendered nature of domestic violence itself. However, the legal formulation of equality (i.e. formal equality) that they suggest is not capable of integrating the gendered nature of the problem into the scope of law.

b. Cultural feminism

In contrast to the sameness paradigm of liberal feminism, cultural feminists moves the discourse onto difference by arguing that legal measures must be developed to celebrate the fundamental differences between women and men. They contend that women and men are different in a wide range of ways, from their biological makeup to social and cultural factors. One of the most frequently cited work in the context of cultural feminism is the 1982 dated book of psychologist Carol Gilligan, *In a Different Voice*. In her book, Gilligan developed a feminist psychological theory questioning whether women employ different forms of moral reasoning, and therefore, follow a different trajectory of moral development than their male counterparts. Her research was heavily established on the interviews that she conducted with her early adult students in Harvard College as well as women, men, girls and boys at different ages from 6 to 60.

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75 Ebert (n 50) 890
76 Eichner (n 66) 33; Ebert (n 50) 890
77 Carol Gilligan, *In a Different Voice: Psychological Theory and Women’s Development* (Harvard University Press, 1982)
79 Gilligan (n 77) 2-3
After her analysis she concluded that women develop moral reasoning based on being emotional, connected and nurturing, while men identify themselves as independent, logical and individualistic. In other words,

‘women's concept of value revolves not around the axis of autonomy and individuality which refers to liberal understanding of justice and rights, as does men's, but instead around the axis of intimacy, nurturance, community, responsibility and care’. 

Although Gilligan is not a lawyer, her findings have been a big inspiration for the subsequent feminist legal thinking, yet at the same time her conclusions were and still are subjected to heavy critiques. Her findings have been argued to have a nature that could easily slip into socio-biologism and are wrongly placed in the category of feminists confirming innate differences between women and men. It should be underlined that Gilligan, while arguing for the differences of moral reasoning between women and men, has never attributed these differences to biology, neither has she suggested that biological boys or girls may incline towards the feminine or masculine mode. In fact, in her opening in *In a Different Voice*, she noted that the research was of an empirical nature and that she made no claim on the origins of the differences in moral reasoning that she argued to be present between men and women, boys and girls and was open to the fact that they may have been socially imbued. In other words, Gilligan’s research pursued an answer to the question of whether women and men were different in their moral development, but not for the question of why they were different.

Beyond Gilligan, however, some other cultural feminists ended up putting too much emphasis on female biology in explaining women’s differences, implying that female

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80 ibid 17, 151-3
81 Eichner (n 66) 33 The other prominent cultural feminists are Robin West and Martha Fineman. Fineman has particularly focused on the connection between mother and child in her writing. See Martha Fineman, ‘Dominant Discourse, Professional Language and Legal Change in Child Custody Decisionmaking’ (1988) 101:4 Harvard Law Review 727. Similarly, West focused on connectedness in contrast to the autonomous individual imposed by liberal philosophy. See Robin West, ‘Jurisprudence and Gender’ (1988) 55:1 The University of Chicago Law Review 1
82 Davis (n 78)
83 Smart (n 78) 75
84 ibid 73-4
85 Gilligan (n 77) 2
86 Joan M Shaughnessy, ‘Gilligan’s Travels’ (1988) 7 Law & Inequality 1, 7
identity was innate, and therefore falling into the pitfall of biological reductionism. For example, Mary Daly refers to female energy, which she argues to be essentially biophilic and flowing from women’s life-affirming and life-creating biology. On the other hand, Adrienne Rich refers to female consciousness, which she strongly relates to female biology, and suggests that female biology has far more radical implications on women than supposed. Although the extent of dependence on female biology varies, there is not much critique within cultural feminism of the power structures used to perpetuate sexism, social structures and economic institutions which all function to the detriment of women and promote male-violence.

Leaving aside the discussions on whether women’s differences are the products of social or biological constructions, the reflections of this difference approach to law should be analysed. Cultural feminists argue that the values of intimacy, nurturance, emotions, community, responsibility and care which are the foundation of women’s moral reasoning are entirely excluded from the legal thinking and practice that is based on the liberal values of autonomy, rationality and individualism. They see this as a big problem since they suggest that these values should have been fully embraced by all and not rendered negative. They argue that the legal system overly stresses rules and abstraction, and fails to reach context and reciprocal responsibility. As a result of this, the law is predominantly based on an adversarial and competitive rights understanding that uses an abstract construction of persons, not in a way that embraces the emotion of connectedness which is argued by cultural feminists to be a reflection of women’s ethic of care. According to cultural feminism, achieving equality depends on taking into consideration women’s different natures and valuing them equally with men’s within the legal system and other settings of life. In this context, based on the care-giving character of women and biological or social ‘differences’ from men, they insist on the

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88 Mary Daly, Gyn/Ecology (Boston: Beacon, 1978) 355 citing Alcoff (n 87) 408
90 Adrienne Rich, Of Woman Born (New York: Bantam, 1977) 21 citing Alcoff (n 87) 409
91 Alcoff (n 87) 408, 415
92 Charlesworth and Chinkin, The Boundaries of International Law (n 66) 41. See Karst for a discussion on the possible reflections of reconstruction the constitution to employ women’s distinctive morality in Sunstein (n 55) 827
93 See Minow in Sunstein (n 55) 828
94 Charlesworth and Chinkin, The Boundaries of International Law (n 66) 40-41
95 Ebert (n 50) 890
necessity of special legal accommodations.\textsuperscript{96} In the light of the foregoing, cultural feminists develop an equality framework which pays regards to the \textit{differences} between women and men, unlike the \textit{sameness} paradigm supported by the liberal feminists.

In applying these legal critiques to the special context of domestic violence, cultural feminists commonly suggested the use of methods, such as restorative justice, mediation or alternative dispute resolution, instead of criminal legal measures which are based on the idea of abstract harm to the state.\textsuperscript{97} As women’s unique voices and values, including inter-connectedness, constitute the focal point of cultural feminists, in applying this to the context of domestic violence, it is argued that as long as the justice system emphasises the damage that violence causes to relationships, rather than the abstract state, the requirements of cultural feminism could be satisfied.\textsuperscript{98} In this sense, a justice system which pays regard to the women’s individual experiences and harms as the result of the violence on one hand, and a justice system that embraces the idea that connections and relations matter on the other, could be the best and most functional system for women subjected to intimate violence.

In this regard, Hopkins and Koss argue that rather than having a criminal justice system which runs through the codes enacted for everyone with sharp lines, a victim-centred restorative justice system could be a more promising approach for the cultural feminists. They contend that in the restorative justice approach, the individual experiences and voices of women could be heard more prominently. Through reconciliation processes, the harm made to the relations but not to the abstract state could be taken into account more.\textsuperscript{99}

However, there is a nuance being missed here: women and men do not have equal powers over the issue, and only having such equality would make restorative justice fair and effective. As well documented, women are mostly reluctant to report violence or to maintain their complaint, due to their economic dependency on men or the social

\textsuperscript{96} ibid
\textsuperscript{98} Hopkins and Koss (n 69) 700
\textsuperscript{99} ibid
pressures put upon women through deeming them as family-keepers.\textsuperscript{100} In this context, women are mostly not as free as men in making a decision to stay in or leave a relationship, and therefore are more likely to be manipulated during the reconciliation in restorative justice proceedings. At the other end of spectrum, in criminal law measures, the control over the case is given to the judge, who can function as a power neutralising third party in the conflict, as will be discussed in length in the fifth chapter of this thesis.\textsuperscript{101}

Even beyond these specific legal implications of cultural feminism, there are some essential and broader problems surrounding their difference theory. First of all, there is either a disagreement on, or a reluctance to, conceptualise the source of said differences of women from men, i.e. whether they are social or biological. This constitutes an enormous impediment to embodying a consistent feminist activism.\textsuperscript{102} Secondly and more importantly, as stated briefly above, cultural feminism overall fails to address the systemic oppression of women arising from patriarchal structures, therefore it does not deal with the root causes of women’s problems, including domestic violence. For this reason, this line of thinking is not capable of offering a long-range program for a feminist movement in the context of domestic violence. Cultural feminism does not only fail in conceptualising the power structures, it also favours the values alleged to belong females, such as being nurturing, emotional and caring which are the very products of those power structures.\textsuperscript{103} MacKinnon specifically states in response to Gilligan’s work:

‘[Gilligan] achieves for moral reasoning what the special protection rule achieves in law: the affirmative rather than negative valuation of that which has accurately distinguished women from men, by making it seem as though these attributes, with their consequences, really are somehow ours, rather than what male supremacy has attributed to us for its own use. (…) I do not think that the way women reason morally is morality in a “different voice”. I think it is morality in a higher register, in the feminine voice.’\textsuperscript{104}

\textsuperscript{100} According to the criminologists, domestic violence is the most under-reported crime throughout the world. Barnett (n 15) 72-3; 252. Also, see Rhodes and McKenzie, ‘ Why Do Battered Women Stay?: Three Decades Of Research’ (1998) 3:4 Agression and Violent Behavior 391
\textsuperscript{102} Alcoff (n 87) 411-2
\textsuperscript{103} ibid 414
\textsuperscript{104} MacKinnon, Feminism Unmodified (n 70) 38-9
A legal theory addressing the unequal power distribution, instead of focusing on differences between women and men whether or not due to biological or social accounts, would address the problem of domestic violence more effectively.

c. Radical Feminism

In the conceptualisation of equality between women and men, radical feminism rejects both the sameness approach, imposed by liberal feminism, and the difference approach, defended by cultural feminism. Rather the debate has been shifted to the terms of subordination and dominance. Simply put, for radicals, equality is a matter of power distribution. Before delving into the depth of this theory, it should first be stated that radical feminism is a broad branch that cannot be easily reduced to only one description. There are numerous feminist scholars who are considered to fit in radical feminism, but who bring different concepts through the spectrum of wider radical feminism. In trying to label radical feminism with one trait, some scholars categorise them as difference feminists (unlike this study that perceives difference as the theory of cultural feminism), while others refer to them as dominance theorists, by particularly relying on the theory developed by Catharine A. MacKinnon. This study takes MacKinnon’s so-called dominance theory as the focal point, and while referring to radical feminism in general, it actually refers to the dominance model of MacKinnon developed within radical feminist theory.

It also should be underlined that the focus of MacKinnon’s writing is not solely devoted to the issue of domestic violence (or ‘battery of women’ in her terms), since she has predominantly written on the issues of rape, pornography, sex work, sexual harassment and to a certain extent, domestic violence. However, as will be discussed below, the

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105 Hill (n 62) 141
106 Angela Harris, ‘Categorical Discourse and Dominance Theory’ (1990) 5:1 Berkeley Journal of Gender, Law & Justice 181,187
107 Cain (n 51) 832
109 For an example, see Featherstone and Trinder (n 8)
110 Harris calls it as both dominance theory and categorical discourse, see Harris (n 95) 181. ‘Anti-subordination’ is another name it is called, see Amanda J Albert, ‘The Use of MacKinnon’s Dominance Feminism to Evaluate and Effectuate the Advancement of Women Lawyers as Leaders within Large Law Firms (2006) Hofstra L Rev 291,292
111 Harris (n 106)
112 MacKinnon, Feminism Unmodified (n 70) 41
legal theory she has developed is so holistic that her conceptualisation of equality overall is suitably applicable to domestic violence as a form of violence against women. It also should be confirmed that MacKinnon’s theory is considerably broad, which would exceed the focus of this study. In fact, *sexuality* is central to her theory of equality as a social construct of male power, which is defined by men and forced upon women to serve toward the construction of gender.\(^{114}\) She has written extensively on rape, pornography and prostitution on the basis of this sexuality reading.\(^{115}\)

Instead of the sexuality interpretation of MacKinnon, this study particularly focuses on her sex equality reading, as this is the most relevant part for this study’s analysis of domestic violence in legal terms, with a focus on the Istanbul Convention. As Sunstein argues, MacKinnon’s critique of sexuality is distinct from her dominance approach to sex discrimination, although the two are related.\(^{116}\) One does not have to agree with MacKinnon’s argument that sexuality is the constructive element of gender in order to argue that sex discrimination should be approached in terms of dominance.\(^{117}\) As will be discussed in-length below, this study adopts the dominance approach of MacKinnon, as it brings the most efficient legal theory by defining violence as a form of subordination of women as a group, and therefore grants a political identity to the problem to be addressed within a legal framework under the right to equality.

The dominance model developed by MacKinnon brings a novel legal approach to equality that is independent from the sameness or difference test, by arguing that equality is simply a matter of power distribution and hierarchy in power.\(^{118}\) This hierarchy is a product of the patriarchal social structures that distribute power to men in an institutional and systematic manner, and this power translates to the male control of gender.\(^{119}\) As a consequence, this makes the men powerful, dominant and oppressive.

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\(^{114}\) MacKinnon, *Toward a Feminist Theory of the State* (n 113) 128

\(^{115}\) This research will touch upon this perspective in the context of essentialism critiques against MacKinnon, as well as the public/private dichotomy and the individualistic nature of rights in the following parts.

\(^{116}\) Sunstein (n 55) 847

\(^{117}\) ibid

\(^{118}\) MacKinnon, *Feminism Unmodified* (n 70) 32-3

\(^{119}\) ibid
and the women become oppressed, exploited and subordinated by men.\textsuperscript{120} Therefore men and women have a power relationship that can be defined as domination and subordination, and any equality approach to be brought to neutralize this power imbalance has to be grounded on the concept of \textit{domination}, and not \textit{sameness} or \textit{difference}.\textsuperscript{121} She argues that, only in this way, equality provision in law can challenge the practical realities of male supremacy and the patterns of socialisation which lead to the oppression of women.\textsuperscript{122}

MacKinnon has posed the strongest and the most unique critiques against liberalism by arguing that feminism and liberalism are two projects that cannot meet.\textsuperscript{123} The equality model that MacKinnon suggests rejects the \textit{sameness} approach based on the liberal principle of formal equality that proposes \textit{treating likes alike and unlikes unlike}, and argues that this approach only maintains present power status quo leading to the subordination of women.\textsuperscript{124} She goes on to state that in this legal approach to equality, a real social equality becomes an unachievable project. In fact, in such a formal equality understanding, women are entitled to get what men have due to the sameness paradigm, and are refused to have what men do not have or would not need, since such a treatment would lead to a different treatment and therefore discrimination.\textsuperscript{125} In fact, women’s biggest difference to men is their lack of power;\textsuperscript{126} in this regard, the difference of women is the social disadvantages that they experience. Therefore, in the formal equality understanding, addressing these disadvantages of women is excluded, because

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  \item \textsuperscript{121} MacKinnon, \textit{Feminism Unmodified}\ (n 70) 32-35, MacKinnon, \textit{Toward a Feminist Theory of the State}\ (n 102) 215-221
  \item \textsuperscript{122} Catharine A MacKinnon, ‘From Practice to Theory, or What Is a White Woman Anyway?’ (1991) Yale Journal of Law & Feminism 13, 23
  \item \textsuperscript{123} Schaeffer (n 63) 699-700, Smart (n 78) 72; Harris (n 106) 186-7. In fact, in all her works covering different forms of gendered issues, MacKinnon refers to liberalism and liberal state as the institution of male dominancy. See the chapter ‘state’ in \textit{Towards a Feminist Theory of the State} (n 113) 155-215. Although vast majority of feminists including MacKinnon hold a critical stance against liberalism, there are alternative views on the link between liberalism and feminism and liberalism and dominance theory of MacKinnon. For example, Carol Pateman argues that feminism is seen as a completion of the liberal revolution through an extension of liberal principles and rights to women. See Carol Pateman, ‘Feminist Critiques of the Public/Private Dichotomy’ in Anne Phillips (ed), \textit{Feminism and Equality} (New York University Press 1987) 103. Schaeffer, on the other hand argues that MacKinnon does not abandon liberalism, on the contrary, she contracts her theory on some liberal principles, such as primacy of individual choice, consent, protection of individuals from harm by others etc. See Schaeffer (n 63)
  \item \textsuperscript{124} MacKinnon, \textit{Feminism Unmodified}\ (n 70) 37
  \item \textsuperscript{125} Catharine A MacKinnon, \textit{Butterfly Politics} (The Belknap Press of Harvard University Press 2017) 111-112; Charlesworth and Chinkin, \textit{The Boundaries of International Law} (n 66) 39; Albert (n 110) 296
  \item \textsuperscript{126} Bartlett in Albert (n 110) 312
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\end{footnotesize}
to address difference is excluded within this formula. In other words, social definitions of disadvantaged groups (women) are based on their unlikeliness to advantaged groups (men).\textsuperscript{127} To the extent that women are disadvantaged, they are different, and to the extent that they are different, they are not entitled to equality, because women are only entitled to equality if they are same as men.\textsuperscript{128} MacKinnon puts this as:

‘A built-in tension exists between (formal) concept of equality, which presupposes sameness, and (formal) concept of sex, which presupposes difference. Sex equality thus becomes a contradiction in terms, something of an oxymoron, which may suggest why we are having such a difficult time getting it.’\textsuperscript{129}

Another aspect of this liberal sameness approach is its comparative concept of equality that MacKinnon heavily attacks: Same to whom? Different to whom? Under the sameness standard, women are measured according to their correspondence with men, and women’s equality is judged by their proximity to men’s measure. Under the difference standard, women are measured according their lack of correspondence with men, and womanhood is judged by women’s distance from men’s measure. In this context, male is norm, male is the standard, and therefore gender neutrality is simply the male standard.\textsuperscript{130} For example, women’s unique reproductive nature and ability to gestate children, \textit{in utero}, is a key difference and for long, to give women what they needed in terms of pregnancy has been perceived as sex discrimination, because only women need it.\textsuperscript{131} Men’s differences do not make them different, because men have the power.\textsuperscript{132} Because of this, radical feminists including MacKinnon define the liberal state as a male-gendered facility that disguises the realities of power under the name of formal equality and state neutrality.\textsuperscript{133} In this sense, the liberal law turns out to be constructed on a male standard, thus \textit{gender-neutral} turns out to be \textit{male} in liberal approach. MacKinnon contends that in such a sex equality law, women are merely being assimilated to what a male standard would require.\textsuperscript{134} Therefore, it can be said that only when equality is formulated so as to highlight the dominance of men and subordination of women, i.e. in making the male domination visible unlike the abstract...
liberal equality theory,¹³⁵ can a substantive and social equality be achieved within law.¹³⁶

In returning to the issue of domestic violence against women, MacKinnon argues that different types of violence against women, including domestic violence (in her words, battery of women), have been silenced out within law, since they almost exclusively happen to women, i.e. differently than men.¹³⁷ She underlines the patriarchal nature of domestic violence and its prevalence by pointing out that it occurs in one-quarter to one-third of homes.¹³⁸ In fact, as argued at the beginning of this research, patriarchy is in function across cultures and boundaries and this is put by Copelon as:

‘[w]hile the particular cultural embodiments of patriarchal thinking vary between different cultures, there appears to be an astounding convergence of cultures in regard to the basic tenets of patriarchy and the permissibility, if not necessity, of violence as a mechanism of enforcing that system.’¹³⁹

In spite of the gendered and systematic nature of domestic violence, in the liberal reading of equality, which is formal equality, measures necessary to be taken to eliminate domestic violence against women would be discriminatory unless treated in a similar way to a man being subjected to violence. As domestic violence would be rendered a gender-neutral phenomenon which could victimise everybody regardless their sex, the invocation of sex discrimination would not be possible for the domestic violence act itself. This is very indicative of how liberally-constructed law is male and how male concerns are the standard through which women’s issues are excluded.

On the contrary, according to the dominance equality approach, domestic violence is a straightforward matter of inequality. It arises out of the power imbalance between women and men, and should be addressed as sex discrimination under sex equality laws.¹⁴⁰ In fact, within the same line of thinking, MacKinnon argues that rape, pornography, sexual harassment, prostitution and abortion constitute different forms of violence against women as a reflection of the domination of men and the subordination

¹³⁵ Harris (n 106) 194
¹³⁶ MacKinnon, *Butterfly Politics* (n 125) 111
¹³⁷ MacKinnon, *Feminism Unmodified* (n 70) 41
¹³⁸ ibid
¹⁴⁰ Featherstone and Trinder (n 8) 152-155
of women, all of which should be addressed under a sex equality legal framework.\textsuperscript{141} It is evident here that when discrimination is formulated as dominance, a wide-range of issues which have not been considered to involve sex discrimination raise a question of equality in law. This approach sees inequality in patterns of interaction between women and men that are taken as gender-neutral and intrinsic in liberal thinking, and enables these forms of inequality to get into the realm of sex discrimination law.\textsuperscript{142}

In the light of the foregoing, as stated at the beginning of the radical feminist analysis, MacKinnon politicises equality and violence against women. She does this by invoking equality guarantees for issues which were deemed to be natural and outside state scrutiny, thus moving them into the public sphere.\textsuperscript{143} The dominance model makes power inequality (as the constitutive element of gender) visible, which is otherwise invisible in liberal philosophy.\textsuperscript{144} In this sense, what is considered normal and neutral is problematised and has been integrated into the scope of state responsibility. Ultimately, she brings a grand theory of violence and equality in a totalising manner.\textsuperscript{145} In the conceptualisation of the issues referred to above, such as domestic violence, pornography, sexual harassment and so on, the demarcation between individuals and power holders is clear: men hold power, women do not; liberal equality serves to male interests, but not to women interests; all women are subordinated and all men dominate. In contrast to an individualist liberal construction of equality and rights, the dominance model deems violence as a group-based problem for women by confirming a ‘women category’.\textsuperscript{146} This study will therefore delve into this group-based aspect of the theory, whereby women are homogenised in the context of essentialism critiques in the following parts of this chapter. However, at this point it would suffice to say that radical

\textsuperscript{141} MacKinnon, Feminism Unmodified (n 70) 40-41; Sunstein (n 55) 833; Harris (n 106) 194; Laura W Brill, ‘MacKinnon and Equality: Is Dominance Really Different?’ (1993) 15:2 University of Arkansas at Little Rock Law Review 261, 270

\textsuperscript{142} Sunstein (n 55) 828

\textsuperscript{143} MacKinnon, Feminism Unmodified (n 70) 41. MacKinnon criticises the focus of the liberal philosophy only on the public sphere. She argues that only the dominance approach is capable of making sex discrimination a political matter, and therefore can lead to change in the distribution of power in private sphere. MacKinnon, Feminism Unmodified (n 70) 43-44, MacKinnon, Butterfly Politics (n 125) 119

\textsuperscript{144} Harris (n 106) 194

\textsuperscript{145} Her theory is called as standpoint theory by some. Susan Hekman, ‘Truth and Method: Feminist Standpoint Theory Revisited’ (1997) 22:2 The University of Chicago Press Journals 341, 362. Joanne Conaghan, in her article analysing the relationship between academic feminism and political activism, states that she prefers the term ‘women-centred’ to ‘standpoint feminism’, as women-centredness expresses political purpose of standpoint feminism. Conaghan (n 1) 363

\textsuperscript{146} Schaeffer (n 63) 706
feminism is the branch of feminism which has politicised all forms of violence against women, including domestic violence, by formulating a grand theory and by opening the doors toward state responsibility.\textsuperscript{147}

Moreover, the dominance theory which points out the systematic nature of the problem and refers to women as a category has political powers to mobilise the social movements aiming for legal reforms.\textsuperscript{148} Such a broad declaration of the wrongness of violence strengthens the hands of women to claim radical policies and law reforms to combat the problem. As Tong puts, ‘all movements need radicals and the women’s movement is no exception’.\textsuperscript{149} In this way of thinking, dominance feminist theory goes beyond ensuring interesting philosophical and epistemological discussions on gendered problems and brings praxis to law.\textsuperscript{150} MacKinnon, however, does not confine herself to reach that liberal law is gendered; instead she goes further by strategically employing the concept of equality in law to bring practical solutions.

For example, the legal claim for sexual harassment as a form of sex discrimination is largely attributable to the work of MacKinnon. In fact, in her 1979 dated book \textit{Sexual Harassment of Working Women: A Case Of Sex Discrimination}, MacKinnon strongly argued that sexual harassment, which she defined as the sexual oppression caused by the economic dominance men have over women, is a form of sex discrimination.\textsuperscript{151} This reading of MacKinnon was embraced in 1986 in \textit{Meritor Savings Bank v Vinson} case\textsuperscript{152} by the US Supreme Court, when sexual harassment involving a ‘hostile environment’ was found in violation of Title VII of the Civil Rights Act of 1964 which prohibits sex

\begin{thebibliography}{99}
\bibitem{147} Kensinger argues that for all social movements, a radical approach is a must, and women’s movement is not an exception to this. See Kensinger (n 54) 189
\bibitem{148} Charlesworth and Chinkin, \textit{The Boundaries of International Law} (n 66) 55
\bibitem{150} Smart (n 78) 76
\bibitem{151} Catharine A MacKinnon in her two works, i.e. \textit{Sexual Harassment of Working Women: A Case Of Sex Discrimination} (New Haven and London, Yale University Press 1979) and ‘Sexual Harassment: Its First Decade in Court’ in Patricia Smith (ed) \textit{Feminist Jurisprudence} (New York: OUP 1993) identifies sexual harassment as a form of discrimination. It is also worth noting that MacKinnon has distinguished two forms of sexual harassment, ‘quid pro quo’ and ‘condition of work’ situation. The former refers to the case where a person in position of authority demands sexual attention in exchange for an employment benefit, where the latter one refers to cases where a person is continuously subjected to sexual insults without any offer of employment benefit. See MacKinnon, \textit{Sexual Harassment of Working Women: A Case of Sex Discrimination} 32
\bibitem{152} \textit{Meritor Savings Bank v. Vinson}, 477 US 57 (1986) 106 S Ct 2399. The Court stated that for a sexual harassment case to be discriminatory, there is no need to prove a ‘tangible loss’ of an ‘economic character’ and it did not question whether the plaintiff’s participation was voluntary. It was argued that the right inquiry was whether the sexual advances were unwelcome. See Pp. 2404-2407
\end{thebibliography}
discrimination by employers. Not long after, this approach was echoed in the groundbreaking judgment of the Supreme Court of Canada in Janzen v Platy Enterprises Ltd in 1989. The Supreme Court of Canada decided that sexual harassment was a form of discrimination based on sex and therefore was in violation of the Manitoba Human Rights Act. It is also worth mentioning that two-years earlier in Robichaud v Canada (Treasury Board), the Supreme Court of Canada had only analysed whether or not, in the case of sexual harassment by an employee, the employer was also liable for the act and answered in the affirmative, instead of questioning whether the sexual harassment itself was discriminatory.

It was not only MacKinnon’s approach to sexual harassment that influenced the Supreme Court of Canada. In its infamous R v Butler decision in 1992, the Court incorporated MacKinnon’s interpretation of pornography from a series of Antipornography Civil Rights Ordinances that she had written with Andrea Dworkin in 1980s. In these ordinances, MacKinnon and Dworkin suggested pornography should be treated as a violation of women’s civil rights, including the prohibition of discrimination, and proposed allowing women harmed by pornography to seek damages through lawsuits in civil courts. The Supreme Court of Canada decided in Butler that the obscenity law was unconstitutional and in violation of the right to freedom of speech if enforced on the grounds of morality, but was constitutional if enforced to guarantee women’s sex equality. Although the Court did not handle the case explicitly under Section 15 of the Canadian Charter of Rights and Freedoms, which guarantees sex equality.

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154 Janzen v Platy Enterprises Ltd [1989] 1 SCR 1252  
155 Manitoba Human Rights Act SM 1974 c 65. The Court found the violation of s 6(1) of the Manitoba Act which prohibited discrimination on the basis of sex. It should be noted that the Court applied the test of whether the sexual advance was unwelcome, in a similar vein to the Meritor Savings Bank v Vinson decision. It was also contended the fact that not all female employees of Platy Enterprises Ltd were targeted is not to mean that the act was not based on sex. The Court underlined that sexual discrimination is where there is a ‘practice or attitude which had the effect of limiting the conditions of employment of, or the employment of, or the employment opportunities available to, employees on the basis of a characteristic related to gender’.  
156 Robichaud v Canada (Treasury Board) [1987] 2 SCR 84  
158 R v Butler [1992] 1 SCR 452  
159 Some versions of the ordinance were passed in several cities in the US in 1980s, however they were struck down by courts as they were found in violation of the freedom of expression which is protected in the First Amendment to the US Constitution.  
equality, and instead it analysed the case under the freedom of speech guarantees of the Charter, the Court explicitly recognised the threat pornography poses to women’s equality by exposing certain types of degrading material. This approach was influenced by MacKinnon and Dworkin’s anti-pornography theory. Similarily, in the special context of domestic violence, radical feminism overall is repeatedly argued to inform the legal reforms, including its criminalisation and the feminist understanding overall in the UK and the USA in 1970s and 1980s. Owing to these achievements within law, some have argued that MacKinnon has been the most important force behind the use of sex discrimination law by politicising women’s equality and violence against women.

In the light of the foregoing, it is evident that the dominance theory brings the strongest challenge against the liberal construction of equality and violence, through its holistic and group-based approach. In this sense, the main tension seems to be between the liberal and radical feminist conceptualisation of violence. This tension is not only a philosophical discussion between liberal and radical feminists; it is instead political and instrumental. As this thesis will mainly analyse where the Istanbul Convention stands in this spectrum between the liberal and radical feminist understanding of domestic violence, it is useful at this point to summarise the main clashing points between two.

First of all, while the equality reading is formal and based on sameness in liberal philosophy, dominance is the focus in the radical approach. For radicals, the domestic violence act itself is a reflection of the subordination of women, and is therefore a form of sex discrimination. However, in the liberal construction of equality, as domestic violence or any other issues of women are drawn in a gender-neutral manner, the act itself is not considered a matter of inequality outright. For a claim of discrimination in a domestic violence case to be successful, the applicant would have to prove certain things, all of which in a comparative position with men. Thinking from an international

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161 In fact, the Court analysed whether the obscenity law was in violation with the Section 2(b) of the Charter which guarantees freedom of thought, belief, opinion and expression, and if so, whether the obscenity law can be demonstrably justified under Section 1 of the Charter as a reasonable limit prescribed by law.
163 Featherstone and Trinder (n 8) 147-149; Houston (n 15) 233; Kersti Yllo, ‘Political And Methodological Debates In Wife Abuse Research’ in Kersti Yllo and Michele Bograd (eds) Feminist Perspectives on Wife Abuse (Sage Publications, 1988) 28; Damand and others (n 120) 125
164 Sunstein (n 55) 829
165 Cain (n 51) 831-2
law perspective, the state would need to be proven to have acted beyond neutral towards female and male victims and to have intentionally discriminated female victims of violence before the law, compared to male victims. Moreover, proof might be required to reveal that women were victimised in greater numbers than men in order to identify the discriminatory nature of violence.

Secondly, as radical feminism directly identifies violence as a form of discrimination, it achieves to recognise the harm occurring to women in women’s terms, i.e. not in comparison to the male standard of harm or violence, which is inherent in liberal thinking.\(^{166}\) This would strongly challenge and deconstruct the male subject of law. Thirdly, as domestic violence is considered a group-based and systematic problem in radical conceptualisation, unlike the individualistic nature of liberal philosophy, a law constructed on radical terms would open the doors to structural and holistic legal measures to be taken by states to address the problem. The following chapter will analyse to what extent the Istanbul Convention achieves to meet these points within the human rights law structure.

d. Postmodern Feminism

i. Essentialism Critiques

After analysing radical feminism, another major school of feminism, i.e. postmodern feminism should be put under the spotlight. This is selected specifically because of its tension with the radical feminism’s categorisation of women, which has been highly influential within feminist literature. Postmodernism, as a broader category, rejects a unitary truth or objective reality, as a principle.\(^{167}\) In this sense, postmodern feminism rejects the concept that gender, as well as power dynamics within gender, function in a certain and consistent way. It argues that gender is not a fixed entity and that power is circumstantial.\(^{168}\) In translating these statements to the context of domestic violence, it perceives domestic violence not as a unitary phenomenon, but contends that there is not one form of masculinity and femininity, as performed by men and women in the

\(^{166}\) Sneja Gunew, *A Reader in Feminist Knowledge* (Routledge 1991) 305
\(^{167}\) Cain (n 51) 838
\(^{168}\) Featherstone and Trinder (n 8) 152
incidents of domestic violence. It instead proposes that each violence act must be examined in its own terms.\textsuperscript{169}

In this reading, postmodern feminists approach the unitary ‘women category’ with scepticism.\textsuperscript{170} In fact, all postmodern and poststructuralist theories, including critical race theorists beyond feminism have challenged the idea of self as fixed and stable, therefore the idea of essentialism.\textsuperscript{171} Essentialism, in the context of feminism, can be defined as the notion that women (and men) have an inherent, universal essence that can be captured and described.\textsuperscript{172} In this regard, anti-essentialists argue two things which are interrelated. Firstly, the concept of gender is not fixed in the sense that it is the result of biological characteristics; rather it is a social construct.\textsuperscript{173} Secondly, they contend that gender cannot be representing a group of people in a homogenous sense rejecting the idea of female \textit{essence} all together. Anti-essentialism was developed first by Black feminists in the late 1980s arguing that feminist discourse envisaged Whiteness as the essence of womanhood, therefore privileged the interests of White women.\textsuperscript{174} The suspicion towards homogeneity and invocation of women’s individual and shared experiences as the epistemological base of feminist discourse, at the end, led to suspicion on all categories, including the category ‘woman’.\textsuperscript{175} In fact, within this deconstructive thinking, as Conaghan argued, it followed that gender categories had no authentic content, and there was not such a thing as gendered reality that feminism could represent.\textsuperscript{176}

\textsuperscript{170} Dennis Patterson ‘Postmodernism/Feminism/Law’ (1991-1992) 77 Cornell Law Review 254, 260; Conaghan (n 1) 366; Eichner (n 66) 30, 35-6
\textsuperscript{172} Angela Harris, ‘Race and Essentialism in Feminist Legal Theory’ (1990) 42 Stan L Rev 581. Alternatively, essentialism can mean that gender is the basic ground for women oppression, while the other identity characteristics have secondary effect. See Davies (n 64) 656-7
\textsuperscript{173} Bond (n 171) 109
\textsuperscript{174} Joanne Conaghan, ‘Intersectionality and the Feminist Project in Law’ in Emily Grabham, Davina Cooper and others, Intersectionality and Beyond: Law, Power and the Politics of Location (Routledge 2009) 22-3
\textsuperscript{175} ibid 23
\textsuperscript{176} ibid
Unsurprisingly, these anti-essentialist critiques have predominantly been directed against radical feminists and particularly MacKinnon.\(^{177}\) Her dominance theory which envisions women as a homogenous group that are subordinated to men in all circumstances, was seen as too generalised, and thus not reflecting the reality of power dynamics and female identity.\(^{178}\) For example, Deborah Rhode found MacKinnon trapped by essentialism arguing that all standpoint theories, including MacKinnon’s dominance theory, failed to acknowledge that a single overarching framework cannot truly reflect social experience.\(^{179}\) She went on interpreting MacKinnon’s approach as a theory where all women become one woman due to her neglect on dynamics among them.\(^{180}\) Taking this a step further, Angela Harris argued that the one woman of MacKinnon is simply a White woman.\(^{181}\) Beyond MacKinnon, radical feminism as a whole, and in fact sameness and difference feminisms are considered to hold an essentialist view predicitng upon a monolithic and coherent woman category.\(^{182}\)

In the face of the rise of the anti-essentialist critiques within feminist literature, one must start asking questions about whether feminism could exist as a philosophy or a project without the confirmation of a women category, e.g. how can there be feminism without a systematic critique of gender relations?\(^{183}\) It is difficult to argue with the rejection of the existence of a meaningful objective category (i.e. women) that feminism would be a legitimate project. This is put forward by Fellmeth as follows:

‘If all women do not have some important interests in common, then the term “feminism” is as meaningless as “international human rights” would be if all human beings did not have some interests in common.’\(^{184}\)

To recognise that women share some common interest does not necessarily amount to the rejection of differences in their experiences and identities. As MacKinnon puts it in response to the anti-essentialist critiques against herself, feminism in theory is based on women’s shared suffering and only by confirming this commonality, women’s

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\(^{177}\) Schaeffer (n 63) 704; Price (n 16) 52. Cain underlines that some liberal feminists developed the same critique against radical feminism. See Cain (n 51) 835; John Hoffman, ‘Blind Alley: Defining Feminism’ (2001) 21:3 Politics 193, 197; Ebert (n 50) 892; Naffine (n 49) 89-90

\(^{178}\) Smart (n 78) 77

\(^{179}\) Deborah L Rhode, ‘The “Woman’s Point of View”’ (1988) 38/1-2 Journal of Legal Education 39, 41

\(^{180}\) See Deborah L. Rhode, Justice and Gender: Sex Discrimination and the Law (HUP 1989) 83

\(^{181}\) Harris, ‘Race and Essentialism in Feminist Legal Theory’ (n 172)

\(^{182}\) ibid 590-605

\(^{183}\) Patterson (n 170) 261

subjugation in societies can be eradicated.\textsuperscript{185} Her group-based approach towards women does not refer to an affirmation that women are uniform, but it means to say that women are interrelated in their common experience of powerlessness.\textsuperscript{186}

Feminism should be drawn in a manner that enables law to be instrumentalised, and thus challenges women’s powerlessness, and this is only possible with the acknowledgement of the subject of feminism as women as a group, instead of a disparate conceptualisation of women’s experience of inequality. That is, with such fragmented thinking, how could law be urged to take radical and comprehensive measures to challenge cases of inequality, which are both cause and effect of the overall subordination of women? As Joanne Conaghan reflects in an article in which she expresses her concern on the increasing gap between academic and political feminism, feminism is a transformative project and thus, beyond producing academically legitimate work, it should ensure a political urge to change things by using law.\textsuperscript{187}

In fact, law is unlike many other social disciplines in that it has a strong transformative potential by having a direct impact on millions of women’s lives. At the expense of reaching toward academic purity by recognising all the differences amongst women and gender relations, and therefore rejecting the women category in the first place, anti-essentialism could jeopardise this transformative potential of law.\textsuperscript{188} The overstatement of differences among women undermines the political legitimacy of feminism,\textsuperscript{189} and therefore its intrusion upon law for potential solutions to women’s inequality. In a case such as domestic violence, which women across the world are experiencing in large numbers, it would not be too utopic to argue for a women category that shares the same interest to be free from dominance and violence.\textsuperscript{190} Radical feminism does this, and for this reason, has achieved the biggest success in law to date in urging states to criminalise domestic violence and deploy police response more effectively. Anti-essentialism claims should rather be understood as a reminder of the plurality in the experiences of women (which are all the reflections of the same structural inequality) to

\textsuperscript{186} ibid
\textsuperscript{187} Conaghan, ‘Reassessing the Feminist Theoretical Project in Law’ (n 1) 353-4; 375
\textsuperscript{188} Charlesworth and Chinkin, The Boundaries of International Law (n 66) 55
\textsuperscript{189} Maria Drakapoulou, ‘The Ethic of Crae, Female Subjectivity and Feminist Legal Scholarship’ (2000) 8 Feminist Legal Studies 199, 210
\textsuperscript{190} Charlesworth and Chinkin accept that women is an appropriate category in some contexts. Charlesworth and Chinkin, The Boundaries of International Law (n 66) 55
be taken into account in legal responses. As Trina Grillo puts, the point is not to swear off generalisations altogether but rather it is to use the insights of anti-essentialism to act as checks while formulating generalisations.

ii. Intersectionality

Within the category of postmodern theories that has rooted in anti-essentialist thinking, another important feminist approach has flourished which is intersectional feminism. Intersectionality, in a broad sense, is a challenge to the ‘dominant perception’ about discrimination and inequality as along a single and independent axis, such as gender, race, sexuality and so on, and is an attempt to uncover and redress the forms of discrimination that remain hidden in such a single axis discrimination framework.

The term ‘intersectionality’ was coined by Kimberle Crenshaw in 1989, and since then there has been a significantly growing literature and interest on the concept. In this piece, Crenshaw highlighted that Black women experience discrimination in a different way than White women and Black men, as their experience is located at the intersection of both their femaleness and Blackness. For this reason, discrimination against Black women is neither only on the basis of their sex, nor race, but both at once. She underlines that intersectional discrimination against Black women is a unique experience, and is greater than the sum of sexism and racism. In this regard, a discrimination framework which separates the lines of sex and race discrimination,
ignoring that some forms of discrimination occur on both grounds at the same time, cannot bring equality for all. In fact, she demonstrates that in such a single axis framework, alongside a view of single identity, what anti sex discrimination laws protect is White women’s interests and what anti race discrimination laws protect is Black men’s interests. She brings a strong critique against anti-discrimination law in the US which has one or other approach where Black women fall through the cracks of both sex and race discrimination.198

It follows from this reading that, from a terminological viewpoint, intersectional discrimination differs from multiple or cumulative forms of discrimination.199 In fact, multiple discrimination refers to the cases where an individual is discriminated against on different grounds in different occasions, while cumulative discrimination, which can also be called additive discrimination, occurs when a person is discriminated against on the same occasion but in two different ways.200 In both cases, each incident can be assessed separately and independently on a single ground. However, in the cases of intersectional discrimination, various grounds of discrimination cannot be disentangled from each other as, by being interconnected, they create unique forms of disadvantage. In the case of Black women, for example, it cannot be argued that they are discriminated against because they are women or they are Black, but because they are both. Crenshaw considers this a synergistic phenomenon.201

Since this groundbreaking work of Crenshaw, intersectionality has engaged a great amount of interest from feminists and has been expanded to include not only the forms of discrimination involving sex and race aspects, but also to the categories which were excluded from the reach of traditional anti-discrimination laws, such as sexuality and class.202 Intersectionality has been developing as an approach to law for the purpose of challenging the single identity understanding of subjects in a wide-range of contexts, and as a practical tool to detect and address intersecting forms of discrimination by

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198 Atrey, ‘Women's Human Rights: From Progress to Transformation’ (n 195) 869
200 Sandra Fredman, Intersectional Discrimination in EU Gender Equality and Non-Discrimination Law (European Commission 2016)
201 Crenshaw, ‘Demarginalizing the Intersection of Race and Sex’ (n 195); Fredman (n 200) 27-28
202 Conaghan, ‘Intersectionality and the Feminist Project in Law’ (n 174) 26
recognising the fluid and multiple-faceted nature of identities.\textsuperscript{203} Within this reading, one essential part is that power relationships in between these identities and categories are also fluid and flexible. This means that power relationships can operate both vertically and diagonally.\textsuperscript{204} The oppressed in one case can be the oppressor in another. For example, White women are in a position of power in relation to their colour, but not their gender.\textsuperscript{205}

There is a wide-range of research demonstrating the intersectional nature of domestic violence. In her other groundbreaking analysis, ‘Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color’,\textsuperscript{206} Crenshaw demonstrated how domestic violence was shaped by intersecting patterns of sex and race-based subordination and how the legal tools and protection services provided for domestic violence victims in the US then excluded the intra-group disadvantages of Black women.\textsuperscript{207} In her much more recent works, Shreya Atrey also underlines that Black, disabled, indigenous, Roma, bisexual, transgender and lesbian women all face a greater rate and different forms of sexual and gendered violence than women who are not Black, disabled, Roma and sexual minorities.\textsuperscript{208}

It must be underlined that although anti-essentialism and intersectionality are similar and complementary in a way,\textsuperscript{209} they are two different concepts. It is true that intersectionality takes its roots in anti-essentialist thinking and addresses some issues raised by anti-essentialists, such as the recognition of complex and fluid self and plurality. However, while anti-essentialism rejects essence in all forms and categories thereof, intersectionality embraces categories and actually uses them, aiming to respond to intragroup / intra-categorical differences. In other words, as expressed by Conaghan,

\begin{footnotesize}
\begin{enumerate}
\item Fredman (n 200) 28-30
\item ibid 30
\item Crenshaw, ‘Mapping the Margins’ (n 194)
\item According to Crenshaw's study concerning domestic violence shelters located in minority communities of Los Angeles, the challenges that confront shelter workers were not confined to addressing acts of violence that were perpetrated against victims, but they were various and multifaceted manifesting victims’ subordination. See Crenshaw, ‘Demarginalizing the Intersection of Race and Sex’ (n 195) 1245
\item Atrey, ‘Women's Human Rights: From Progress to Transformation’ (n 195) 868; Shreya Atrey, ‘Lifting as We Climb: Recognizing Intersectional Gender Violence in Law’ (2015) 5:6 Onati Socio-Legal Series 1512, 1512
\item Arif A Jamal, ‘Comparative Law, Anti-essentialism and Intersectionality: Reflections from Southeast Asia in Search of an Elusive Balance’ (2014) 9:1 Asian Journal of Comparative Law 197, 198
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while anti-essentialism as a concept got stuck within a theoretical conundrum of questioning essence and deconstructing all categories, intersectionality deployed anti-essentialism in a political and strategic way, by making it applicable to the cases of subordination and inequality.210

The question then becomes what is the position of MacKinnon’s dominance theory and radical feminism overall in the context of intersectionality. The dominance theory of MacKinnon has been prevalently criticised for being shaped with the primary aim to address White women’s problems, excluding all other women, or at best, putting them on the back burner by leaving them to be handled superficially within an equality mechanism fundamentally designed for White women.211 In other words, her theory is referred to as ‘one-size-fits-all feminism’ and argued to be oppositional to intersectional theory.212 However, MacKinnon’s dominance theory and Crenshaw’s intersectionality approach are synergetic and complementary, instead of contradictory, especially through their critique against sameness/difference paradox in antidiscrimination law.213

In fact, what Crenshaw demonstrated in her 1989 dated article ‘Demarginalizing the Intersection of Race and Sex’ was that Black women’s discrimination claims in a series of employment cases214 were rejected mainly because their recovery was conditioned on their sameness to Black men or White women, on the other hand, Black women were seen too different to represent people who always have been permitted to represent them, namely Black men and White women.215 This critique is entirely parallel to the antidiscrimination law critique of MacKinnon, which replaces sameness and difference paradigms with dominance, and bares the invisible power inequalities, unlike the sameness/difference approach. Indeed, through Crenshaw’s approach, Black women who are erased as subjects from law become visible. Furthermore, Crenshaw in her theory points out the standard of White women in feminism and Black men in

212 ibid 152
213 ibid 155-156, 164-165
214 DeGraffenreid v General Motors 413 F Supp 142 (E D Mo 1976); Moore v Hughes Helicopter 708 F2d 475 (9th Cir 1983); Payne v Travenol 673 F2d 798 (5th Cir 1982)
215 Crenshaw, ‘Close Encounters of Three Kinds’ (n 211) 155-156, 164-165
antiracism,\textsuperscript{216} in a similar vein to the male standard critique of MacKinnon which was explained earlier in-length. In brief, both theories challenge the mainstream liberal equality approaches and aim to replace them with one which is truly capable of detecting and redressing discrimination against people who are subordinated (to different extents) due to structural power inequalities. Indeed Crenshaw states that her analysis in Demarginalizing is a specific reflection of a broader dynamic that MacKinnon exposed in her critique of the liberal constructions of antidiscrimination law.\textsuperscript{217}

As a response to these critiques posed against herself, MacKinnon in ‘From Practice to Theory, or What is a White Woman Anyway?’ states that in her method, commonality is not presumed but informed by what women, including women of colour, say about their experiences, therefore the method that she employs is not top-down, but bottom-up, and she calls for feminists to ‘build a theory out of women's practice, comprised of the diversity of all women's experiences’.\textsuperscript{218} In her examination of MacKinnon, Crenshaw cannot find a point in dominance theory which would stand as a point of absolute impediment to address the intersectional concerns.\textsuperscript{219} It is true that her dominance theory opens the door for people who have been traditionally marginalised in the individualist and fragmented structure of liberalism, no matter what the degree or type of the marginalisation. In fact, within such an equality formulation, intersectional discrimination claims of women would be fully recognised when they are framed so as to acknowledge this intersectional nature which may be leading to more significant forms of subordination due to racism, heteronormativity, ableism, ageism and so on.\textsuperscript{220} Crenshaw argues one reason for these critiques would simply stem from the fact that MacKinnon is a White woman,\textsuperscript{221} and criticises the fact that MacKinnon’s feminism has been the target of extensive critiques of exclusion of race, while antiracism movements

\textsuperscript{216} ibid 166
\textsuperscript{217} ibid 165
\textsuperscript{218} Catharine A MacKinnon, ‘From Practice to Theory, or What is a White Woman Anyway?’(n 122) 22
\textsuperscript{219} Crenshaw, ‘Crenshaw, ‘Close Encounters of Three Kinds’ (n 211)
\textsuperscript{220} Beyond characteristics of race, sexuality, disability etc, Conaghan moves the attention to one other point and argues that all second wave feminists, including radical feminists took an intersectional approach by looking at intersectional relation of class and gender. See Conaghan , ‘Intersectionality and the Feminist Project in Law’ (n 174) 33
\textsuperscript{221} Crenshaw, ‘Close Encounters of Three Kinds’ (n 211)169
and Critical Race Theory have escaped scrutiny of exclusion of gender in their theorisations to a great extent.\(^{222}\)

It should be recalled that intersectionality as a concept is far from having a clear meaning and is still subject to heavy debates on its definition, method, practical efficiency and consequences.\(^{223}\) The implications of intersectionality in the context of the Istanbul Convention, i.e. whether the Convention has achieved to integrate the intersectionality concept into its reading of violence, if so, what type of intersectionality approach it takes as well as how the Convention’s intersectionality understanding can be improved by its monitoring body through its supervisory mandates, will be discussed in-depth in the fifth chapter of this thesis. At this point, it should be briefly put that dominance theory and its rejection of sameness and difference paradox is fully capable of addressing intersectional discrimination claims at a theoretical level.

In the light of these comparisons of different feminist schools overall, it becomes apparent that radical feminism and the dominance theory developed by MacKinnon seems to be the most effective feminist approach in the legal theorisation of domestic violence. It considers all forms of violence against women as a matter of inequality (through the dominance reading of equality, in contrast to liberal sameness), and thus provides a political identity to the problem to be addressed within legal framework. In the next part, the study moves to the human rights law framework and analyses the rights critiques from a radical feminist perspective. Doing this, it focuses on two specific issues, which are the public/private dichotomy and the individualistic nature of rights that stem from the liberal construction of human rights law.

4. Critiques of Human Rights from a Radical Feminist Perspective

a. Public/Private Dichotomy

As the structure of international relations is informed by the construction of the ‘liberal state’, international law, and in particular international human rights law, adopts the social contract discourse of the liberal state, as well as its values.\(^{224}\) As explained before

\(^{222}\) ibid 170
\(^{223}\) Lorena Sosa, *Intersectionality in the Human Rights Legal Framework on Violence against Women: At the Centre or the Margins?* (CUP 2017) 14
\(^{224}\) For Koskenniemi’s argument on international legal liberalism, see Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 1989) XVI-XVII
in the context of liberal feminism, the notions of autonomy, freedom and equality have long been founding principles of liberalism. Within this understanding of independent and equal individuals, the main purpose of liberalism is to emancipate individuals from the oppression of political formulations that reinforce hierarchical forms of human association.\footnote{Romany (n 47) 87} Simply put, it aims to protect individuals from the state and its political hegemony. Consequently, liberalism inevitably operates with what could be described as a negative conception of freedom. In other words, freedom is understood as consisting of being free from outside interference, particularly by the state.\footnote{Lacey, ‘Feminist Legal Theory and the Rights of Women’ (n 60) 21} On this understanding, the issue of freedom from the interference of other individuals is overlooked.\footnote{Bern and Gaus demonstrates that the public/private dichotomy is central to liberalism. See Stanley I Benn and Gerald F Gaus, ‘The Liberal Conception of the Public and Private’ in Stanley I Benn and Gerald F Gaus (Eds), \textit{Public and Private in Social Life} (St Martin’s Press 1983). The connection between liberalism and public private dichotomy can also be seen in Johanna A Brenner, ‘Feminist Political Discourses: Radical versus Liberal Approaches to the Feminization of Poverty and Comparable Worth’ (1987) 1:4 Gender & Society 447, 449-50. Even though liberalism is dominantly critised as the reason of this dichotomy, there are alternative views that a publicly justifiable privacy like the one radicals seek to achieve can be reconstructed according to the liberal principles such as free and equal citizenship. See Corey Brettschneider, ‘The Politics of the Personal: A Liberal Approach’ (2007) 101:1 The American Political Science Review 19, 19} Looking at international human rights law, it can be seen through different ways that the liberal political framework is embraced in the construction of rights, and thus the states’ responsibilities. This is most apparent in the public/private dichotomy. As a matter of fact, regulation of the public realm is considered appropriate as it possesses a public concern in the course of the protection of the individual from the state.\footnote{Ursula A O’Hare, ‘Realizing Human Rights for Women’ (1999) 21:2 Human Rights Quarterly 364, 368} As the state is dominant, active and responsible for its acts in the public realm, it is the realm that international human rights law attempts to regulate. On the other hand, the private sphere is considered as a sort of control free zone in an effort to protect the freedom and equality of individuals from other individuals. Therefore it is the private realm in which the free will of the individuals is realised and thus it is not to be regulated by international human rights law authorities.\footnote{Hilary Charlesworth, Christine Chinkin and Shelly Wright, ‘Feminist Approaches to International Law’ (1991) 85:4 American Journal of International Law 613, 625-7} In short, liberalism reflects its principles via two ways, both of which are intertwined: firstly, states are not responsible for the acts of individuals against other individuals, but are responsible for their own acts.
Secondly, it is the public realm where states are active participants to be controlled, while the private sphere must be kept from the interference of the international human rights law mechanism.

This mechanism, which is a result of the confirmation of liberal principles, is referred to as the public/private dichotomy, and it is most clearly reflected in the concept of state responsibility in international human rights law. State responsibility is the concept determining the limits of the state’s accountability for human rights abuses under international law, and according to this concept, a state can be held responsible for the acts of person or persons only if these acts can be attributed to the state. In other words, states can be held responsible for the acts of their agents or persons acting with the apparent authority or condonation of them. Therefore, the state is mainly responsible for its own acts and it may be responsible through individuals’ acts only in the specific case of those acts’ being carried out under apparent state authority. This means that in the very basic structure of international human rights law, a state’s international liability does not arise as a consequence of normal individual acts (i.e. acts realised without state authority or condonation) made against individuals.

Whereas this dichotomy looks gender-neutral at first sight, by taking into account women’s political, economic and social subordination, it seems instead to be a tool which explicitly operates to the disadvantage of women. As a matter of fact, historically women have been excluded from political life – dating back to the Greek city-state era whereby only land-owning men were allowed to vote. The restriction of women’s lives to only the private sphere became more pronounced with industrialisation, as work became increasingly distinct from the home and family. While men dominated the public sphere, women were seen as belonging to the household and taking care of the private lives of the family. This structure has maintained its effects until today, and has engendered the fact that women are the subjects who are the least active in the public realm, but the most active in domestic and private settings, as they

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231 Fellmeth (n 184) 669; Hilary Charlesworth, ‘Women and International Law’ (1994) 9:19 Australian Feminist Studies 115, 122
232 Baron and Past (n 48) 12-13
233 ibid
have never had enough political, economic or social tools to be a true public subject. This is put clearly by Charlesworth as:

‘The public realm of the work place, the law, economics, politics and intellectual and cultural life, where power and authority are exercised, is regarded as the natural province of men; while the private world of the home, the hearth and children is seen as the appropriate domain of women.’

The operation of this public/private dichotomy in international human rights law can be observed in many aspects. It can be seen in the construction of civil and political rights, such as the right to life and the right to be free from torture. Even though positive state obligations have been developed over time to include private acts within the structure of these rights, as Charlesworth notes, it is visible in their original wordings that they mainly aim to address potential violations within the public sphere which are more likely to be experienced by men, while not taking into account the problematic gendered activities occurring in the private sphere, which could predominantly harm women.

In looking at Article 6 of the International Covenant on Civil and Political Rights (ICCPR) enunciating the right to life, it is seen that the casting of the article is concerned with the arbitrary deprivation of life through public action in a manner that disregards the fact that being a woman could be, in itself, life threatening. In fact, due to the social and economic pressure in some cultures to bear male children, womanhood is rife with risks of abortion and infanticide. Furthermore, due to social practices giving men and boys priority, women are faced with the risk of insufficient food, restricted access to healthcare, and a threat of endemic violence. However, the definition of right to life provided in the text of the ICCPR was not designated to respond to these threats to women’s lives. It is true that its monitoring body, the Human Rights Committee, has been trying to integrate a gender-sensitive perspective in its interpretation of the right to life in the last decade. For example, in its 2000 dated

235 Charlesworth, ‘Women and International Law’ (n 231) 122
238 Charlesworth, ‘Human Rights as Men’s Rights’ (n 236) 107
General Comment 28, which specifically handled the equal application of the Convention for women and men, the Committee asked states to report on practices that violate women’s right to life, including female infanticide and dowry killings as well as taking measures to prevent women to undergo abortion in life-threatening clandestine places and to provide data on childbirth-related deaths of women.

A similar case to this can be seen in the regulation of torture. One of the most fundamental features of the definition of torture provided by various human rights instruments is that it requires acts to be ‘inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity’. Whereas many forms of torture against women occur in the private non-governmental sphere, such as battery, marital rape and female genital mutilation, the original definition reveals a certain myopia in this regard. It is again true that, for example the UN Committee against Torture has taken steps to make the Convention against Torture applicable to the particularities of women’s experiences. For example, in its 2012 dated General Comment 3, the Committee asked states to deploy positive measures in their complaint mechanism which take into account gender aspects of the phenomenon in order to ensure that female violence victims can obtain efficient redress. Throughout these examples it becomes evident that monitoring bodies have been trying to develop a gender-sensitive approach in their interpretation of the scope of the instruments that they supervise, and therefore to deconstruct the public/private dichotomy. However, this does not negate the fact that these rights were created to address male concerns in their origin by prioritising public sphere over private, as argued earlier by Charlesworth. In this regard, Charlesworth’s critique about the origin of the rights is still valid, as the architecture of human rights is made to a male blueprint, and this is the reason why human rights bodies have been trying to challenge this male origin over the last decades.

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239 UN Human Rights Committee General Comment No 28: Article 3 (The Equality of Rights between Men and Women) (adopted 29 March 2000) CCPR/C/21/Rev1/Add10
240 Para 10
241 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) UNGA Res 39/46 (CAT) Article 1(1)
242 Charlesworth, ‘Human Rights as Men’s Rights’ (n 236) 109
243 UN Committee against Torture General Comment No 3: Implementation of Article 14 by State parties (adopted 13 December 2012) CAT/C/GC/3
244 Para 33
245 Charlesworth, ‘Human Rights as Men’s Rights’ (n 236) 109
Undoubtedly, nowhere is the effect of the public/private dichotomy engrained in international law more evident than in the case of domestic violence, which happens exclusively in the private sphere. As the public realm is prioritised within the scope of state responsibility, abuses that women are privately subjected to, mostly by men, are excluded from state concern, thus becoming effectively invisible. In fact, as will be analysed in depth in the following chapter, there has not been any direct provision regarding violence against women in any of the treaties, including CEDAW, and there has not been a treaty anywhere in the world specifically dealing with the issue until 1994. For decades, domestic violence as one of the most serious forms of endemic violence against women has therefore been left untouched, in a ‘grey zone’. This omission has inevitably prompted the arguments within the literature that ‘rights are defined by the criterion of what men fear will happen to them’. It is also claimed that the public/private distinction posits a hierarchy of oppressions: men fear oppression by the state, while women fear oppression by men. Given that women also fear oppression by the state, it is clear that women are subjected to more layers of oppression than men. It is true that human rights law has taken steps to integrate domestic violence into the scope of state responsibility and this will be analysed in depth in the next chapter. However, the silence on the original texts of the human rights law instruments on domestic violence is highly indicative of the well-ingrained dichotomy between public and private spheres that excludes the latter.

The previous explanations on the radical feminist approach already makes it clear that, by politicising violence and invoking the application of the right to equality provisions to the problem, radical feminism and MacKinnon pose the strongest challenge against this separation between spheres. In fact, as well-repeated in the literature, the starting point of radicals has been the motto ‘personal is political’. In taking the analysis of radical feminism further in the context of the public/private dichotomy, the case of

246 Thomas and Beasley (n 234) 40
248 Charlesworth, ‘Human Rights as Men’s Rights’ (n 236) 107
249 Hilary Charlesworth, ‘What are Women’s International Human Rights?’ in Rebecca J Cook (ed), Human Rights of Women: National and International Perspectives (University of Pennsylvania Press, 1994) 71
250 Fellmeth (n 184) 668
251 Lee refers to radical feminism as the second wave feminism in this regard. See Theresa Man Ling Lee, ‘Rethinking the Personal and the Political: Feminist Activism and Civic Engagement’ (2007) 22:4 Hypatia 163, 163
pornography is fairly illustrative of the extent to which radical feminism challenges this separation in a comparative fashion with other feminist strands, particularly liberal feminism. In fact, the most intense disagreement between liberal and radicals has been over pornography.\textsuperscript{252}

Liberal feminists argue that sexuality is private and a matter of consensual personal choice.\textsuperscript{253} In fact, by grounding on liberal principles such as individual freedom, consent and autonomy, they argue that pornography should not be legally prohibited, rather the state should perceive it as a profession that women seek out of their personal choice.\textsuperscript{254} They do not overall reject that pornography itself is male created,\textsuperscript{255} but they are fairly concerned with the likelihood of the state to interfere with other aspects of women’s sexuality once it is given the chance to do so in this context.\textsuperscript{256} It therefore becomes apparent here that when sexuality is of concern, they are reluctant towards melting the line between public and private spheres. In line with this thinking, they consider the issue to be within the freedom of expression of both producers and the people acting in the pornography sector.\textsuperscript{257}

At the other end of the spectrum, MacKinnon argues that sexuality is gendered in a form of a male power exercise over women and therefore it is political.\textsuperscript{258} She sees pornography as a manifestation of patriarchal domination in characterising sexual relations between women and men, thus functioning to consign all women to unequal social and economic status on account of their sex.\textsuperscript{259} She does not consider pornography to be a harmless profession which is a matter of individual choice; she instead thinks that it is an eroticised inequality between women, i.e. it strengthens structural male supremacy, and for this reason, is a form of violence against women.\textsuperscript{260} In this regard, it is again visible how the individualistic understanding of liberal

\textsuperscript{252} Cain (n 51) 834. It should be underlined that the dichotomy between public and private spheres is not only challenged by radicals, for example, Susan Moller Okin, one of the most prominent liberal feminists, pointed out the ignorance of the political power inequality distributed in family life within human rights law. See Susan Moller Okin, \textit{Justice, Gender and the Family} (Basic Books 1987) 115


\textsuperscript{254} ibid 28; Kensinger (n 54) 184

\textsuperscript{255} Cain (n 51) 834-5

\textsuperscript{256} ibid

\textsuperscript{257} Thornton (n 253) 34; Sunstein (n 55) 844

\textsuperscript{258} MacKinnon, \textit{Towards a Feminist Theory of the State} (n 113) 127-130; MacKinnon, \textit{Feminism Unmodified} (n 70) 49-51

\textsuperscript{259} MacKinnon, \textit{Towards a Feminist Theory of the State} (n 113) 196; Smart (n 78) 121-22

\textsuperscript{260} MacKinnon, \textit{Towards a Feminist Theory of the State} (n 113) 171
feminism and group-based understanding of MacKinnon are in disagreement. In this approach, she rejects that pornography is a part of freedom of speech, rather it is a hate speech to be legally prohibited.\textsuperscript{261} A similar contradiction between liberal and radical feminists can be seen in the context of prostitution.\textsuperscript{262}

Undoubtedly, domestic violence and pornography (which explicitly involves the issue of sexuality) are not identical issues.\textsuperscript{263} However, this is very illustrative of the extent to which MacKinnon is critical of the borders of ‘privacy’ and how she is not reluctant to invoke state interference to such a privately considered area. As stated before in this chapter, one does not necessarily have to agree with her sexuality reading and this study does not intend to go further in the sexuality issue. It rather aims to reveal how MacKinnon’s confirmation of the group-based subordination of women provides a ground to invoke strong legal interference and state regulation. In applying this reading to the context of domestic violence, a radical feminist approach would require a human rights law framework to entirely disregard the public/private dichotomy, and to impose the most detailed state responsibilities in addressing domestic violence. It would require this at the expense of the potential critiques that charge this attitude as patronising and disregarding of the choice of women to stay within violent relationships.\textsuperscript{264} This analysis therefore reveals how a radical feminist approach brings the strongest critique against the dichotomy, which is most needed considering the long-lasting silence of the human rights framework on domestic violence.

b. Individualistic Nature of Rights

Besides the public/private dichotomy, the individualistic nature of rights is the other reflection of liberal philosophy.\textsuperscript{265} This is simply because the subjects of law are characterised as liberal and atomistic. The connection between liberalism and individualism is put by Christian Bay as:

\textsuperscript{261} ibid 197; Catharine A MacKinnon, \textit{Only Words} (HUP 1993) 29,52. The Ordinance of MacKinnon and Andrea Dworkin declared pornography as a form of discrimination against women. The Ordinance enabled women to bring civil actions against those who produce, make, distribute, or sell pornography. See MacKinnon, \textit{Feminism Unmodified} (n 70) 262
\textsuperscript{262} Beran (n 52) 30-38
\textsuperscript{263} It should be reminded that sexuality involves heavily into the sexual forms of domestic violence.
\textsuperscript{264} Karen Boyle, ‘\textit{Media And Violence: Gendering The Debates}’ (London SAGE Publications 2005) 33. The critique against so-called patronising nature of radical feminism over women’s choices will be addressed in the 5th Chapter of the thesis in the context of the Istanbul Convention and domestic violence.
\textsuperscript{265} Zillah Eisenstein, ‘Elizabeth Cady Stanton: Radical-Feminist Analysis and Liberal-Feminist Strategy’ in Anne Phillips (ed), \textit{Feminism and Equality} (New York University Press 1987) 78
‘Liberal contract theorists have assumed human beings to be bourgeois by nature—that is, to be individualist maximizers, always looking out for themselves (...) , and it is assumed that these are facts of human nature, not of history: that people will always tend to remain acquisitive and possessive individualists, preoccupied with their own immediate wants, not with the needs of others.’

In fact, rights are drawn with the perception of individuals having a ‘competing and autonomous’ character, and in this view, individuals are concerned chiefly with their own personal well-being. The individuals are considered to want to separate themselves from others in their community, owing to their competing legal interests and entitlements. In fact, the legal and political world is formed as a market of rights, competitively asserted as against other market actors. One extreme implication of such an understanding of human rights law can be seen in the context of the right to abortion, where a woman has to compete with her foetus in order to win.

As an extension of these imaginary strong lines separating individuals and their interests from each other, the structural and societal dynamics and their discriminatory impacts on individuals are perceived as the products of autonomous individual choices, and thereby justified within a liberal world view. In fact, according to liberal theory, the autonomy of individuals must be ensured so that moral or prudential choices rely on private judgment, i.e. uncoerced and unindoctrinated. However, as women’s life experiences indicate, gendered exclusion is not the choice of women, but it is a result of the economically, socially and politically circumscribed conditions they experience. As discussed in the first part of this study, domestic violence does not stem from individual factors, decisions, characteristics or deviancies but from societal patriarchal structures that position men in a higher status in terms of power. In the face of this picture, the invocation of an individualistic rights mechanism to reduce intricate power relations, whilst ignoring the patriarchal social constructions in a simplistic and formalistic manner would not be sufficient to redress these inequalities. As Nicola Lacey says,

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266 Christian Bay,‘Toward a Postliberal World Order of Human Rights’ (Montreal, 1983) revised version of paper prepared for Seventeenth World Congress of Philosophy, 3
267 Lacey, ‘Feminist Legal Theory and the Rights of Women’ (n 60) 39
268 ibid 20
269 Charlesworth, Chinkin and Wright, ‘ Feminist Approaches to International Law’ (n 229) 635
‘the assumption of ‘a world of autonomous individuals starting a race or making free choices has no cutting edge against the fact that men and women are simply running different races.’

This idea that freedom and individuality consist of being the agent of one’s actions does not only disregard the collective interests of individuals, it also denigrates cooperative efforts as it puts the experience of combined action, either on behalf or in solidarity with others, into a morally inferior position. Any combined action is rendered as a threat to the autonomous agency of the participants. This would explain why the third generation of rights, which are group-based, have only recently emerged within the human rights law structure. However, the assumption of abstract individual action is an illusion, on the grounds that social relations cannot be considered separate from both abstract individuals and moral codes. As V. Spike Peterson notes:

‘The glorification of individual agency makes collective action seem less glamorous and less authentic, and thereby renders it much less likely. Cooperative action is then associated with utopian projects, or devalued as activities in the private sphere, not applicable to the real world of politics.’

The fact that human rights law instruments have originally been drawn in a gender-neutral, or in other words, a gender-symmetrical manner, is a simple reflection of the rejection of the understanding of collective interests. Indeed, ‘gender’ as a societal factor that generates and distributes power unequally between groups of individuals was originally excluded from liberally-constructed human rights. This led to an absence of a legally-binding human rights law treaty tackling women’s collective interest to be free from domestic violence, which was not remedied until 1994.

In looking at the issue from a feminist perspective, there is no need to further expand on the group-based/collectivist understanding of radicals and MacKinnon, as these aspects came to fore in the previous discussions of this chapter. In fact, it is apparent that MacKinnon’s affirmation of all forms of violence, including domestic violence, as a

273 ibid
274 The Convention of Belem do Para, see (n 247)
manifestation of subordination of women as a group constitutes the main ground for her critiques against liberal individualism.\textsuperscript{275} She puts it very clearly that:

\begin{quote}
‘[w]omen are men’s equals as groups. Real equality rights are collective in the sense of being group-based in their essential nature. Individuals may suffer discrimination one at a time, but the basis for this injury is group membership.’\textsuperscript{276}
\end{quote}

This group-based understanding, in contrast to liberal feminism’s individualist approach, can be seen in the discussions of pornography, as mentioned earlier. Whilst liberal feminists have embraced pornography as a matter of women’s individual sexuality and choice, MacKinnon conceptualised it as an institution where women are sexually objectified and male supremacy is strengthened by looking at the issue from a structural and group-based lens.\textsuperscript{277} The entirety of her dominance theory is based on the conviction that the liberal individualist perspective cannot address the structural nature of women’s secondary status, nor gender-based violence against women.

This understanding of women as a class to be subordinated has made MacKinnon the focal point of critiques arguing that her approach portrays women as victims under all circumstances, therefore strengthening their subordinate status.\textsuperscript{278} Yet, it should be reiterated that law has a transformative function and that the realisation of this function is only possible when the \textit{structural} and \textit{group-based} nature of the problem is confirmed. In translating all these points to the human rights law structure, the radical approach would require an understanding whereby the gendered nature of domestic violence, which disproportionately affects women, as well as the collective interest of women to be free from violence, is recognised. It would require human rights law to confirm that domestic violence is different than other forms of violence that occurs between two individuals without the involvement of gendered structures, and leads to violation of rights, such as the right to life or the prohibition of ill-treatment. Instead, a radical feminist approach would aim for a human rights approach whereby women’s collective interest to be free from violence is recognised and where strong state responsibilities to achieve this end are imposed on a collectivist basis.

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\textsuperscript{275} Harris, ‘Categorical Discourse and Dominance Theory’ (n 106) 187
\textsuperscript{276} Catharine A Mackinnon, \textit{Are Women Human?} (Belknap Harvard, 2006) 5
\textsuperscript{277} See the ‘Radical Feminism’ section above.
\textsuperscript{278} Albert (n 110) 311
\end{flushright}
5. Conclusion

In applying different feminist legal theories to the concept of domestic violence, this study has demonstrated that the dominance theory of MacKinnon achieves to propose the most efficient legal conceptualisation of domestic violence. First of all, it formulates equality as a matter of the dominance of men/subordination of women unlike the sameness (as suggested by liberal feminists) and the difference (as suggested by cultural feminists) approaches. Secondly, it confirms that all forms of violence against women, including domestic violence, are the manifestation of the subordination of women. In taking these two points together, domestic violence against women becomes a form of discrimination on the basis of sex. In contrast to the liberal formal equality understanding, this formula achieves to integrate the gendered nature of violence into the scope of equality laws. In this way, law becomes enabled to be utilised for achieving a gendered understanding of equality, and thus eliminating domestic violence thereof.

On the basis of this equality reading, MacKinnon’s theory within radical feminism brings the strongest challenge against liberal philosophy, which has constituted the ground of law, including human rights law. In this regard, the main tension seems to be between the liberal and radical conceptualisations of domestic violence. Firstly, while in radical feminism, domestic violence itself is discrimination on the basis of sex, in liberal thinking it cannot be concluded that the violent act is discriminatory at the first instance. As domestic violence is drawn in a gender-neutral sense in liberal philosophy, the victim would have to prove additional points in order to succeed in a discrimination claim such as the intention of the state to differentiate female and male victims when addressing domestic violence before the law, or the proof showing that female victims are in greater numbers than male victims. Secondly, radical feminism strongly challenges and deconstructs the male standard imposed by liberal philosophy. In fact, as radical feminism directly confirms the violent act as a form of discrimination, it would achieve in recognising the harm occurring to women in women’s terms, not in comparison with the male standard of equality, harm or violence which is inherent in liberal thinking. Thirdly, as in the radical feminist conceptualisation, domestic violence is considered as a group-based and systematic problem (as a matter of subordination of all women), and unlike the individualistic approach of liberal philosophy, the doors would be opened for structural and holistic legal measures to be taken by states to address the problem.
This study also addressed the essentialism critiques posed by postmodern feminists against MacKinnon’s theory, who argued that she totalises the women category by disregarding the differences amongst women and in power dynamics. This research argues that it is this so-called totalising or grand nature of dominance theory that establishes a political ground for invoking comprehensive legal reforms to address women’s inequality. When the women category is deconstructed for the sake of recognising the differences in each experience of women’s inequality, feminism loses its political potency to guide social movements and legal reforms.

As Conaghan argues, it should not be forgotten that feminism is a political engagement with the law and in the course of reaching academic purity and legitimacy, feminism should not abandon its political soul.\textsuperscript{279} Considering that women across the world are disproportionately victims of domestic violence regardless their socio-economic status, religion, race or culture, to affirm the category of women suffering from gendered power inequality would not be going too far. Finally, in moving its focus to the human rights law structure, the study demonstrated that radical feminism challenges the public/private dichotomy and the individualistic nature of rights to a greater extent than liberal feminism that defends privacy, individualism and autonomy; the concepts which lose their context when the gendered nature of violence is taken into account.

The main question that the remainder of this study will analyse is the position of the Istanbul Convention within the spectrum between the liberal and radical feminist conceptualisation of domestic violence. In order to answer this, the way in which domestic violence was addressed within human rights law structure up until the adoption of the Istanbul Convention should be analysed and this is the aim of the following chapter.

\textsuperscript{279} Conaghan, ‘Reassessing the Feminist Theoretical Project in Law’ (n 1) 355
CHAPTER 3

THE APPROACH TO DOMESTIC VIOLENCE AGAINST WOMEN IN INTERNATIONAL HUMAN RIGHTS LAW BEFORE THE ADOPTION OF THE ISTANBUL CONVENTION

1. Introduction

After the analysis of the second chapter which demonstrated the theoretical framework of the thesis, this chapter aims to analyse how domestic violence was addressed by human rights law bodies up until the adoption of the Istanbul Convention. Doing this, the chapter discovers what was achieved in the integration of domestic violence into the scope of human rights law, and at which points these developments fell short. In this context, this chapter brings an in-depth doctrinal analysis on the most relevant instruments, jurisprudence and political documents of various international and regional human rights law institutions.

Considering that the number of domestic violence cases brought before an international or regional body was scarce, and the Istanbul Convention has an international scope since it can be acceded from countries across the world,1 this part of the study keeps its scope beyond Europe. Its analysis contains the tools developed to tackle domestic violence within the United Nations (UN), the Organization of American States (OAS) and the Council of Europe (CoE). In the light of the examination of the approach of these bodies, the chapter identifies three main problems, i.e. the failure to declare domestic violence as an independent human rights violation, to employ a strong concept of equality, and to impose state responsibilities in a holistic and structural manner. The chapter argues that these failures have mainly stemmed from the fact that the liberal conceptualisation of domestic violence has been prevalent within the international human rights law structure.

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1 Article 76(1) of the Istanbul Convention states that ‘(...)The Committee of Ministers of the Council of Europe may, after consultation of the Parties to this Convention and obtaining their unanimous consent, invite any non-member State of the Council of Europe, which has not participated in the elaboration of the Convention, to accede to this Convention by a decision taken by the majority (...)’
2. The General Approach to Domestic violence in Human Rights Law Instruments

In looking at the UN frame, it can be seen that there had been no single provision that explicitly prohibited violence against women within any of the nine core international human rights treaties, nor a treaty specifically particularly dealing with the issue. The Convention on the Elimination of All Forms of Discrimination Against Women (hereinafter CEDAW) was rendered as a cornerstone development on behalf of women, since it affirmed that women had been subjected to disadvantages not on certain and independent sides of life, but on negative stereotypes against women that were engrained in culture, which led to systematic discrimination against them. Furthermore, it was the first UN instrument that broke ‘gender-neutral’ language. While all prior instruments had an attitude appealing both genders equally by prohibiting any discrimination on the ground of sex, CEDAW was the first instrument specifically focused on the structural inequality against women. Owing to this gender-specific structure, it was mostly considered as the ‘international bill of rights for women’. It was the most comprehensive instrument that banned the discrimination against women on various specified fields, such as the political and public life, access to education, employment, healthcare, and financial services. Whereas violence against women had been confirmed to be the result of power inequality between women and men by

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4 Dubravka Simonovic, ‘Global and Regional Standards on Violence against Women: The Evolution and Synergy of the CEDAW and Istanbul Conventions’ (2014) 36:3 Human Rights Quarterly 590, 591

5 Sally Engle Merry, ‘Constructing a Global Law- Violence against Women and the Human Rights System’ [2003] Law and Social Inquiry 941, 950

6 Articles 7 and 8 of CEDAW

7 Article 10 of CEDAW

8 Article 11 of CEDAW

9 Article 12 of CEDAW

10 Article 13 of CEDAW
most of scholars and practitioners, as discussed in the first chapter, CEDAW did not make any specific reference toward the issue of violence against women within its text.11

The picture was not much different when moved to the Council of Europe. Until the adoption of the Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention)12 there had been neither a provision in a treaty that explicitly prohibited violence against women, nor a separate treaty in this regard. In pursuance of the principles of the Universal Declaration of Human Rights, the European countries adopted the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),13 which became the most effective instrument of the European Council through its supervisory judicial body, the European Court of Human Rights (ECtHR). Whilst the ECHR contained many provisions in relation to the various faces of women’s lives, including Article 14, which guaranteed the enjoyment of rights and fundamental freedoms without any form of sex discrimination, Article 12, which provided the right to marry and establish a family, Article 8, which ensured the right to respect for one's private and family life, home, and correspondence without any interference by a public authority except on certain limited grounds, and the Protocol No 7 to the ECHR, which guaranteed the spouses’ equality of rights and freedoms,14 there was no explicit provision prohibiting violence against women.

Another regional human rights organisation, the Organization of American States adopted the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, also known as the Convention of Belém do Pará, in 1994.15 This instrument had considerable importance as being the first intergovernmental agreement and binding document that explicitly addressed violence against women.16

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11 Simonovic (n 4) 591
However, as will be analysed below, it was not a comprehensive instrument that laid out state responsibilities in a detailed and holistic way. Furthermore, whereas any states, including those that were not members of the OAS, could ratify the Convention in principle, only member states ratified it up to now. As a result of this, the Convention became a regional instrument, rather than a global one.

One final regional instrument concerning violence against women was the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa (also referred to as Maputo Protocol). The Protocol guarantees a wide spectrum of civil, political and socio-economic rights of women and also brings regulations for states parties to take measures to suppress violence against women. It is still the most cogent instrument at the international level in Africa which deals with violence against women.

The Maputo Protocol has numerous significances in the context of violence against women. First of all, it defines violence against women and obliges states to adopt and implement appropriate measures to ensure women protection from all forms of gender-based violence, particularly sexual and verbal violence. It does not have a specific provision about violence against women, rather the measures that it requires states to take to address the problem are placed across its whole text. Article 4 ensuring the rights to life, integrity and security of the person is particularly essential in this regard, as it is entirely devoted to the context of violence against women, and it brings a wide

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17 Article 17 of the Convention of Belem do Para (n 15)
18 See, ‘Status of signatures and ratifications of the Convention of Belem do Para’ accessioned 17 October 2018
19 Ursula A O’Hare, ‘Realizing Human Rights for Women’ (1999) 21:2 Human Rights Quarterly 364, 376. Whereas the States which are not parties to the Organization of American States can ratify the Convention in principle, only state parties to the Organization have ratified it.
23 Article1(j) states "Violence against women" means all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war."
24 Article 3(4)
25 Article 5(d) under ‘Elimination of Harmful Practices’; Article 11(3) under ‘Protection of Women in Armed Conflicts’; Article 22(d) under ‘Special Protection of Elderly Women’ and Article 23(b) under ‘Special Protection of Women with Disabilities’. 
spectrum of obligations to states from prohibiting all forms of violence against women in their laws\textsuperscript{26} to providing adequate budgetary to implement anti-violence policies.\textsuperscript{27} Although the Protocol does not specifically refer to domestic violence or intimate partner violence, it is clear that the phenomenon is included in its scope, since the Maputo Protocol refers to \textit{all} forms of violence against women in its entirety.\textsuperscript{28} Defining violence against women, it also openly includes all forms of violence regardless of whether perpetrated public or private sphere,\textsuperscript{29} and it restates this in its article concerning the right to life and integrity.\textsuperscript{30}

The Maputo Protocol does not have an independent monitoring mechanism, yet is supervised by the African Commission on Human Rights\textsuperscript{31} and the African Court on Human and Peoples' Rights.\textsuperscript{32} The Commission received two individual communications that directly involve violence against women up to today,\textsuperscript{33} although neither of them was related to domestic violence. The first case, \textit{Curtis Francis Doebbler v Sudan}\textsuperscript{34} was concerning a group of female students convicted and sentenced to lashes for acting contrary to public authority on a picnic, such as ‘girls kissing, wearing trousers, dancing with men, and sitting or talking with boys’ that was prohibited under the Sudanese Criminal Law.\textsuperscript{35} The second case, \textit{Egyptian Initiative for Personal Rights & INTERIGHTS v Egypt}\textsuperscript{36} involved four female journalists who were subjected to physical abuse from the hands of government’s security agents during the 2005 referendum to amend the Egyptian Constitution. Whereas the Commission did not directly apply the Maputo Protocol in either case, the Commission found serious

\textsuperscript{26} Article 4(2)(a)
\textsuperscript{27} Article 4(2)(i)
\textsuperscript{28} Preamble of the Protocol; Article 3(4); Article 4(2)(a)(b) and (d); Article 11(3)
\textsuperscript{29} Article 1(j)
\textsuperscript{30} Article 4(2)(a)
\textsuperscript{31} The African Commission was established under Article 62 of the African Charter on Human and Peoples' Rights to give effect to the rights and freedoms recognised and guaranteed by the Charter. The Maputo Protocol also refers to the Article 62 of the African Charter and therefore authorises the African Commission as its monitoring body.
\textsuperscript{32} The Court was established under the Article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples’ Rights which came into force came into force on 25 January 2004.
\textsuperscript{33} Ngozi and others (n 22) 342
\textsuperscript{34} Curtis Francis Doebbler v Sudan (11 May 2012) 236/00 African Commission on Human and Peoples' Rights
\textsuperscript{35} Article 152 of the Sudanese Criminal Law of 1991
\textsuperscript{36} Egyptian Initiative for Personal Rights & INTERIGHTS v Egypt (12 Oct 2013) 323/06 African Commission on Human and People’s Rights
violations of the African Charter in both cases.\textsuperscript{37} One of the most important supervisory tasks of the Commission is to adopt Resolutions and Recommendations\textsuperscript{38} on issues that arise from the African Charter and numerous other instruments, including the Maputo Protocol,\textsuperscript{39} which are determined as the scope of the Commission’s jurisprudence. Looking at these Resolutions, the Commission seems to have been primarily concerned with the problem of sexual violence due to the overly prevalent nature of the problem across the continent. The Commission has not adopted a comprehensive document regarding domestic violence either in a thematic or country-based context yet.\textsuperscript{40}

On the other hand, the African Court on Human and Peoples' Rights recently applied the provisions of the Maputo Protocol for the first time in \textit{APDF v. Mali case} (2018).\textsuperscript{41} The Court found that the provisions of the Mali Family Law on minimum age of marriage for girls, the consent to marriage, right to inheritance, and the obligation to eliminate traditional practices and conduct harmful to the rights of women and children violated the Maputo Protocol guarantees.\textsuperscript{42} Although the case was not explicitly related to domestic violence, considering that the subjects covered can be highly relevant to a domestic violence case, the decision is a significant development in this context.

\textsuperscript{37} In \textit{Doebbler} case (n 34), the African Commission found a violation of Article 5 of the African Charter which guarantees Prohibition of Torture and Cruel, Inhuman and Degrading Treatment. In \textit{Egyptian Initiative for Personal Rights & INTERIGHTS v Egypt} case (n 36), the Commission decided that Articles 1, 2, 3, 5, 9(2), 16(1), 18(3) and 26 of the African Charter were violated. What is important here is the Commission ruled that the acts of gender-based violence took place in the case amounted to discrimination against women and therefore violated their right to equality guarantees.

\textsuperscript{38} In a similar vein to the monitoring bodies of other international and regional human rights instruments, the African Commission is also authorised to receive individual communications, periodic state reports and embody special mechanisms, such as creating special rapporteurs, committees, and working groups.

\textsuperscript{39} For the list of legal instruments that the African Commission supervises, see \url{http://www.achpr.org/instruments/} accessed 25 June 2019.


\textsuperscript{41} \textit{Association Pour Le Progrès Et La Défense Des Droits Des Femmes Maliennes (Apdf) And The Institute For Human Rights And Development In Africa (Ihrda) v Republic of Mali} (11 may 2018) 046/2016 African Court on Human and Peoples' Rights

Overall, the Maputo Protocol is an essential development in the context of domestic violence as the most comprehensive supranational legal document in Africa addressing all forms of violence against women by including domestic violence into its scope. However, due to the limits in space, this research had to pick only one regional instrument outside Europe. In this regard, the Convention of Belem do Para is included in the analysis, primarily for being an instrument that is specifically devoted to violence against women, while the Maputo Protocol is generic in its nature that contains a wide spectrum of women’s rights from the right to food security\(^{43}\) to the right to participation in the political and decision-making process.\(^{44}\) It, however, must be underlined that there is much space and necessity for further research to compare two regional mechanisms, i.e. the Maputo Protocol and the Istanbul Convention.

As can be seen through the adoption of the Convention of Belem do Para and the Maputo Protocol, the human rights law instruments took positive steps to fill the normative void with regards to domestic violence over the last three decades,\(^{45}\) and this study sheds a light on these developments below. However, while human rights had progressed in many spheres since the 1950s, this long-lasting blindness with regards to domestic violence was interpreted as a clear indicator of the fundamentally male nature of rights.\(^{46}\) This was put by Charlesworth, Chinkin & Wright as:

''Because men generally are not the victims of (...) domestic violence (...), this matter can be consigned to a separate sphere and tend to be ignored. The orthodox face of international law and politics would change dramatically if their institutions were truly human (not male) in composition.''

In the light of the foregoing, it is necessary to analyse the extent to which this male-centeredness identified in international human rights law has been challenged in the last decades, through the steps taken for addressing domestic violence.

\(^{43}\) Article 15
\(^{44}\) Article 9
\(^{47}\) Hilary Charlesworth, Christine Chinkin and Shelly Wright, ‘Feminist Approaches to International Law’ (1991) 85:4 American Journal of International Law 613, 622 (emphasis added)
3. Due Diligence: Transcending the Public/Private Dichotomy

Within the traditional understanding of state responsibility, owing to the dominance of the liberal understanding of rights, states are obliged to prevent or remedy human rights violations emerging out of the acts that are only imputable to governments or any of its agents. As explained in the previous chapter, this creates a dichotomy between public and private spheres due to the liberal understanding of state responsibility. In fact, violations stemming from the acts of non-state actors, rather than public authorities, have remained outside the realm of states’ international obligations for long. Undoubtedly, domestic violence against women, which occurs exclusively in the private sphere through the acts of private individuals, has been the phenomenon most untouched in the international human rights law system. The lack of a provision in relation to domestic violence against women in the binding treaties, as revealed previously, is the biggest indicator of how this type of violence was ignored within the scope of international human rights law, largely due to the artificial separation of public and private spheres.

However, this gap started to be gradually challenged through various strategies. The application of the principle of due diligence has been one of the most crucial ways to develop responses to the problem of domestic violence. The due diligence principle simply refers to:

‘a set of standards to determine when a state’s omission or failure to act, prevent, investigate, or punish violations constitutes a breach of its

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international obligations, even if private persons commit those violations.  

In this context, states may be held responsible for private acts such as domestic violence if they fail to act with due diligence to prevent the violence, to investigate and punish acts of violence, or to provide compensation. This principle was placed and formulated within the blueprint of General Recommendation 19 of the CEDAW Committee with regards to violence against women including domestic violence, in 1992. Besides the invocation of the due diligence principle, General Recommendation 19 also remarkably established a link between violence and discrimination against women. CEDAW, as an equality instrument aiming to achieve substantive equality for women, kept silent on violence, therefore the relation between violence and inequality of women was not confirmed within the human rights law framework. In order to fill this gap, the CEDAW Committee explicitly confirmed that the definition of gender-based inequality in CEDAW included violence against women. The Committee expressed that Article 1 of CEDAW, which defined the ‘discrimination against women’, also includes the gender-based violence which was explained as:

‘violence that is directed against a woman because she is a woman or that affects women disproportionately. (…) Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.’

This was a step of great importance since it was the first identification of the discriminatory pattern of violence against women, by affirming its gender-based nature in human rights framework. It thus provided the ‘missing link’ between discrimination

52 Garcia-Del Moral and Dersnah (n 16) 661
54 General Recommendation 19 (adopted 1992) CEDAW A/47/38. In paragraph 9, the General Recommendation notes that the states’ responsibility to realize due diligence is required in the context the Article 2(e) of CEDAW which obliges states to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise. It is worth mentioning that the principle of due diligence was raised in the second UN Women’s Conference, i.e. the World Conference of the United Nations Decade for Women : Equality, Development and Peace which was held in Copenhagen between 14th and 30th July 1980.
55 CEDAW Committee in its earlier Recommendation 12 (1989) urged states parties to take steps to eradicate violence against women, and to include all measures they have taken in this context as well as the statistical data on incidence of such violence in their periodic reports to the Committee. It was a progressive development particularly regarding domestic violence since, the Women’s Committee integrated the violence against women into its ambit by emphasising that ‘violence of any kind occurring within the family’ would be covered by the concept of violence against women. Whereas the Women’s
and violence against women.\textsuperscript{56} By reconciling the existing gap between the Convention’s description of ‘discrimination against women’ and the concept of ‘violence against women’,\textsuperscript{57} as well as invoking the principle of due diligence for the acts of private actors, the Committee integrated the issue of domestic violence against women into the Convention’s protection ambit. This allowed the CEDAW Committee to supervise states’ compliance with the CEDAW’s guarantees in the context of violence against women, in the following times.\textsuperscript{58} It also should be noted that this Recommendation was a response to the proposal to elaborate upon a new convention on violence against women that had been examined and rejected by the UN Commission on the Status of Women.\textsuperscript{59} As a new treaty explicitly dealing with violence against women had not been sighted on horizon, the CEDAW Committee took this path instead, where violence against women is integrated into the scope of CEDAW implicitly through the Recommendation.

The efforts to integrate violence against women into the UN mainstream body on the basis of due diligence did not stop with the adoption of the General Recommendation 19. The Vienna Conference instructed the UN General Assembly to adopt a draft declaration on violence against women, and not long after, the Declaration on the Elimination of Violence against Women (DEVAW) was adopted.\textsuperscript{60} DEVAW was important as being the ‘first broadly based statement by the General Assembly itself on the unacceptability of violence against women’.\textsuperscript{61} The Declaration mostly borrowed the language of General Recommendation 19, obliging states parties to denounce violence against women and to take all appropriate measures to eradicate gender-based violence incidences by ‘exercising “due diligence” to prevent, investigate, and (...) punish acts of Committee touched the issue though a creative interpretation of the provisions of CEDAW, it did not explain how the Convention encompassed violence against women. See Qureshi (n 23) 188-9
\textsuperscript{56} Simonovic (n 4) 601
\textsuperscript{57} Qureshi (n 46) 188
\textsuperscript{58} The Recommendation also explicitly referred to intimate/family violence as one of the most subtle forms of violence and reiterated its prevalence in all societies in para 23.
\textsuperscript{59} Simonovic (n 4) 600
\textsuperscript{61} Chinkin (n 46) 26
violence against women, whether those acts are perpetrated by the state or by private persons.⁶²

Considering that General Recommendation 19 provided the ‘missing link’ between gender-based violence and gender-based discrimination⁶³ and DEVAW was the first comprehensive statement of the UN General Assembly expressing that violence against women was unacceptable,⁶⁴ the importance of these two documents are evident. However, both these documents approached the issue just as an impediment for women’s enjoyment of human rights, thus preferring to count a series of rights which were negatively affected by the practice of violence.⁶⁵ Furthermore, neither General Recommendation 19 nor DEVAW amounted to a legally binding instrument. They only indicated a sort of aspiration and political consensus among states, leaving state parties in the position to follow the stated requirement when it was most politically convenient.⁶⁶ Considering that states even breached their legal obligations arising out of CEDAW, imposing responsibilities upon them through ‘soft-law’ instruments was certainly a cause of concern, especially in regard to the strength of these obligations in being able to respond to domestic violence.⁶⁷

a. The Inter-American Court/Commission of Human Rights

A few years before the adoption of Genera Recommendation 19, the Inter-American Court of Human Rights⁶⁸ heard Velasquez Rodriguez v. Honduras,⁶⁹ which was the first

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⁶² DEVAW (n 60) para 4(c). It should be mentioned that the DEVAW has led the former Commission on Human Rights to appoint a Special Rapporteur to collect and analyse wide-array of data from all international, regional and national levels and develop recommendations to eliminate violence against women thereupon. In her 1999 dated thematic report, the special rapporteur Coomaraswamy outlined a list of considerations for the use of due diligence standard. (E/CN 4/1999/68)


⁶⁵ General Recommendation 19 (n 54) para 7; DEVAW (n 60) Article 3

⁶⁶ Sally Engle Merry, ‘Constructing a Global Law- Violence against Women and the Human Rights System’ (2003) Law and Social Inquiry 941, 952; Chinkin (n 23) 2

⁶⁷ Chinkin (n 23) 27

⁶⁸ The Court is established by the Organization of American States to enforce the American Convention on Human Rights (Pact of San José, Costa Rica) (hereinafter American Convention) (adopted 22 January 1969, entered into force 18 July 1979) B-32. The ratification of the American Convention does not automatically give a judicial authority to the Court over the state’s jurisdiction. The state must explicitly recognise the competence of the Court. See Paula Spieler, ‘The María da Penha Case and the Inter-American Commission on Human Rights: Contributions to the Debate on Domestic Violence Against Women in Brazil’ (2011) 18:1 Indiana Journal of Global Legal Studies 121, 129

⁶⁹ Velásquez Rodríguez Case (Inter-American Court of Human Rights, 29 July 1988) (Ser C) No 4 1988
case decided at the Court in which the principle of *due diligence* was articulated, by upholding the responsibilities of a State arising out of the acts of non-state actors. The case was considered a landmark development regarding domestic violence, notwithstanding that it did not concern an issue related to gender-based violence. In the case, the Court examined the state’s responsibility for the abduction and disappearance of a politically dissident graduate student. It was affirmed in the verdict that even though the disappearance of Velasquez Rodriguez had not been proved to have been ‘carried out by agents who acted under cover of public authority’, Honduras was still responsible for its failure to fulfil its duties that stemmed from the American Convention on Human Rights (American Convention). The Court affirmed the responsibility of Honduras ‘not for the act itself, but because of a lack of due diligence to prevent the violation or to respond to it as required by the Convention’. In this reading, the Court contended that the State was complicit in several breaches of the individual’s rights when it failed to take serious measures to effectively prevent or investigate actions leading to such violations. This decision served to expand the grounds on which individuals could argue for state responsibilities, so as to include private realm too. As such, it ensured an opportunity for feminists and the transnational women’s rights movement to argue that states could be internationally responsible for their failures to take measures to address and effectively prevent violence against women, specifically when at the hands of non-state actors.

Following the *Velasquez Rodriguez* case, the due diligence approach was seized by the Inter-American Commission on Human Rights, and used on two occasions within the special context of domestic violence against women. The first was the 2001 case of

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72 American Convention (n 68), *Velasquez Rodriguez Case* (n 69) Para 182
73 ibid para 172
74 ibid para 177
75 Garcia-Del Moral and Darshnah (n 16) 665
76 The Commission is established by the approval of the American Declaration of the Rights and Duties of Man ((hereinafter American Declaration) in 1948. It enforces numerous instruments within the Organization of American States, mainly the American Declaration and the American Convention. For the others, see <http://www.oas.org/en/iachr/mandate/sources.asp > accessed 17 July 2017
Maria da Penha Maia Fernandes v Brazil, which gained remarkable progress toward the discourse of domestic violence in the international field. The decision was the first occasion where an international human rights organisation, i.e. Inter-American Commission, sought to highlight the problem. It concerned a typical domestic violence case, as lodged by Maria da Penha, who suffered tragic acts of domestic violence by her then-husband over the period of their marital cohabitation, including two attempts to kill by firearm, one attempt to electrocute and so on. After the first time she was shot, at the age of 38, Maria da Penha became a paraplegic, and had since suffered from both physical and psychological ailments.

The issue at stake was that, although the local public prosecutor had filed violent acts of the then-husband of Maria da Penha and the sufficient evidence for concluding trial had been acquired long before, the case augmented to years. By the end of the case, it had been more than 15 years since the attack occurred, there had been no judicial resolution and the husband had never been taken into custody throughout entire time. Ultimately, the Inter-American Commission found various violations of rights provided in the American Declaration, the American Convention, and the Convention of Belém do Pará on the ground that Brazil failed to exercise due diligence to prevent and investigate the complaints on domestic violence. The Court reached the conclusion

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78 Spieler (n 68) 122
79 Maria da Penha v Brazil (n 77) Para 9
80 ibid para 2
81 ibid para 39
82 ibid paras 1-20
83 (n 76)
84 (n 68)
85 It should be mentioned that the MECESVI was established in 2004 as the monitoring body of the Convention of Belem do Para (n 15). It mainly functions through a systematic and permanent multilateral evaluation mechanism similar to the state reporting mechanism of the UN treaty bodies. However, MECESVI is not authorised to receive individual complaints, rather the Convention of Belem do Para entitles the Inter-American Commission to receive individual complaints for only issues engaging state responsibilities provided in the Article 7 of the Convention of Belem do Para. (Article 12 of Belem do Para)
86 The case has a remarkable aspect as it is the first case where Belem do Para is applied in the context of domestic violence. The Commission found the violations of the right to justice (Article XVIII) of the American Declaration (n 76) and to a fair trial (Article 8) and judicial protection (Article 25) under the American Convention (n 68). The Commission also found the State in violation of Articles 7(b), (d), (e), (f), and (g) of the Convention of Belém do Pará (n 15) in relation to rights enshrined in the instrument, including the right to a life free of violence, the right of a woman to have her life, her physical, mental, and moral integrity, her personal safety, and personal dignity respected, to equal protection before and of the law, and to simple and prompt recourse to a competent court for protection against acts that violate her rights (Articles 4(a), (b), (c), (d), (e), (f), and (g)) of the Convention of Belem do Para.
that the case indicated a general pattern of negligence and a lack of effective action in prosecuting and convicting aggressors, as well as a failure to fulfil the obligation to prevent these degrading practices.\textsuperscript{87}

In the following 2011-dated \textit{Lenahan (Gonzales) v United States} case,\textsuperscript{88} the Commission examined the same issue, i.e. whether the state exercised due diligence to prevent incidents of domestic violence and to protect the victims, this time against the United States.\textsuperscript{89} By relying on the principle of due diligence and developments in international human rights law,\textsuperscript{90} the Commission declared that the US failed to protect the right to life of the applicant’s daughters.\textsuperscript{91} What is more striking here is that the Commission expressly invoked due diligence as customary international law.\textsuperscript{92} The Commission also referred to the due diligence principle calling for state responsibility with regards to violence against women in numerous thematic and state reports.\textsuperscript{93}

\textbf{b. The CEDAW Committee}

Moving to the UN framework, it is seen that the principle of due diligence was the main ground on which the CEDAW Committee found violations of rights, as ensured by CEDAW, in the domestic violence cases that it received under the Optional Protocol, in parallel with the General Recommendation 19 and DEVAW. \textit{AT v Hungary}\textsuperscript{94} was the first case of domestic violence that the Committee examined. The case pointed out a concerning picture as to the lack of legal regulations that ensured protection orders for domestic violence victims (or any such restraining orders in Hungary) and the lack of

\textsuperscript{87} Maria da Penha v Brazil (n 77) Para 56
\textsuperscript{89} The Commission examined the case under the American Declaration (n 76) as the United States is a party to neither the American Convention (n 68) nor Belem do Para (n 15). See Jennifer Koshan, ‘State Responsibility for Protection against Domestic Violence: The Inter-American Commission on Human Rights Decision in Lenahan (Gonzales) and its Application in Canada’ (2012) 30:1 Windsor YB Access Just 39, 44-5
\textsuperscript{90} Jessica Gonzalez et al v United States (Lenahan) (n 88) para 132
\textsuperscript{91} ibid para 150
\textsuperscript{92} ibid paras 123-127
\textsuperscript{94} AT v Hungary (CEDAW Committee, 26 January 2005) Com No 2/2003, UN Doc A/60/38 (2005)
shelters for the victim and her children. Furthermore, even though there had been criminal proceedings against the husband, he was never kept in custody throughout the duration of proceedings. In relying on the principle of due diligence, the CEDAW Committee reached the conclusion that there had been a violation of Article 2 of CEDAW, since Hungary failed to have adequate legal and institutional arrangements in place to protect women from violence. Article 2 obliged states to take adequate measures to ensure the practical realisation of gender equality on various platforms, including the legislative means and implementation of these laws by state authorities. In other words, Article 2 displayed the very basic road map for states to practically realise the abstract guarantees of CEDAW. In finding the violation of Article 2, the Committee expressly affirmed that the obligation of states to eliminate discrimination extended to the prevention and protection of women from domestic violence, in accordance with the statement of General Recommendation 19.

In the following Yıldırım v Austria and Goekce v Austria cases, the Committee examined cases where women suffered violence and were eventually murdered by their husbands. In both decisions, it reaffirmed its finding that the failure of the states to act with due diligence to prevent violations of rights, or to investigate and punish acts of violence perpetrated by private actors, and to provide compensation could lead to their violation of international law. In line with its examination of AT v Hungary, the Committee found Austria responsible for not taking effective measures to protect the victims and promptly investigate and prosecute the offenders, therefore in breach of Article 2. The Committee carried on applying a similar due diligence reading in the examination of the states’ compliance with article 2 in the following domestic violence cases it received.

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95 ibid para 2.1  
96 ibid para 2.6  
97 ibid para 9.3. The Committee also declared the breach of right to security of person, since the government failed to discharge the obligation to eliminate discrimination against women. (para 9.3)  
98 Pearce (n 70) 408; AT v Hungary (n 94) para 9.3  
101 Ibid para 12.1.1  
102 Ibid para 12.1.5; Yıldırım v Austria (n 99) para 12.1.5  
c. The European Court of Human Rights

Moving the focus onto the structure of CoE, undoubtedly the main judicial developments came under the jurisprudence of the ECtHR, which holds an essential importance in the examination of the international human rights law structure, and thus deserves to be analysed in-depth. In fact, the Court’s opinions developed within its case-law have attained a high level of authority in international human rights and have been influential in defining the emerging human rights norms. For this reason, the ECtHR is deemed as the ‘crowning achievement of the CoE’. Furthermore, the Court’s judgements are binding on the states concerned.

Even though the Court has considered many cases of gender-based violence, either at the hands of state authorities or in the form of sexual violence, such as rape in many occasions, it was not until 2007 that domestic violence was addressed individually and substantively for the first time. In overviewing the case-law of the Court in relation to the decisions involving violations from non-state actors, it can be seen that the invocation of positive obligations had been the ground on which the Court invoked state responsibility for the violations occurring within the private sphere for decades. As will be analysed below, even though the Court had articulated the principle of due diligence within domestic violence cases, particularly in its recent judgements, positive obligations of states to protect rights still constituted the central tool for the integration of domestic violence into the scope of the ECHR.
For example, *Airey v Ireland*[^111] was the case in which the Court examined domestic violence implicitly for the first time, the issue at stake was Ireland’s failure to provide financial assistance to a woman seeking a judicial separation from her violent spouse. In finding a violation of Article 8 (the right to privacy and family life), the Court’s confirmation of states’ positive obligations for fulfilling Article 8 was central. In fact, the Court argued that the right to respect for family life:

‘does not merely compel states to abstain from interference; in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for family life.’[^112]

In *MC v Bulgaria*, which concerned the rape of a minor by private individuals, the Court confirmed the positive obligations of states in regard to Article 3 (prohibition of torture and inhuman or degrading treatment).[^113] It stated that by failing to ensure adequate legal guarantees for rape victims, including criminal sanctions for perpetrators, the state had failed to exercise its positive duties arising out of Article 3.

In the cases involving domestic violence, it is seen that the court had pursued its consideration mainly under three rights: the right to life (Article 2), the right to be free from torture and ill treatment (Article 3), and the right to respect for privacy and family life (Article 8).[^114] However, it was not until 2009 that the Court first found a breach of the equal protection of law clause (Article 14) in the case of domestic violence, thus affirming the discriminatory nature of such violence. The Court’s novel interpretation of Article 14 will be examined in the following section. In the Court’s findings that each of these rights had been breached in domestic violence cases, its affirmation of positive obligations was the building block. In cases where the Court examined the breach of the right to life, the Court continuously affirmed the positive obligations of states to take affective measures to safeguard the lives of those within their jurisdictions, and their primary duty to secure the right to life.[^115] It applied the test that was constructed primarily in its earlier judgement, *Osman v The UK*,[^116] which became an oft-cited

[^111]: Airey v Ireland App No 6289/73 (ECtHR, 9 October 1979)
[^112]: ibid. In a similar vein to *Airey*, In *X and Y v The Netherlands* (n 107) where sexual assault of a mentally handicapped minor by private individuals at stake, the Court affirmed the positive obligations of states in regard of Article 8 of the ECHR again.
[^113]: MC v Bulgaria (n 107)
[^114]: McQuigg, ‘The ECtHR and Domestic Violence: Valiuliene v Lithuania’ (n 50) 756
[^115]: Kontrova v Slovakia App No 7510/04 (ECtHR, 24 September 2007) para 49
[^116]: Osman v The UK App no 87/1997/871/1083 (ECtHR, 28 October 1998)
principle in its jurisdiction to determine, in the context of Article 2, when those positive obligations arise to protect individuals from the threats of non-state actors.\(^{117}\) With reference to *Osman*, in a domestic violence case the Court stated that:

‘For a positive obligation to arise, it 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.’\(^{118}\)

The Court found violations of Article 2 where it was convinced that no effective measures had been taken by the authorities, despite the fact that the real and immediate risk to life of the domestic violence victim had been known to police. Such measures could have included the registration of the applicant’s complaint, the initiation of a criminal investigation, the recording of the emergency telephone calls made by the victim, or the provision of necessary criminal justice tools.\(^{119}\)

In the domestic violence cases where the violations of Article 8 (the right to privacy and family life) were examined, it is evident that, similar to the approach taken in *Airey*, the Court highlighted the states’ positive obligations arising out of the right to privacy. This led to the Court finding violations of this right on numerous occasions. The Court repeatedly contended that whereas the main purpose of Article 8 was to hinder the undue state intrusion to private life, it also contained ‘a duty to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals.’\(^{120}\) The Court also rejected the defence of states arguing that if they

\(^{117}\) Joanne Conaghan, ‘Investigating Rape: Human Rights And Police Accountability’ (2017) 37:1 Legal Studies 54, 61. In this article, Conaghan refers to the *Osman* case in the context of how English courts interpreted the duty to investigate imposed by the ECtHR in various contexts including stalking, domestic violence and rape at 57-59.

\(^{118}\) *Kontrova v Slovakia* (n 115) para 50

\(^{119}\) For example, *Kontrova v Slovakia* (ibid) para 53. The cases where the Court found the violation of Article 2 are *Kontrova v Slovakia* (n 115); *Branko Tomasic and others v Croatia* App no 46598/06 (ECtHR, 15 January 2009); *Opuz v Turkey* App no 33401/02 (ECtHR, 9 June 2009); *Durmaz v Turkey* App no 3621/07 (ECtHR, 13 November 2014); *Civek v Turkey* App no 55354/11 (ECtHR, 23 February 2016); *Halime Kilic v Turkey* App no 63034/11 (ECtHR, 28 June 2016); *Talpis v Italy* App no 41237/14 (ECtHR, 2 March 2017).

\(^{120}\) For example *Bevacqua and S v Bulgaria* App no 71127/01 (ECtHR, 12 June 2008) para 65. The domestic cases where the court found violation of Article 8 are *Kontrova v Slovakia* (n 115); *Bevacqua and S. v Bulgaria; ES and others v Slovakia* App no 8227/04 (ECtHR, 15 September 2009); *A v Croatia* App no 55164/08 (ECtHR, 14 October 2010); *Hajduova v Slovakia* App no 2660/03 (ECtHR, 30 November 2010); *Kalucza v Hungary* App no 71127/01 (ECtHR, 12 September 2008); *Eremia and others v The Republic of Moldova* App no 3564/11 (ECtHR, 28 May 2013); *B v The Republic of Moldova* App no 61382/09 (ECtHR, 16 July 2013)
were to interfere in the case through the separation of couples, and continue the criminal proceedings when the victim had withdrawn their consent, it would have led to the violation of the right to privacy of the individuals. The Court, as a response, expressed that the state must have struck a fair balance between the victim’s right to privacy and other rights, and it criticised the states of placing the protection of the right to family of the victim as their main concern, while the victim’s security was being entirely ignored.

This emphasis on positive obligations had been consistently spelled out in the context of Article 3 as well. The Court applied a test of a ‘minimum level of severity’ on each case in which the allegation of the breach of Article 3 was admissible. The Court confirmed the positive obligations of states to protect the security and the bodily integrity of victims when the acts met the threshold of this minimum level of severity. In the light of its jurisprudence, the Court enumerated the circumstances determining the level of severity, such as ‘the nature and context (…) its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim.’ When the acts of violence were found to be severe by taking these factors into account, the Court investigated whether the state had fulfilled its positive obligation to ensure both a comprehensive legislative framework that addressed the violence, and an efficient implementation of the law. It should be underlined that the violation found most often in domestic violence cases so far has been the breach of Article 3.

In the light of this review of the case-law of the ECtHR, it is not considered controversial that the Court systematically and consistently recognised positive obligations of states arising out of Article 2, 3 and 8 in addressing the issue of domestic violence. By referring to both the judicial and political steps taken by the institutions

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121 For example, Opuz v Turkey (n 119) para 123
122 Ibid para 142
123 Ibid para 158; Costello-Roberts v the United Kingdom App no 28867/03 (ECtHR, 25 March 1993) para 30; Kudla v Poland App no 30210/96 (ECtHR, 26 October 2000) para 91
124 Eremia and others v The Republic of Moldova (n 120) para 50
125 By the time of writing this thesis, in 13 domestic violence cases out of 23, the violation of Article 3 has been found.
126 Besides the jurisprudence of the ECtHR, the Parliamentary Assembly of the Council of Europe has issued different resolutions addressing different aspects of the domestic violence and requiring various state responsibilities across the years. See Recommendation Rec(2002)5 of the Committee of Ministers to Member States on The Protection of Women Against Violence (Adopted 30 April 2002); Parliamentary Assembly Resolution 1662 (2009) on Action to Combat Gender-Based Human Rights Violations, including The Abduction of Women And Girls (Adopted 28 April 2009); Parliamentray Assembly
of the international human rights law framework, including General Recommendation 19, case-law of CEDAW Committee, DEVAW, the case-law of Inter-American Court and Commission and so on, the ECtHR introduced the principle of due diligence within its consideration of domestic violence cases. The Court even went further, in evaluating the due diligence principle as a customary international law by relying on DEVAW and the 2006 Report of the Special Rapporteur on violence against women. However, the term of due diligence was not referred to in a systematic manner and when it did, it was mostly as a simple reference in the section related to developments occurring in the UN and OAS, in merely pointing out the relevant international law. Yet, it should be underlined that there was not any substantial difference between the principle of due diligence and the invocation of positive obligations as both were the recognition of states’ responsibility toward acts being perpetrated by non-state actors in a private sphere.

In taking all of these steps of different international and regional instruments together, it can be easily argued that the recognition and invocation of the principle of due diligence in the context of domestic violence had been the main canal through which the barrier that existed before a state’s responsibility for non-state actors was overcome within the international human rights law framework. It could be argued that by following the principle of due-diligence, human rights law challenged to some extent the liberal foundation of rights as having a negative and gender-neutral nature. At a minimum, it shows a consensus between jurisdictions that the states could not take a hands-off approach towards domestic violence, despite the silence of the original instruments regarding the problem. Yet, it remains to be seen whether these developments that have occurred on the basis of the due diligence principle have effectively addressed domestic violence by challenging the other reflections of the liberal construction of rights. The following parts of the chapter shed light on this question.


127 Bevacqua and S v Bulgaria (n 120) para 53
128 ibid para 73; Opuz v Turkey (n 119) paras 131 and 149; Valiuliene v Lithuania App no 33234/07 (ECtHR, 26 March 2013) Concurring Opinion; Eremia and others v The Republic of Moldova (n 120) para 36; Mudric v The Republic of Moldova App no 74839/10 (ECtHR, 16 July 2013) para 29; Rumor v Italy App no 72964/10 (ECtHR, 27 May 2014)

As can be seen in the analysis thus far, although the international and regional human rights law institutions had openly reached a consensus on the confirmation of the states’ responsibility to address the problem of domestic violence against women, they did not recognise domestic violence as an independent human rights violation. In fact, within the UN structure, domestic violence against women was confirmed to be a matter of discrimination against women through the creative interpretation of the CEDAW Committee in its General Recommendation 19 and this was followed in its case-law. Besides the confirmation of the discriminatory nature of violence, General Recommendation 19 and DEVAW affirmed domestic violence to be an impediment for women’s enjoyment of human rights and preferred to enumerate a series of rights that were negatively affected due to violence, instead of declaring such acts as independent human rights violation.¹²⁹

Within the OAS, by relying on the due diligence principle, the Inter-American Commission found various violations of human rights, including the prohibition of discrimination against women, which will be analysed in the following section. However, due to the lack of an explicit provision of a human right for women to be free from violence within the texts of the American Declaration¹³⁰ and the American Convention,¹³¹ there was no chance for the Commission to declare domestic violence as an independent human rights violation; all it could do was to confirm that domestic violence led to the violation of various rights ensured by the Organisation, such as the right to fair trial, judicial protection and so on.¹³²

The way that domestic violence was addressed before the ECtHR was similar to that of the OAS. Due to the lack of an explicit prohibition of violence against women in ECHR, the ECtHR only achieved to declare the violation of certain rights, such as the right to life, the right to be free from torture or ill treatment, and the right to equality, as previously stated. However, the way in which the Court interpreted domestic violence was more inconsistent when compared to the other said jurisdictions. In fact, the Court

¹²⁹ General Recommendation 19 (n 54) para 7; DEVAW (n 60) Article 3
¹³⁰ See n (76)
¹³¹ See (n 68)
¹³² See (n 77) for Maria de Penha and (n 88) for Lenahan
itself failed to analyse the allegations of the afore-mentioned rights in each domestic violence case in a consistent manner. To put it more clearly, in a number of cases the Court was reluctant to investigate the allegation of the breach of Article 3, instead finding such an analysis unnecessary, and thus continuing to pursue its examination on the basis of Article 8. Therefore, in these occasions the Court missed an opportunity to analyse whether domestic violence constituted torture or ill treatment. Conversely, in other cases the Court did consider Article 3, as well as other allegations, but omitted the examination of Article 8.

According to McQuigg, two possible reasons can be brought forward to explain the attitude of the Court in its hesitation to examine the case under Article 3. The first is that the court may have failed to fully appreciate the magnitude of domestic violence, and therefore, preferred to handle the issue as one involving breaches of the right to privacy and family, instead of a non-derogable right to be free from torture. The second potential reason could be practical concerns on the basis of an over-load of cases. McQuigg indicates that for the reason of expediency, the Court frequently preferred to limit the finding of violations to one article of the Convention, thus omitting the consideration of other articles on which the plaintiffs’ claims had been brought. McQuigg further highlights that this attitude was not only limited to cases involving domestic violence, but was taken in other contexts as well. She goes on to remind that if the ECtHR was to achieve consistency in its jurisprudence by considering all the allegations with attention and reaching conclusions through coherent reasoning, such consistency would potentially produce clearer guidance in relation to the Court’s interpretation of rights and issues, including domestic violence. This, over a long

133 Bevacqua and S v Bulgaria (n 120); A v Croatia (n 120); Kalucza v Hungary (n 120)
134 Valiuliene v Lithuania (n 128); Mudric v The Republic of Moldova (n 128); TM and CM v The Republic of Moldova App no 26608/11 (ECtHR, 28 January 2014)
135 McQuigg, ‘The ECtHR and Domestic Violence: Valiuliene v Lithuania’ (n 50) 766 It should be underlined that the Court found the violation of Article 3 in numerous domestic violence cases including Opuz v Turkey (n 119); ES and others v Slovakia (n 120); Eremia and others v The Republic of Moldova (n 120); EM v Romania (App no 43994/05 (ECtHR, 30 October 2012); Valiuliene v Lithuania (n 128); B v The Republic of Moldova (n 120); Mudric v The Republic of Moldova (n 128); TM and CM v The Republic of Moldova (n 134)
136 McQuigg, ‘The ECtHR and Domestic Violence: Valiuliene v Lithuania’ (n 50) 766
137 ibid
138 ibid
term, could lead to a decrease in the number of applications being lodged at the Court, and therefore lessen its workload.139

Even if the only reason lying behind this omission related to practicality concerns, to reject to examine Article 3 was highly problematic, since it left an open door for the interpretation that domestic violence incidents did not amount to the ‘minimum level of severity’ to be accounted as a torture or ill treatment. Instead, such incidents were only deemed as a violation of the right to respect private and family life.140 This was a risky approach that potentially sent the wrong message in that it might have resulted in the trivialisation of the issue in the eyes of the responsible member states. It should be noted that the court apparently tried to take a step against the possibility of such a perception in the case of Valiuliene v Lithuania.141 In this case, as a response to the applicant’s argument that the state’s failure to effectively protect her from domestic violence amounted to the breach of Article 3, as well as Article 8, the government submitted a unilateral declaration acknowledging that its failure to address the violent acts amounted to the violation of Article 8, but not Article 3, due to the ‘trivial nature’ of the applicant’s injuries. The ECtHR, however, dismissed this declaration and went on to examine the case under Article 3. Upon its analysis, the court concluded that ‘the practices at issue in the present case, together with the manner in which the criminal-law mechanisms were implemented, did not provide adequate protection to the applicant against acts of violence’ and therefore led to the violation of Article 3.142 As such, it is apparent that the Court aimed to emphasise that violence at home was a serious matter which should not be underestimated by the states.143

Whatever reason led the Court to be reluctant to consider Article 3 in the context of domestic violence against women, it is clear that the Court failed to practice a consistent and coherent approach towards the problem. Even in the cases where the violation of Article 3 was found, the Court never made a far-reaching statement such that domestic violence inherently constituted torture, and thus any other tests were not required to confirm this nature of the problem. This is still the approach taken at the moment. In this context, it remains to be seen whether the court will depart from its reasoning in

139 ibid 766-7
140 ibid
141 See (n 128)
142 Valiuliene (n 128) para 86
143 McQuigg, ‘The ECtHR and Domestic Violence: Valiuliene v Lithuania’ (n 50) 758-60
following cases. If this does happen, it could be considered a landmark development that grants a certain human rights violation status to domestic violence. This would satisfy many scholars who argue that domestic violence is a form of torture and ill treatment, which should be treated as such within international law.\textsuperscript{144}

In the light of all of the information above, it is evident that the right to be free from domestic violence did not exist in an explicit manner in either of the jurisdictions handled in this study. To put it differently, domestic violence against women lacked a legally binding acknowledgement as a specific and independent human rights violation. It should be emphasised here that the Convention of Belem do Para, as a legally-binding treaty, did mention the right to be free from violence.\textsuperscript{145} Even in this case, it is visible that domestic violence did not receive a legally-binding status of an independent human rights violation within Europe.

At this point, the importance of a right, or instruments in general, being ‘legally-binding’ must be considered. There has already been, and will be, extensive references to soft-law instruments, such as General Recommendations, Resolutions, decisions of various monitoring bodies on individual complaints and so on throughout this study. However, just like the emphasis on the ‘legally-binding’ status of the right to be free from violence in the paragraph above, this study will keep appraising the importance of the legally-binding rights/instruments over the non-binding measures. In this context, why a right having ‘legally binding’ status is so important and what the relationship is between legally-binding/hard-law and soft-law measures must be elaborated.

It should be stated that this study intends to neither underestimate the value of these soft-law instruments in the development of norms to address violence against women, nor does it ignore the interplay between soft and hard law instruments. It is true that soft-law instruments played a significant role, particularly in the development of human rights responses to violence against women.\textsuperscript{146} For example, the CEDAW Committee’s interpretive works on CEDAW, which constitute soft-law, have significantly influenced

\footnotesize{\textsuperscript{144} ibid 771 \\
\textsuperscript{145} Article 6 of the Convention of Belem do Para (n 15) \\
\textsuperscript{146} Lorena Sosa, \textit{Intersectionality in the Human Rights Legal Framework on Violence against Women: At the Centre or the Margins?} (CUP 2017) 44}
State behaviour at a domestic level and the general policies leading to the adoption of legally-binding instruments at an international level. The preamble of the Istanbul Convention is a good example regarding the interactions at an international level. The drafters of the Convention explicitly referred to some specific recommendations of the Committee of Ministers and to General Recommendation 19 of the CEDAW Committee, which made it clear that these soft-law instruments had constituted a strong guideline for the drafters in their designation of the Convention. In this context, Boyle and Chinkin argued that soft laws must be considered as delegated laws as they supplement the limited jurisprudence in human rights law and also contribute to their status.

It should be recalled that the interplay between non-binding and binding instruments is not limited to only a specific monitoring body’s work or to a specific context. It is prevalent across the international human rights law mechanisms that soft-law instruments, such as recommendations, resolutions or decisions of monitoring bodies in individual complaints effect state behaviours and general ideas, ignite political initiatives, and in many cases, lead to the adoption of legally-binding instruments. For this reason, in contrast to the binary thinking between binding and non-binding instruments, some have suggested the idea of ‘graduated normativity’ or ‘continuum’ or the existence of a ‘penumbra’ in which soft law has its being. Confirming that there is not such a distinct line between the two, however, there are still additional advantages that legally-binding rights or instruments have. First of all,

147 ibid. As this thesis demonstrated earlier, a good example in this regard is that Brazil adopted Maria de Penha Law after the decision of Maria de Penha decision of CEDAW Committee, and this law was the first law that specifically dealt with domestic violence, together with new and comprehensive measures. See the section ‘Imposition of State Responsibilities in a Fragmented and Dispersed Manner’ in Chapter 3.


152 Fajardo (n 151)
granting a binding status to an issue has a symbolic value where the said issue is expressed as one of a top-priority matter to the all states and international bodies. Secondly, as Thürer argues, the practical and juridical qualification of a norm can be highly determinative on the extent of states’ implementation and compliance of the norm.\textsuperscript{154} Finally, the condemnation that a state would receive in the case of breaching a legally-binding norm would be more severe compared to a soft norm.\textsuperscript{155} Therefore, for an issue such as violence against women, which was ignored for so long both in international and national laws, derogating from the juridical qualification of norms would be a particularly risky approach, although it is also recognised that the qualification itself does not guarantee effective implementation.

The affirmation of domestic violence as a specific human rights violation therefore would ultimately have important consequences.\textsuperscript{156} This confirmation would bring about a state’s responsibility to prevent, investigate, and prosecute gender-based violence, even at the hands of private individuals, on stronger and more secure grounds. Recognising the issue as a violation under international law would narrow the states’ freedom to determine the manner in which they handle domestic violence within their own jurisdiction, and therefore, would impede their tolerance to the phenomenon by failing to address it on effective and appropriate grounds. Del Moral and Dershnah put that, ‘[t]hough the power to enforce those rights lies with the state, the ability to claim rights still has legitimising functions.’\textsuperscript{157} As a result of deeming gender-based domestic violence as a human rights violation, and thus transforming the language of politics, women would have a better opportunity of protection against such violence, which is ‘less about whether or not states will immediately comply with the decisions of these institutions (but) more about the extension of what women can demand (...).’\textsuperscript{158}

Moreover, it can be argued that the public/private dichotomy that is inherent to the liberal construction of rights was not challenged to the maximum extent possible. It is


\textsuperscript{155} ibid para 6

\textsuperscript{156} Duramy (n 49) 415; Jill Laurie Goodman, ‘The Idea of Violence against Women: Lessons from United States v Jessica Lenahan, the Federal Civil Rights Remedy and the New York State Anti-Trafficking Campaign’ [2012] 36 NYU Review of Law & Social Change 593, 600

\textsuperscript{157} Garcia-Del Moral and Darshnah (n 16) 670-1

\textsuperscript{158} ibid
true that these instruments did invoke state responsibilities through the imposition of positive obligations in the context of domestic violence, yet they did not go further to declare the problem as an independent human rights violation. This weakened the ground on which women could claim legal reform and stronger state interference. Secondly, this approach failed to recognise the gendered harm within, and of, domestic violence itself. In fact, attempts were made to assess domestic violence within existing (mostly) gender-neutral and negatively drawn rights, such as the right to life and the right to be free from torture, which had originally been designated to address male concerns as demonstrated in the previous chapter. In this context, it could be concluded that the subject of human rights did not reach women, since a gendered problem such as domestic violence had been handled under liberally constructed male rights. Contrary to this, as discussed in the previous chapter, radical feminism strongly argued for the deconstruction of the male subject of rights as created by liberal philosophy, by confirming the wrongs to women in their own terms. In this regard, a legal framework where domestic violence was considered as an independent human rights violation, and therefore, where gendered harm in itself was recognised, would have been a radical way of addressing the problem. This would have moved the subject of rights more towards a female character, in the same line with a radical feminist reading.

5. Domestic Violence as Discrimination: Problematic Aspects of the Equality Reading Developed by Human Rights Law Bodies

As demonstrated in the previous section, which discussed the development of the due diligence principle, the CEDAW Committee straightforwardly recognised gender-based violence against women as a form of discrimination in its General Recommendation 19. Such violence was defined as gender-based, i.e. the ‘violence that is directed against a woman because she is a woman or that affects women disproportionately.’

In the application of the Recommendation on practical grounds, the Committee found a breach of Article 2 in all of the reviewed domestic violence cases, which explained the steps to be taken in order to achieve substantial equality. This means that the Committee interpreted all of the domestic violence cases it heard as involving gender-based violence, without questioning the gendered nature of the problem. In order to reach this end, the type of equality employed by the Committee was so broad that the gendered

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159 General Recommendation 19 (n 54) para 6
160 ibid
structures were integrated into the scope of equality guarantees, far beyond a formal equality understanding.

This approach inspired other international and regional institutions and led them to introduce an even broader concept of equality by confirming the structural nature of the problem on more explicit terms. Gender inequality was evaluated as both the very reason for the occurrence of violence against women, and the main factor in promoting the maintenance of this phenomenon. For example, the preamble to DEVAW stated that:

‘[v]iolence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men (...) and that violence against women is one of the crucial social mechanism by which women are forced into a subordinate position compared with men’.161

Likewise, the preamble to Belem do Para confirmed, in briefer terms, that ‘violence against women is (...) a manifestation of the historically unequal power relations between women and men.’162 More recently, the same formulation of idea was embraced in a UN Report on the Progress of Women that ‘[v]iolence against women and girls is both an extreme manifestation of gender equality and a deadly tool used to maintain women’s subordinate status.’163 A similar approach was echoed by the Special Rapporteur in her work defining violence against women as ‘a systematically used tool of patriarchal control’164 and ‘a logical outcome of the unequal social, cultural and economic structures, rather than (...) a social aberration or a ‘law-and-order’ problem.’165

What is promising about this line of approach is that gender equality between women and men was perceived in a way that is constructed on the recognition of power inequality between women and men that led to the dominance of men and subordination of women, and therefore resulted in violence against women. This reading was far

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161 DEVAW (n 60)
162 The Convention of Belen do Para (n 15)
165 ibid para 88
beyond a liberal formal equality approach, which would have required intentional discriminatory treatment of women on a de jure basis, or the proof for greater victimisation of women than men in domestic violence cases, for the confirmation of the discriminatory nature of violence. In other words, by recognising the link between gender-based violence and the historical power inequality between women and men, this approach confirmed the discriminatory nature in the essence of violence without any further requirements. This was in parallel with the dominance model of equality developed by Catharine A. MacKinnon, which conceptualised equality as a matter of dominance/subordination and violence as a matter of inequality between women and men.\textsuperscript{166}

In line with this approach, in \textit{Maria de Penha}, in the context of the allegation of equality breach, the Inter-American Commission pointed out a huge disparity between the numbers of women and men that are subjected to domestic violence, as well as the lack of investigation and prosecution on the incidences of domestic violence.\textsuperscript{167} In the light of this finding, it held that gender-based violence constituted a form of discrimination due to the state’s failure to exercise due diligence to prevent and investigate the complaints on domestic violence, thus breaching the equal rights of all women before the law.\textsuperscript{168} In much the same way, in \textit{Lenehan}, the Commission referred to the prevalence of the issue of domestic violence in the United States which mostly resulted in the lack of investigation into the facts and the failure to prosecute the perpetrators.\textsuperscript{169} It went on to argue that a state’s failure to protect women from violence perpetrated by ‘private actors (...) constitutes a form of discrimination, and denies women their right to equality before the law’.\textsuperscript{170} In both these readings, a substantive equality approach was applied in which the structural nature of violence that disproportionately affected women was taken into account without any further requirements, such as the state intention to discriminate or de jure discrimination against women.

\textsuperscript{166} Catherine A Mackinnon, \textit{Feminism Unmodified: Discourses on Life And Law} (Harvard University Press 1989) 32-3
\textsuperscript{167} \textit{Maria de Penha v Brazil} (n 77) para 47
\textsuperscript{168} ibid Para 58
\textsuperscript{169} Jessica Gonzalez et al v United States (Lenahan) (n 88) para 110
\textsuperscript{170} ibid paras 111-13, 131-35
As briefly mentioned above, the first time that the ECtHR found a violation of Article 14 (the right to non-discrimination on the basis of sex), in the case of domestic violence was less than a decade ago. In fact, the Court, in its 2009-dated landmark decision of *Opuz v Turkey*, made a significant change in its approach by confirming that domestic violence was a form of discrimination. It acknowledged for the first time that the failure of the state to protect the victim and her mother from domestic violence amounted to discrimination in combination with Articles 2 and 3. In relying on international materials, such as the Belem do Para Convention, and the work of international bodies, including the CEDAW Committee (and its jurisprudence), the UN Commission on Human Rights, and the Inter-American Commission on Human rights, the Court held that ‘the state’s failure to protect women against domestic violence breaches their right to equal protection of law and this failure does not need to be intentional’. By relying on the reports submitted by the intervention parties which demonstrated the state’s failure to implement the relevant laws efficiently, the court concluded that the judicial passivity of the authorities to address the problem had created a climate of impunity for perpetrators, and that this stance had disproportionately affected women, albeit unintentionally. Therefore the Court regarded the violence in question as a form of gender-based violence, and thus a form of discrimination against women.

This ruling of the court was met favourably as ‘a significant step forward’ by great circles, including Turkish women rights activists and the international institutions. The then Deputy Secretary General of the Council of Europe put that the *Opuz* decision could ‘make a difference for hundreds of thousands of women victims of domestic violence’.

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171 See (n 119)
173 Londono (n 172) 665; Danisi (n 172) 798-9
174 *Opuz v Turkey* (n 119) paras 184-90
175 ibid para 191
176 ibid para 198, 200
177 Abdel-Monem (n 172) 32
violence in Europe.\textsuperscript{178} One of the most effective reflections of this decision was the confirmation that, once a substantive reading of equality is implemented, one which took into account the gendered nature of the problem that disproportionately affected women, domestic violence against women had to be seen as a matter of inequality, and thus discrimination. The Court confirmed the discriminatory nature of the problem through its interpretation of equality in broader terms, i.e. in a similar vein to the previous developments, as aforementioned. Thus, it did not analyse whether the respective state had legally dealt with victims of both genders \textit{similarly}, or whether the state had been reluctant in addressing the problem \textit{intentionally}, as per the liberal formal equality understanding. Besides the overwhelmingly positive reactions to the ruling, the expectation inevitably arose that the Court would pursue its \textit{Opuz} reading of domestic violence and equality in its succeeding cases.\textsuperscript{179}

In contrary to this expectation, the Court failed to consistently apply Article 14 to the extent that the failure of states to address the issue and the impunity that perpetrators enjoyed together with the disproportionate numbers of women victims, constituted gender-based discrimination. At the first glance, it might seem that the Court followed its reading of Article 14 from \textit{Opuz} to a considerable extent; that is to say that in a number of domestic violence cases lodged after \textit{Opuz}, the Court found a breach of Article 14.\textsuperscript{180} Looking into the cases and reasoning, however, it comes to light that this was not the fact. In the recent case of \textit{Civek v Turkey},\textsuperscript{181} the Court found the examination of Article 14 unnecessary, whereas a violation of Article 2 was found. Considering that the ECtHR had been catching up quite recently with the international developments that confirm the discriminatory nature of gender-based violence, such a reluctance to even examine the allegation of Article 14 in a domestic violence case after \textit{Opuz} overshadowed the Court’s commitment to reach to level of the said developments. Furthermore, in \textit{A v Croatia},\textsuperscript{182} which was the first domestic violence case after \textit{Opuz}, the Court rejected the applicant’s complaint of the breach of Article 14, even though the

\begin{footnotes}
\item[179] Çetin (n 172) 7
\item[180] Eremia and others v The Republic of Moldova (n 120); Mudric v The Republic of Moldova (n 128); TM and CM v The Republic of Moldova (n 134); Halime Kılıç v Turkey (n 119); Talpis v Italy (n 119); Bălșan v Romania App no 49645/09 (ECtHR, 23 May 2017)
\item[181] Civek v Turkey (n 119)
\item[182] A v Croatia (n 120)
\end{footnotes}
facts of the case were fairly similar to the ones of \textit{Opuz}. In fact, the court dismissed the applicant’s complaint by stressing that she had failed to provide sufficient evidence, such as reports or statistics, to establish that the measures and practices adopted by Croatia against domestic violence, or the effects of such measures, were discriminatory, even though in \textit{Opuz}, discrimination was provided by the applicant through statistical data.\textsuperscript{183}

However, in \textit{A v Croatia}, the applicant based the reasoning of her allegation regarding Article 14 on statistical data, which revealed the ineffective response of the authorities to the problem in general in the city of Zagreb, where the applicant was from, in a very similar way to the case in \textit{Opuz}.\textsuperscript{184} She provided the evidence that pointed out that only in a minority of the victims’ applications, were protective measures issued and perpetrators found guilty.\textsuperscript{185} Even where perpetrators were convicted, only a handful cases involved a sentence of imprisonment,\textsuperscript{186} a fact that reflected a judicial passivity similar to \textit{Opuz}. The applicant also showed that there was an overwhelmingly larger number of women victims of domestic violence than men.\textsuperscript{187} In \textit{Opuz}, the decision of violation was structured upon the ‘overall unresponsiveness of the judicial system and the impunity enjoyed by the aggressors’, which came to the fore in the light of statistical data, and which demonstrated that women had been affected disproportionately.\textsuperscript{188}

However, it would not be wrong to state that the data provided by the applicant in \textit{A v Croatia} sufficiently revealed a similar type of unresponsiveness of the judicial system, as well as impunity enjoyed by the perpetrators in Croatia. In addition, whereas the Court noted in \textit{Opuz} that the states’ failure to effectively protect women from domestic violence could amount to a violation of Article 14, even if \textit{unintentional},\textsuperscript{189} apparently, it now required a certain degree of discriminatory \textit{intention} in \textit{A v Croatia}. In explaining why Article 14 had not been breached in \textit{A v Croatia}, the Court highlighted that there

\textsuperscript{183} ibid paras 95, 97
\textsuperscript{184} ibid para 91
\textsuperscript{185} ibid
\textsuperscript{186} ibid
\textsuperscript{187} ibid para 95; In \textit{Opuz v Turkey} (n 119) para 200
\textsuperscript{188} ibid para 95; In \textit{Opuz v Turkey} (n 119) para 191
\textsuperscript{189} In \textit{Opuz v Turkey} (n 119) para 191
had not been a discriminatory intent on the basis of gender in respect of the applicant. In the light of foregoing, it would not be wrong to conclude that the Court took a backward step in A v Croatia by requiring discriminatory intention in order to find a violation of Article 14 in the case of domestic violence, a requirement that seems inconsistent with its prior judgement.

In the light of this overview of ECtHR case-law on domestic violence, there seem to be essential differences, when compared to the developments before the UN and the OAS which are concerning. First of all, even in the rulings that accepted the discriminatory character of domestic violence, the Court, in fact, appears to have stepped away from acknowledging gender-based discrimination as a natural element of domestic violence. This can be contrasted with the aforementioned DEVAW, Belem do Para and the UN Special Rapporteur’s statements that considered gender-based violence as a natural reflection of historical power inequality between women and men, without any further requirements. Instead, the ECtHR required statistics and reports to determine the discriminatory nature of an openly gender-based problem that disproportionately harmed women. In fact, similarly to Opuz and A v Croatia, in the cases of Eremia and others v The Republic of Moldova, Mudric v The Republic of Moldova and TM CM v The Republic of Moldova, which referred to the failure of states to effectively protect the victims, the Court found the violation of Article 14 not by confirming the discriminatory nature of the issue, but by referring to a specific report of the UN Special Rapporteur, which revealed the discriminatory effect of domestic violence on women.

In such an approach, the gendered facet of the problem was thrown out of focus. Furthermore, the additional requirements of statistics and reports inevitably increased the threshold for the establishment of discrimination in domestic violence cases. Secondly, the Court’s departure from its judgement in Opuz, by failing to examine the discrimination claims, or requiring intention of the state, was at odds with the principle of stare decisis, which required the court’s pursuance of its own precedents in the

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190 A v Croatia (n 120) para 101
191 Çetin (n 172) 36-8
192 Eremia and others v The Republic of Moldova (n 120) para 89
193 Mudric v The Republic of Moldova (n 128) para 63
194 TM and CM v The Republic of Moldova (n 134) para 62
195 Çetin (n 172) 55
course of legal certainty and the orderly development of the Convention’s case-law’. By taking these together, the Court’s commitment to increase the ECHR standards of equal treatment of women and the promotion of gender equality to those of the UN and the OAS turned out to be suspicious.

In the light of the foregoing, it is essential to theoretically evaluate the difference in the approaches taken by these bodies, i.e. the difference between recognising domestic violence against women as discriminatory in an explicit sense (on the basis of a power gap between sexes), and recognising it as discriminatory solely on the ground of studies proving *de jure* inequality, (or women’s greater victimisation). In fact, the difference between the two approaches was so enormous that the latter made the gendered nature of the problem questionable. In other words, the gendered nature of the problem became a condition to be proven in each individual case through empirical research. This approach says a lot in terms of how the concept of gender equality was formulated in the context of violence against women. As studied in depth in the previous chapter, once equality was formulated as the dominance of men over women due to the structural inequality in power distribution in society, all incidents of violence against women became the manifestation of the meta structure of patriarchy and male supremacy. However, when additional evidence proving that women were discriminated against through state practices was required to confirm the discriminatory nature of the violence, the equality understanding employed here became the one that ignored power inequality, through a lens of liberal formal equality.

In this context, the approach taken by the said UN and the OAS, which declared violence against women as a manifestation of gender equality, employed the dominance approach of equality developed by MacKinnon, albeit in non-legally binding documents, with the exception of the Convention of Belem do Para. On the contrary, the approach taken by the ECtHR, whose decisions were binding on state parties, appeared to be a more liberal/formal understanding of equality, where any gendered societal structures were ignored. In fact, violence itself was not considered gender-based

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197 Çetin (n 172) 37-8
198 See the section ‘Domestic Violence as a Gendered Problem’ in Chapter 2.
199 See both the ‘Liberal Feminism’ and ‘Radical Feminism’ sections in Chapter 2.
200 In fact, as mentioned before, the General Recommendations of CEDAW Committee, DEVAW and the reports delivered by the Special Rapporteurs do not have a legally enforceable nature.
per se, and thus discriminatory to women. Again, as analysed in the previous chapter, particularly within the scope of law, the dominance approach created an effective ground for the imposition of strong responsibilities upon states to address violence against women, due to its perception of the problem in a holistic and systematic acknowledgement of inequality. This being the case, the approach employed by the ECtHR did not only constitute a clash with other developments, but also employed a more liberal and conservative understanding of equality, which fell short of confirming the issue to be a systematic gendered problem.

6. Imposition of State Responsibilities in a Fragmented and Dispersed Manner

As laid out above, both international and regional human rights law instruments recognised state responsibility with regards to domestic violence against women, mainly on the ground of the principle of due diligence and the right to equality. Reaching this recognition, however, does not readily guarantee that these bodies have succeed in imposing such measures to be taken by states in sufficient detail, and thus in a sufficient means in order to fight against the problem. In other words, after the recognition that states are obliged to address the problem, further analysis is required to determine the extent to which these human rights bodies have declared the necessary steps to be taken, and whether these measures are imposed on legally secure grounds.

Starting with the OAS, it is important to analyse the Belem do Para Convention, which was adopted in 1994 as the first legally-binding supranational treaty solely devoted to the issue of violence against women. In confirming the significance of the Convention, however, it should be stated that the Convention was quite limited and compact in its scope, in that it had only twenty five provisions.\textsuperscript{201} Furthermore, states’ duties in the context of violence against women were placed in only two articles.\textsuperscript{202} In the first article, those duties to be undertaken immediately were enumerated, and these mainly concerned the adoption of the necessary legal measures, ensuring effective legal procedures and the establishment of the administrative mechanisms that provided women subjected to violence access to effective remedies.\textsuperscript{203} In the second article, the duties to be fulfilled progressively were stated, and these included a wide-array of

\textsuperscript{201} See the Convention of Belem do Para (n 15)
\textsuperscript{202} Articles 7 and 8 of the Convention of Belem do Para (n 15)
\textsuperscript{203} Article 7 of Belem do Para (n 15)
measures, such as the rising awareness on women’s right to be free from violence, the modification of cultural and social practices that were harmful to women, the education and training of law enforcement members, the guarantee of specialised services such as shelters, the counselling of women subjected to violence and so on.\textsuperscript{204} In taking into account the systematic nature of domestic violence, to impose state responsibilities only through a two-fold categorisation of immediate and progressive duties without further guideline made the Convention a fairly limited tool. Furthermore, to not set up all state responsibilities towards immediate realisation, but at the same time require some responsibilities to be realised progressively, was a risky approach. By relying on the concept of progressive realisation, the states were enabled to escape from taking measures timely.

Again, within the OAS, in looking at the case-law of the Inter-American Commission, it could be seen that in each domestic violence case whereby the violation of state was declared, various positive obligations were suggested, both in general and specifically on behalf of the applicant. For example, in \textit{Maria de Penha} and \textit{Lenahan},\textsuperscript{205} the Commission recommended numerous positive steps to be taken in order to reform the legal structure in general, and pursue an effective investigation and compensation on behalf of the victim. The recommendations with concern to the systematic level included the adoption of new laws, the training of law enforcement, the design of models for use by police departments, the establishment of alternatives to judicial mechanisms, and the adoption of public policies aimed at discriminatory practices against women.\textsuperscript{206} In fact, on the basis of the recommendations received in \textit{Maria de Penha}, Brazil adopted the Maria de Penha Law\textsuperscript{207} as the first law that particularly dealt with domestic violence and defined it as a human rights violation. The law also required the creation of special courts to examine domestic violence and the establishment of assistance, as well as the protection measures for victims.\textsuperscript{208} Therefore, the impact of those recommendations could not be underestimated. As reflected in the case of \textit{Maria de Penha}, the adoption of such a law constituted an illustrative example of how international mechanism could be an initiative toward law reforms in the national

\begin{thebibliography}{99}
\bibitem{204} Article 8 of Belem do Para (n 15); Ronagh J A McQuigg, \textit{The Istanbul Convention, Domestic Violence and Human Rights} (Routledge Research in Human Rights 2017) 134
\bibitem{205} \textit{Maria da Penha} v \textit{Brazil} (n 77) para 61; \textit{Lenahan v United States} (n 88) para 201
\bibitem{206} \textit{Maria de Penha} (n 77) para 61(4)(a),(c),(d); \textit{Lenahan} (n 88) 201
\bibitem{207} Lei No. 11.340, de 7 de Agosto de 2006, Diario Oficial Da Uniao, 8 de Agosto de 2006
\bibitem{208} Spieler (n 68) 138
\end{thebibliography}
sphere.\textsuperscript{209} Yet, it needs to be underlined that the measures suggested by the Inter-American Commission were bound only to the states that were party to the cases. Moreover, they were structured in such a general fashion that they were not clear in terms of showing the associated specific purposes and to be taken by which specific authorities. For example, the measures were not categorised as preventive/protective, administrative/legal or as the measures for prosecution/ gender-based policies. Therefore, they fell short to ensure a comprehensive guideline for those measures to be imposed upon states in a systematic manner in the following cases.\textsuperscript{210}

This picture is very similar when it comes to the UN in that the CEDAW Committee did not hesitate to refer to suggestions on the positive steps to be taken by state parties in its domestic violence cases. For example, in \textit{AT v Hungary}, following the consideration of the case overall, the Committee required the state to take positive steps towards the elimination of domestic violence through its recommendations in regard to both the case of \textit{AT} in particular, and the legal system in general.\textsuperscript{211} In terms of \textit{AT}, the Committee recommended the Hungarian state to ensure the applicant’s and her children’s security through services including legal assistance, shelters, and potential reparations.\textsuperscript{212} In the context of the general picture, it summoned Hungary to provide the maximum protection of law by exercising due diligence to prevent and address such acts of violence.\textsuperscript{213} By posing these recommendations to Hungary, the Committee, in fact, elaborated upon states responsibilities arising out of the abstract due diligence principle a bit further.\textsuperscript{214} However, in a similar vein to the explanation made in the case of the Inter-American Commission decisions, these suggestions were legally binding only for state parties to the case, and they fell short to suggest a comprehensive and categorised

\begin{footnotes}\footnotetext{209}{ibid 143}\footnotetext{210}{Inter-American Commission also issued reports which are either dealing with the certain aspects of violence against women or in terms of specific countries, but not in a holistic way. See (n 68).}\footnotetext{211}{\textit{AT v Hungary} (n 94) I (Concerning the author of the communication) and II (General)}\footnotetext{212}{ibid I(a)(b)}\footnotetext{213}{ibid II (a)(b)(f)(g)}\footnotetext{214}{As a further note, In consequence of these suggestions, Hungarian Parliament adopted a resolution on the national strategy for the effective treatment of domestic violence which brings about significant restorations to existing laws as well as other practical measures including, particularly, the introduction of restraining orders. See Duramy (n 49) 428.}\end{footnotes}
structure of measures to be taken by states in their fight with domestic violence to address the systematic nature of the problem. The case before the ECtHR was perhaps even worse. On one hand, the decisions of the Court are legally-binding and the jurisprudence of the Court is highly effective in setting standards in terms of the scope of rights and their actual interpretation on a global scale. On the other hand, the Court’s analysis was heavily based on the facts of each case and was mainly focused on the question of whether there was a violation of rights in the special circumstances of those facts. In this context, in domestic violence cases, the Court’s consideration was limited to the facts of the case at hand, and to the questions of whether any right was breached therein, and if so, which rights and why. Even when Court found a violation, it did not have enough space within its fundamentally negative rights understanding to suggest the positive obligations to be taken by the state parties in a holistic way. In other words, the jurisprudence of the Court was case-based and was not capable of guiding states to reform their entire legal structure. It is true, however, that besides the ECtHR, the Parliamentary Assembly of the Council of Europe (PACE) adopted numerous Resolutions and Recommendations to ensure a guideline on the scope of the state responsibilities in the context of domestic violence. However, these documents were mostly aimed at invoking state obligations in certain contexts, moreover as soft-law instruments. For example, in a 2011 dated Resolution, the PACE merely focused on the protection orders as civil law measures.

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215 It must be underlined that the CEDAW Committee has adopted various General Recommendations elaborating the scope of state responsibilities in the context of gender-based violence against women in particular contexts. See General Recommendation 26 on Women Migrant Workers (5 December 2008) CEDAW/C/2009/WP1/R para 26(i); General Recommendation 27 on Older Women and Protection of Their Human Rights (16 December 2010) CEDAW/C/GC/27 para 37; General Recommendation 30 on Women in Conflict Prevention, Conflict And Post-Conflict Situations (18 October 2013) CEDAW/C/GC/30; Joint General Recommendation 31 of the CEDAW Committee and General Comment 18 of the Committee on the Rights of the Child on the Rights of the Child on Rights of the Child on Harmful Practices (14 November 2014) CEDAW/C/GC/31-CRC/C/GC/18); General Recommendation 32 on the Gender-Related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women (14 November 2014) CEDAW/C/GC/32; General Recommendation 34 on the rights of rural women (7 March 2016) CEDAW/C/GC/34; General recommendation 35 on Gender-based Violence against Women, Updating General Recommendation No 19 (14 July 2017) CEDAW/C/GC/35. It should be reminded that these are soft-law instruments and on legal terms, they cannot go further than bringing suggestions or creating a political pressure on states. Furthermore, many of them are concerning specific aspects of violence, therefore not bringing a structure of comprehensive measures to eliminate domestic violence overall.

216 Merris Amos, “The Value of the European Court of Human Rights to the United Kingdom” (2017) 28:3 The European Journal of International Law 763, 768

217 Interview with Feride Acar, President of Group of Experts on Action against Violence against Women and Domestic Violence and the Retired Professor of the Faculty of Economic and Administrative Sciences in METU (Ankara, Turkey, 18 January 2017)

218 See (n 126).
and brought suggestions on how the states should ensure effective sanctions when they were breached.\(^{219}\) It is evident that due to the lack of a specific legally-binding instrument that addresses domestic violence, the Council of Europe failed to impose justiciable state responsibilities in an integrated and holistic manner.

In looking at the picture in this regard overall, it is seen that in both regional human rights structures, i.e. OAS and CoE, and international (the UN), there had been a lack of a legally-binding guideline for states, which defined state duties in a detailed and systematic fashion. This was problematic, especially considering that all gender-based forms of violence, including domestic violence, were of a structural and systematic nature. Therefore, the responses to the problem needed to be defined through a holistic legal framework. As discussed in the previous chapter, within the spectrum between a liberal and radical feminist conceptualisation of violence, the latter affirmed the problem to be structural, while the former responded to the issue through an individualistic perspective. In fact, the liberal philosophy did not readily conclude that the problem was gendered, but handled each case in its own dynamic, whilst the radical feminist approach conceptualised all forms of violence as a manifestation of the subordination of women, and thus systematic.\(^{220}\) In this regard, it could be argued that the human rights framework did not develop steps so as to meet the radical reading of domestic violence as a systematic and structural problem.

7. Conclusion

This study demonstrated that, although the silence on violence against women, including domestic violence, in the original text of the human rights instruments was challenged, and state responsibilities were invoked on the basis of due diligence principle, since the 1990s, there had been three problematic perspectives in these developments. First of all, domestic violence against women had not been defined as an independent human rights violation within legally-binding instruments, with the exception of the Convention on Belem do Para. Secondly, the dominance model of equality understanding had not been confirmed consistently. Thirdly, once the violation of rights was found in domestic violence cases, the positive state responsibilities with


\(^{220}\) See the ‘Radical Feminism’ section in Chapter 2.
regards to the problem were either not imposed at all, or imposed in a random and fragmented manner.

All three points indicated that the liberal conceptualisation of violence, instead of a radical feminist perspective, prevailed within the human rights law structure. The failure to declare domestic violence as an independent human rights violation on a legally-binding basis, above all, referred to the fact that the harm to women was still not recognised in women’s own terms, and thus the subject of the rights was still male. In fact, research revealed that there had been an attempt to integrate domestic violence into the scope of human rights protection on the ground of different rights, which had been originally drawn-up to address male concerns. Therefore, to declare domestic violence itself as a human rights violation would have posed a challenge to the original male standard of rights, whereby wrongs to women were independently and explicitly recognised.

Secondly, there seemed a difference between the concept of equality employed by the UN and the OAS to that accommodated by the ECtHR. While the former explicitly recognised the problem as both a reason and natural reflection of the historical power imbalance between women and men in a similar vein to the dominance approach developed by MacKinnon (but in legally non-binding instruments, with the exception of the Convention of Belem do Para), the latter recently applied a liberal/formal equality understanding whereby additional proof, as well as the state’s intention to discriminate, were required. This led to the fact that, although there was a broad agreement on the discriminatory nature of domestic violence within international human rights law framework, the discriminatory essence of violence in itself was not recognised consistently. In the light of the explanations made in the previous chapter, this reflected that the dominance reading of MacKinnon, which reformulated all forms of violence against women as an explicit manifestation of subordination of women, and therefore a form of discrimination, was not yet fully confirmed on legally-binding grounds.

Thirdly, due to the original ignorance toward ‘gender’ within human rights law, as well as the negative construction of rights, human rights bodies did not have the space to develop detailed positive state responsibilities with regards to domestic violence. As they did not originally have a provision for dealing with gender-based domestic violence, they could not impose any responsibilities on states upon finding the violation
of a right at all, or they did so in a legally non-binding basis, in a fragmented way. However, as domestic violence was a structural problem, and not an individual incident of violence as suggested by radical feminism, the measures should have been developed in a systematic manner to meet the nature of the problem. In this regard, domestic violence could not go much beyond being recognised alongside any other form of gender-neutral violence occurring between two individuals, due to the gender-neutral liberal construction of rights.

In the light of the foregoing, it is evident that the liberal conceptualisation of violence prevailed within the human rights law structure up until the adoption of the Istanbul Convention. In the next chapter, the study moves to the Istanbul Convention to see the extent of which this instrument challenges these liberal constructions of rights and violence.
CHAPTER 4

THE ISTANBUL CONVENTION: THE SHIFT FROM A LIBERAL TO A RADICAL CONCEPTUALISATION OF DOMESTIC VIOLENCE

1. Introduction

The previous chapter identified three main problems within the human rights law structure, which were argued to stem from the fact that the liberal conceptualisation of domestic violence had been prevalent up until the adoption of the Istanbul Convention.\(^1\) After this reasoning, this chapter puts the Istanbul Convention under the spotlight and questions whether it is capable of addressing those three problematic points and thus satisfying the radical feminism’s critiques against the liberal construction of violence. In this context, the following discussion seeks to analyse whether the Istanbul Convention constructs a shift from a liberal to a radical feminist conceptualisation of domestic violence within the human rights law framework.

The Convention contains numerous types of violence, such as psychological violence,\(^2\) stalking,\(^3\) physical violence,\(^4\) sexual violence including rape,\(^5\) forced marriage,\(^6\) female genital mutilation,\(^7\) forced abortion and sterilisation,\(^8\) and sexual harassment.\(^9\) As the scope of this study is limited to domestic violence in the sense of intimate partner violence against women, the Convention will be analysed by taking this type of violence as the focus, and by touching on the aforementioned types of abuses when they can be considered as a part of intimate violence.

It needs to be reminded that the Convention is a very recent development, and thus there are a limited number of sources dealing with the terms of its implementation or its critical evaluation; the literature in this regard is, however, growing.\(^10\) The Convention was opened for signature on 11\(^{th}\) May 2011 in Istanbul and entered into force on 1\(^{st}\)

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1 Council of Europe Explanatory Report to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (11 May 2011) CETS 210
2 Article 33
3 Article 34
4 Article 35
5 Article 36
6 Article 37
7 Article 38
8 Article 39
9 Article 40
10 Some of these sources will be referred to in the following parts of this chapter.
August 2014. Although not much time has passed since its adoption, the Convention has been signed by 45 out of 47 member states of the Council of Europe, as well as the European Union, and has been ratified by 33 of them as of the time of writing. This high level of accession to the Convention inevitably renders the instrument as a great influence in Europe, and necessitates a comprehensive analysis of the instrument. This chapter conducts its analysis by mainly looking at the text of the Convention in a comparative fashion to the prior developments in human rights law, as explained in the previous chapter. It also draws on the insights provided by the president of the monitoring mechanism of the Convention, Feride Acar in an interview, which was conducted specifically for this thesis.

In light of its analysis, the chapter argues that the Istanbul Convention achieves to address the three problematic aspects of compliance with the radical feminist reading of domestic violence, and thus constitutes a shift from a liberal to a radical feminist conceptualisation of domestic violence within international and regional human rights law. It also sheds light on some crucial points about the Convention, including its stance towards the tension between cultural relativism and universalism, and its enforcement mechanism in comparison with those of the UN, particularly CEDAW.

2. Why a New Convention?: Important Highlights from the Drafting Process

Before proceeding into the analysis of the Convention, it is important to give an overview of the situation regarding domestic violence in Europe, including how and why the Council of Europe has adopted the Convention, as well as identify the most controversial points that arose during the drafting process. The Council of Europe, as a union of 47 member states, primarily aims to protect the human rights of its members’ 800 million citizens and contribute to the universal protection of human rights.

According to the first comprehensive survey to date on violence against women in

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13 Interview with Feride Acar, President of Group of Experts on Action against Violence against Women and Domestic Violence and the Retired Professor of the Faculty of Economic and Administrative Sciences in METU (Ankara, Turkey, 18 January 2017)
14 Explanatory Report (n 12) para 7
Europe, which was published in 2014, ‘violence against women is an extensive but widely underreported human rights abuse across the EU’ and ‘22% of women who are or have been in a relationship with a man have experienced physical and/or sexual violence’. Owing to the fact that violence against women had been a part of the fabric of the lives of women in Europe, the Council of Europe commenced a series of initiatives to promote the protection of women from violence, since the beginning of 1990s. The first was unveiled at the third European Ministerial Conference on Equality between Women and Men which focused on ‘strategies for the elimination of violence against women in society: the media and other means’. This was followed by the Action Plan to Combat Violence against Women, which developed the first broad policy framework for national administrations. In 2002, the Committee of Ministers adopted Rec(2002)5, which has since been an essential document for the member states, given its comprehensive strategy for the prevention of violence and protection of women victims, the first of its kind in Europe. It was seen after the monitoring of this document that, whereas many steps had been taken by member states regarding the legislation, police investigation, prosecution and criminal law responses, many gaps remained, particularly concerning the provision of services for women victims.

The growing debate as to whether a new convention specifically regulating domestic violence against women was necessary goes back to the pan-European Council of Europe campaign on the prevention of domestic violence against women. This lasted for a period of two years between 2006 and 2008. The Secretary General of the Council of Europe appointed a Task Force on Violence against Women, which consisted of a group


17 Committee of Ministers, 3rd European Ministerial Conference on Equality between Women and Men (21-22 October 1993, Rome) CM(93)193

18 Explanatory Report (n 12) para 9; McQuigg (n 16) 949

19 Rec(2002)5 on the Protection of Women against Violence (30 April 2002) (adopted by the Committee of Ministers on 30 April 2002 at the 794th meeting of the Ministers’ Deputies)

20 Explanatory Report (n 12) para 9

of eight experts to supervise the campaign.\textsuperscript{22} As part of their mandate, the Task Force analysed the attitude of 47 member states in the context of violence against women, and adopted a Final Activity Report.\textsuperscript{23} In this report, they confirmed that the legally non-binding Rec(2002)5 was insufficient to bring about harmonised legal standards throughout Europe, and therefore a new and legally-binding convention was necessary to create a uniform standard that defined the required level of support and protection of victims.\textsuperscript{24} It should be underlined that the aim of this group was to adopt a convention that encompassed all forms of violence against women, including domestic violence, through a gender-sensitive lens.

Meanwhile, another body of the Council of Europe was also working on the idea of a new legal instrument within the Council of Europe, yet in a disconnected manner from the aforementioned Task Force.\textsuperscript{25} The European Ministers of Justice decided to assess the need for a new legal instrument that dealt with violence against partners, i.e. specifically domestic violence by 2006. However, this instrument was to be framed in gender-neutral terms that covered both women and men victims. To this end, the European Committee on Crime Problems (CPDC) conducted a feasibility study for a new convention on domestic violence and concluded that such an instrument was necessary.\textsuperscript{26} Without being aware of each other’s work, both the Task Force and the CPDC submitted their suggestions of a new instrument to the Committee of Ministers of the Council of Europe. The Committee of Ministers then decided to establish a multi-disciplinary Ad-Hoc Committee on ‘Preventing and Combating Violence against Women and Domestic Violence’ (CAHVIO), with the objective of drafting a new Convention by uniting these two different projects.\textsuperscript{27} With the input of experts who represented the member states and after two years of drafting, CAHVIO approved the final version in December 2010, with the Istanbul Convention being adopted in April 2011.

\textsuperscript{22} Explanatory Report (n 12) para 14
\textsuperscript{24} Simonovic (n 21) 603; McQuigg (n 16 ) 949; Explanatory Report (n 12) para 14
\textsuperscript{25} Feride Acar, ‘CEDAW’dan İstanbul Sözleşmesine: Kadınlarańskiej Haklar ve Kadınlara Karşı Şiddet ile İlişkin Uluslararası Standartların Evrimi’ in Funda Kaya, Nadire Özdemir and Gülriz Uygur (eds), Kadına Yönelik Şiddet ve Ev-İçi Şiddet (Savaş Yayınevi 2014) 66
\textsuperscript{26} Explanatory Report (n 12) para 18
\textsuperscript{27} Explanatory Report (n 12) para 18; McQuigg (n 16) 449; Simonovic (n 21) 603
What needs to be underlined here is that this clash between the understanding of violence in gender-based and gender-neutral terms had been heavily influential throughout the entire drafting process. In fact, the Task Force proposed a new convention that took a gender-based approach and covered the different forms of violence against women, including domestic violence.\(^{28}\) It was suggested that the new convention should have been gender-asymmetric, in line with the CEDAW Convention and the Convention of Belem do Para.\(^{29}\)

At the other end of spectrum, CDPC was aiming at a new convention to specifically handle domestic violence between partners, in a gender-neutral sense.\(^{30}\) Feride Acar, who took on an active part in the drafting process as a member of CAHVIO, and was later elected as the president of the monitoring body of the Convention, highlighted this two-folded nature while explaining her personal thoughts during the drafting phase.\(^{31}\) She stated that the tension between two different groups of experts lasted throughout the process, as one side comprised feminist gender experts, whilst the other criminal lawyers. While the former group advocated for feminist women’s rights norms, and therefore a women-focused convention for all forms of violence against women, the latter was the defender of gender-neutral criminal law principles in the context of domestic violence.\(^{32}\) She also indicated that, from the beginning, there was a distinct line taken by member states in terms of their approaches. For example, while Austria, France, Germany, Spain, Turkey and some civil society observers were supporting the gender-based approach, others, including Bulgaria, Cyprus, Czech Republic, Ireland, Netherlands and some Nordic delegations preferred a gender-neutral domestic violence instrument.\(^{33}\) As will be analysed in depth in the following section, in the end, the

\(^{28}\) Explanatory Report (n 12) para 19

\(^{29}\) Simonovic (n 21) 603

\(^{30}\) Feride Acar, ‘CEDAW’dan Istanbul Sözleşmesi’ne’ (n 25) 66


\(^{32}\) Interview with Acar (n 13); Feride Acar, ‘Making of the Istanbul Convention: A Look at Some of the Critical Instances and Debates in Drafting’ (Tackling Violence Against Women: International and Regional Approaches, London, February 2016) 4-5

\(^{33}\) ibid 4
gender-based approach towards domestic violence significantly prevailed over the gender-neutral one.

Another noteworthy challenge during the drafting process related to question of whether violence against women, including domestic violence, constituted an explicit human rights violation. Some delegations insisted that violence against women merely formed an obstacle for women to fully realise their human rights, instead of being an explicit human rights violation itself. For example, the United Kingdom suggested the removal of Article 3(a) of the draft Convention, which categorised violence against women as a human rights violation. It proposed this article to be replaced with the statement that ‘[v]iolence against women constitutes a serious obstacle for women’s enjoyment of human rights.’ This proposal was heavily criticized by Amnesty International in its report, which called for a stand against these amendments on the ground that they could potentially weaken the effect of the Convention. Fortunately, the final text of the Convention ended up explicitly recognising violence against women, including domestic violence, as a human rights violation.

In the light of all this information, there are three important points that come to the fore with regards to the pre-adopt stage of the Convention and its final text. Firstly, the lack of harmony in the regulation of violence against women across the Council of Europe’s member states was the main factor that pushed for the adoption of a new convention. Secondly, the division between the two groups of state representatives revealed that many member States still questioned the very core gendered nature of domestic violence, and were in disagreement on how to handle the problem within the human rights law framework. In fact, discussions within CAHVIO during the drafting process were highly indicative of the complex interaction of actors with ideological, political and economic differences, which led some to even challenge the broadly accepted gendered nature of the problem. Thirdly, all forms of violence against women, including domestic violence, were finally recognised as an explicit human rights violation in Europe in a legally-binding treaty.

35 ibid 8
36 Article 3(a) of the Istanbul Convention
37 Feride Acar, ‘Making of the Istanbul Convention’ (n 32) 5
This recognition, besides its symbolic value, has led to important legal implications. As Acar notes, as a result of this development, the ECtHR and other human rights law bodies are henceforth more likely to take the issue of domestic violence more seriously, as the Istanbul Convention does not leave any dispute as to whether domestic violence is a human rights violation.\(^{38}\) Furthermore, this aspect of the Convention remarkably addresses the first problem, as discussed in the previous chapter, which is the previous failure of the human rights mechanisms to recognise domestic violence as an independent human rights violation in a legally-binding instrument, with the exception of the Convention of Belem do Para.\(^{39}\)

Looking at this point from a feminist perspective, as discussed earlier, the recognition of domestic violence as an explicit form of human rights violation strongly challenges the male standard of liberally constructed rights. In fact, by recognising the unique harm that results from gender-based violence (which disproportionately affects women) as a wrong in itself, the Istanbul Convention reveals a shift towards an approach whereby women’s gendered problems are handled in explicit terms, and are not left to be addressed under rights which were drawn in a gender-neutral sense, but ultimately serve male interests. This is in harmony with the dominance theory of MacKinnon which argues for the deconstruction of the male standard within law.\(^{40}\) Surely, this declaration of the Istanbul Convention does not impede other human rights law bodies, like the ECtHR, to address domestic violence cases by reference to other violations of rights contained in the instruments that they supervise, such as the right to be free from torture or ill-treatment, the right to privacy or the right to life. On the contrary, it will strengthen the ground on which to find these violations, as Acar suggests. However, to recognise violence against women as a human rights violation in itself, within a legally-binding treaty, demonstrates that the human rights law framework has reached a point whereby a gendered problem against women is directly integrated into the scope of human rights violations. This is a departure from the original construction of rights in

\(^{38}\) Interview with Acar (n 13)

\(^{39}\) In the preamble, it is stated that the Istanbul Convention ‘affirms that violence against women constitutes a violation of their human rights and fundamental freedoms,’ (Emphasis added). Also, see the Organization of American States Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (The Convention of Belem do Para) (adopted 9 June 1994, entered into force 5 March 1995) 33 ILM 1534. Article 3 of the Convention of Belem do Para ensures every women ‘the right to be free from violence in both the public and private spheres’.

\(^{40}\) For a comprehensive analysis of this point, see the ‘Radical Feminism’ section in Chapter 2 and the ‘Domestic Violence and the Lack of an Independent Human Rights Violation’ section in Chapter 3.
which gender was entirely excluded. As discussed in-length in the previous parts of this study, MacKinnon strongly challenges the liberal construction of rights, which serves male interests under the disguise of a gender-neutral look. She instead advocates for a legal structure, where gender is explicitly integrated into the scope of rights. The Istanbul Convention thus seems to comply with this challenge by declaring violence against women as an independent human rights violation.

3. The Definition of Domestic Violence in the Istanbul Convention

As the specific focus of this study is domestic violence against women, the way in which the Istanbul Convention defines or addresses the problem needs to be analysed. By looking at the title of the Convention, i.e. the Convention on Preventing and Combating Violence against Women and Domestic Violence, it can be seen that violence against women and domestic violence are contained in the scope of the Convention as two separate issues. In other words, the drafters seem to have found it necessary to not only keep the title so as to include violence against women, but also to add the issue of domestic violence. This inevitably brings up the questions as to why these two terms are separated and what specifically does domestic violence refer to. The latter becomes especially worthy of attention, since it is not stated as ‘domestic violence against women’, but only as ‘domestic violence’. Does this mean that domestic violence against women is included in the term ‘violence against women’ and thus domestic violence refers to the gender-neutral aspect of the problem? If this is the case, is one more centralised within the scope of the Convention (i.e. gender-based or gender-neutral domestic violence), or are they drawn as two separate issues requiring the same amount of attention? Before pursuing responses to these questions, it is essential to see how these terms are defined in the Convention and what explanations are brought by the drafters to each concept.

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One of the landmark contributions of the Istanbul Convention is that it provides the first legally binding definition of violence against women in Europe and the first of domestic violence across the world. In Article 3(a) violence against women is defined as:

‘all acts of gender-based violence that result in, or likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.’

Article 3(b) defines domestic violence as:

‘all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim.’

In the definition provided for domestic violence, it can be seen that domestic violence is defined so as to embrace two different types of violence: the first is intimate partner violence between current or former spouses or partners, and the second is inter-generational violence which, for the most part, occurs between parents and children. In the definition, the part ‘violence that occur(s) within family or domestic unit’ refers to the inter-generational case, which reveals a gender-neutral reading, whilst ‘violence between former or current spouses or partners’ indicates intimate partner violence through a gender-based understanding. The former is gender-neutral, since it encompasses victims and perpetrators of both sexes in a domestic unit. The latter, however, constitutes a gendered view, since domestic violence between intimate partners is a type of violence that affects women disproportionately. This is boldly affirmed in the Preamble which recognises that ‘domestic violence affects women disproportionately’ and ‘women and girls are exposed to a higher risk of gender-based violence than men.’

Considering that the Convention contains two types of domestic violence, i.e. gender-based and gender-neutral, the question to be posed becomes whether they have been

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42 Acar, ‘Making the Istanbul Convention’ (n 32) 8. In fact violence against women was defined in the Convention of Belem do Para in Article 2. The Belem do Para integrates domestic violence into its scope by referring to violence ‘that occurs within the family or domestic unit’ without spelling out the term ‘domestic violence’ explicitly in Article 2(a).
43 Explanatory Report (n 12) para 41
44 ibid para 41
45 ibid para 42
46 Emphasis added
equally centralised in the consideration of the Convention, or whether there is a hierarchy created in terms of the importance given and thus, on the amount of state responsibilities imposed by the Convention. Following long-lasting discussions on the scope of the Convention in the drafting process, as demonstrated earlier in this chapter, it is clear that what the Convention prioritises is the elimination of all types of gender-based violence against women, including domestic violence. This is reflected in the final text of the Convention. Article 2(2) states that:

‘Parties are encouraged to apply this Convention to all victims of domestic violence. Parties shall pay particular attention to women victim of gender-based violence in implementing the provisions of this Convention.’

CAHVIO, in its interim report, stressed this approach by emphasising that the focus of the Convention, which had not been completely drafted at the time, should be on the elimination of violence against women. For this reason, in the final text, the member states are imposed an obligation to only encourage the application of the Convention’s provisions to male, elderly and child victims of domestic violence. In other words, it is up to states to decide whether to extend the applicability of the Convention to these victims and if so, there is leeway to determine the extent of its application. Contrary to this, the Convention underlines that a ‘particular attention’ should be given to women victims of gender-based violence including domestic violence. Therefore, member states have a clear obligation to apply the Convention’s provisions on women victims. CAHVIO, in its explanatory report, underlines this by contending that ‘gender-based violence against women in it various manifestations, including domestic violence, must lie at the heart of all measures taken in implementation of the Convention.’ The inclusion of both types of domestic violence into the scope of the Convention can thus be evaluated as a simple reflection of the voices of the experts who belonged to the ‘gender-neutral intimate violence’ camp in the drafting process. If CAHVIO only consisted of the members of the Task Force on Violence against Women, i.e. gender

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47 Emphasis added
48 Interim Report (n 12) para 6; para 60; para 68
50 Explanatory Report (n 12) para 37
51 Article 2(2) of the Istanbul Convention
52 Explanatory Report (n 12) para 37
experts, it is likely that they would have created a purely gender-based violence against women instrument.

It is important to investigate what this two-folded definition of domestic violence says in the context of feminism. For instance, Feride Acar developed a major critique against this aspect during the interview. She interpreted the Convention’s taking men as victims on board as a dilution of its feminist character. She further stated that she would not call the Convention a feminist instrument, but rather a human rights instrument, owing to the inclusion of a gender-blind aspect of violence to the scope of the definition. Acar also noted that, even though at the time, it did not seem realistic to adopt an instrument that only covered violence against women, she was still content of how the Convention turned out, with the mention that she would have preferred a women-only approach. Even though this statement has a valid point in criticising the definition, for leaning towards a gender-neutral manner, it can still be seen that, viewing the Convention in a broader perspective, the instrument nevertheless consists of a set of feminist values.

First of all, as explained above, the Convention constructs an explicit hierarchy between women and other victims of domestic violence in terms of state responsibilities. Secondly, as will be analysed further below, the Convention starts from the confirmation that domestic violence is a gendered problem that disproportionately affects women by referring to the historical power inequality between women and men, and this is the founding principle of all the measures that it develops in its scope. It also seems that this aspect of the Convention is pursued in a practical sense. Acar provided further crucial information in the interview. She expressed that before sending the first questionnaires to the state parties, all members of the monitoring body of the Convention unanimously agreed that the questions to be posed to states would only address the measures taken to address women victims, regardless of their approach to gender-neutral violence. Taking all of these points into account, to call the Istanbul Convention non-feminist by only looking at the definition provided would considerably degrade its strong feminist nature. In fact, by confirming the historical group-based

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53 Interview with Acar (n 13)
54 Preamble of the Istanbul Convention
55 Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO)
56 Interview with Acar (n 13)
subordination of women,\(^57\) as will be analysed in-depth in this chapter, and by perceiving all forms of violence against women as a matter of this subordination, the Convention is actually in total compliance with the MacKinnon’s reading of violence through a radical feminist lens.\(^58\)

In light of the Convention’s focus on gender-based violence against women, including domestic violence, its approach to gender becomes worthy of analysis. One unique feature of the Convention is that it is the first international human rights treaty that contains a definition of gender.\(^59\) In Article 3(c), gender is defined as ‘the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men.’ Feride Acar noted in the interview that this definition was taken from a footnote from the Beijing Declaration and Platform for Action (1995),\(^60\) and was contested during the drafting process by state representatives coming from a gender-neutral criminal school of thought.\(^61\) She argued that the Istanbul Convention’s choice to make gender a legal term for the first time was a groundbreaking development. However, she also expressed her disappointment that the definition of gender and the necessity to include the term was still controversial almost twenty years after the Beijing Declaration. Even more surprising was that this controversy was happening in a European context, which was supposed to be more progressive than other international and regional human rights frameworks.\(^62\)

\(^{57}\) Preamble of the Istanbul Convention


\(^{61}\) Interview with Acar (n 13)

\(^{62}\) Acar also has been a member of the UN CEDAW Committee since 1997. She explicitly stated in the interview that she would expect a more progressive attitude from Europe in comparison to the UN, where a conservative approach is more likely to be pursued, due to the involvement of countries from all over
The fact that the Convention contains a definition of gender undoubtedly strengthens the Convention’s commitment to primarily target gendered structures of violence and it also leaves no loopholes as to the requirement of state parties to fulfil their responsibilities by taking measures toward the elimination of such gendered norms. Furthermore, the definition itself, i.e. ‘society’s determination of appropriate roles for women and men’, is effective in terms of highlighting the constant interaction between society and individuals, as well as the way in which a societal determination is effective at shaping behaviours and perceptions at an individual level. This type of definition is similar to that of West and Zimmerman, who stress that gender is not founded only through individual traits, but that it also amounts to a complex of principles that function on a multilevel system including the interaction of other people.63

To give more insights into their conceptualisation of gender, West and Zimmerman underline the division between ‘sex’, ‘sex category’ and ‘gender’.64 When one person’s sex is guessed as ‘male’, that person is automatically placed within the sex category ‘man’. The sex category, i.e. women or men, refers to the cluster in which the most appropriate behaviours for that category are determined. Gender is an activity where those people are held accountable for the appropriateness of their behaviours, along with their sex category, on the basis of a live interaction to which all members of society inevitably join.65 The Convention’s definition of gender as socially constructed roles that society considers appropriate for women and men is in utmost compliance with this view in underlining how those roles can determinate people’s perceptions, as well as how they can be punitive for people who challenge them. The Convention’s stance in integrating gender into its structure is invaluable in raising awareness on how gender functions in the creation of the division between women and men, and what the

the world having diverse political background. It should be noted that, most recently, the Bulgarian Constitutional Court found the Istanbul Convention contravening the Constitution on the ground that its gender definition separates sexual and biological differences between sexes, and goes beyond the binary biological sexual affiliation. The court declared that this forms a contradiction with the Bulgarian law, which recognises sex only on biological and binary terms. See <https://sofiaglobe.com/2018/07/27/bulgarias-constitutional-court-rules-istanbul-convention-is-unconstitutional/> accessed 20 October 2018

63 Candace West and Don H Zimmerman, ‘Doing Gender’ (1987) 1:2 Gender and Society 125, 125, 130, 149. This approach holds a similarity with the concept of performitivity developed by Judith Butler. She emphasises that gender is not something one is, it is rather something one does through a sequence of acts, therefore it is a doing, but not being. In the context of ‘doing’, she highlights the communication at multiple levels. See Judith Butler, Gender Trouble (Routledge 2007) 25-34

64 West and Zimmerman (n 63) 131-135

65 ibid 127
rationale is for such a division. As West and Zimmerman underline, the distinction between the roles of women and men, which is created by gender, is presented as a natural consequence of the difference between sex groups, but in fact, is a means of honouring, if not producing, this difference. With the recognition of gender and its effects upon women, the Convention opens the door for more effective and radical measures to be taken by states to undermine socially created gendered norms, and therefore to eradicate gender-based violence against women.

In the light of the foregoing, it is seen that the Istanbul Convention has numerous promising features in the context of the definition of domestic violence. Besides providing the first legally-binding definition of gender, it requires states to particularly address domestic violence against women, and only encourages states to apply the Convention to gender-neutral incidents of domestic violence. This is the first time in Europe and the second time worldwide (on the ground of the Convention of Belem do Para) that a legally-binding instrument prioritises violence against women over men. This is a strong blow to the liberal gender-neutral understanding of rights through the confirmation of women victims of violence, as a group, due to the power inequality between women and men. This approach thus addresses the radical feminist critique against liberally constructed rights in perceiving violence in gender-neutral terms. Having said this, in order to see how the Convention regulates states’ responsibilities upon such a broad definition, the whole context and structure of the Convention must be analysed next.

4. **The Holistic Nature of the Convention through its 4(P)s Principle**

In looking at the whole body of the Istanbul Convention, it is seen that the Convention provides the most comprehensive and holistic set of measures in the world that a state can adopt in order to address every aspects of violence against women. Doing this, it

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66 ibid 138  
67 As was demonstrated before, the Convention of Belem do Para (n 39) is the first international instrument specifically devoted to violence against women.  
68 Preamble of the Istanbul Convention  
involves a wide-range of actors in the fight against violence, including law enforcement bodies, members of the judiciary, non-governmental organisations, the private sector and the media.\textsuperscript{70} Furthermore, it requires states to establish institutions\textsuperscript{71} that ensure that these actors work in co-ordination with each other through a holistic anti-violence policy.\textsuperscript{72} The Convention does not exposit those responsibilities in a disorganised and fragmented way. Rather, similar to the other recent Conventions within the Council of Europe,\textsuperscript{73} the Convention pursues a 3(P)s structure, i.e. the (P)revention of violence, the (P)rotection of victims and the (P)rosecution of perpetrators, and places numerous state obligations under each of these pillars. Yet, in contrast with many of other instruments, the drafters agreed that the measures taken under these three pillars would not be effective without integrated policies that took a gender sensitive approach. As a result, another (P) was added, specifically the adoption of (P)olicies that address the gendered nature of violence.\textsuperscript{74} Therefore, the Convention is based on a 4(P)s policy overall.\textsuperscript{75}

Under each of these (P)s, very specific measures are regulated under independent articles. Under the ‘prevention’ pillar,\textsuperscript{76} the Convention adopts general preventive measures to be taken by state parties under Article 12, and elaborates upon these measures in the proceeding articles one-by-one.\textsuperscript{77} These measures promote the availability of awareness-raising campaigns and programs, including teaching materials on gender equality,\textsuperscript{78} training for professionals specially dealing with victims and perpetrators,\textsuperscript{79} setting up preventive intervention and treatment programs for perpetrators,\textsuperscript{80} and encouraging the private sector and media to prevent violence against

\textsuperscript{70} Gill Allwood, ‘Gender-Based Violence Against Women In Contemporary France: Domestic Violence And Forced Marriage Policy since The Istanbul Convention’ (2016) 24:4 Modern& Contemporary France 377, 383
\textsuperscript{71} Article 10(1) of the Istanbul Convention obliges state parties to establish one or more official bodies responsible for the co-ordination, implementation, monitoring and evaluation of policies.
\textsuperscript{72} Article 7(1)
\textsuperscript{74} Article 6
\textsuperscript{75} Stanley and Devaney (n 69) 329
\textsuperscript{76} Articles 12-17
\textsuperscript{77} A similar structure is used for all (P)s throughout the Istanbul Convention.
\textsuperscript{78} Articles 13-14
\textsuperscript{79} Article 15
\textsuperscript{80} Article 16
women.\textsuperscript{81} Under the protection pillar,\textsuperscript{82} the Convention again imposes comprehensive responsibilities upon states, including the setting-up of shelters, state-wide round-the-clock telephone helplines, rape crisis or sexual violence referral centres for victims, to ensure the availability of protection and support services to victims.\textsuperscript{83} It is important to underline that the Convention makes a distinction between general and specialist support services. While general services refer to long-term help services, which are not exclusively designed for the benefit of victims, but the public at large (such as social, health, employment services), specialist services are those that target the (often immediate) needs of victims of specific forms of violence, and therefore are not open to the general public.\textsuperscript{84}

The Convention brings outstanding and comprehensive regulations for the third P—prosecution.\textsuperscript{85} In Article 49, it states that whenever any type of violence contained within its scope occurs, the parties shall take legislative and other measures to ensure that investigations and judicial proceedings are carried out without undue delay. Elaborating on this general obligation, it obliges parties to ensure that responsible law enforcement agencies address the incidents of violence ‘promptly and appropriately by offering adequate and immediate protection of victims’.\textsuperscript{86} Under the pillar of the 4th P—adopting (p)olicies, in Article 6 the Convention requires states to undertake a gender-sensitive perspective toward the implementation and evaluation of the impact of its provisions. It should be emphasised that the Convention is the first legally-binding instrument imposing such an obligation upon state parties.\textsuperscript{87}

These measures, as enumerated by the Istanbul Convention under each of the pillars of 4Ps (prevention, protection, prosecution and adoption of policies), are neither recent inventions nor revolutionary suggestions for the elimination of violence against women. Some of these measures had been considered and imposed as obligations by

\textsuperscript{81}Article 17. Grans in her detailed analysis on the preventive measures ensured by the Convention argues that they provide a more effective guideline than the European Court of Human Rights, since in the jurisprudence of the Court, the interpretation of these measures are left to the state discretion. See, Lisa Grans, ‘The Istanbul Convention and the Positive Obligation to Prevent Violence’ (2018) 18 Human Rights Law Review 133, 154

\textsuperscript{82}Articles 18-28

\textsuperscript{83}Articles 22-25

\textsuperscript{84}Explanatory Report (n 12) para 125

\textsuperscript{85}Articles 49-58

\textsuperscript{86}Article 50(1)

\textsuperscript{87}Council of Europe, ‘A Global Tool to Prevent and Combat Violence against Women and Girls’ \texttt{https://rm.coe.int/168046e60a} accessed 25 October 2017
jurisdictions of both international and regional organisations, such as the CEDAW Committee, the ECtHR and the Inter-American Commission from time-to-time. What is significant about the Istanbul Convention is that they all came together in a legally-binding instrument for the first time. As analysed in the previous chapter, due to the lack of a comprehensive instrument that specifically dealt with violence against women, these measures had been specified in a dispersed and unsystematic way on different occasions. As the analysis of these bodies was mostly restricted to the question of whether the state in concern had been in breach of any articles, they failed to produce a comprehensive guideline of measures to be taken by the states. They thus had to confine themselves to suggest very general, and more often than not, insufficient measures following the declaration of the violence. In this regard, the case-based analysis of the ECtHR, which could not ensure guidelines on states to reform all their legal frameworks, was particularly problematic. The CEDAW Committee, on the other hand, mostly imposed responsibilities after finding a violation in individual complaints, yet they could not include all the measures contained in the Istanbul Convention; at best they mentioned some of the measures imposed under each of (P)s in the Istanbul Convention.

The previous chapter also demonstrated that the CoE, UN and OAS have tried to declare some responsibilities through soft-law instruments such as resolutions, general recommendations and thematic reports, and that these documents mostly referred to certain aspects of violence. It was underlined that even in the Convention of Belem do Para, the first binding supranational treaty specifically devoted to violence against women, all the state duties are only contained in two articles and in different paragraphs, superficially, without any classification of measures for the purposes of prevention, protection and prosecution. Moreover, while Belem do Para obliges states to take numerous measures with a progressive realisation purpose, the Istanbul

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88 See the section ‘Imposition of State Responsibilities in a Fragmented and Dispersed Manner’ in Chapter 3.
89 Interview with Acar (n 13)
90 For the said documents, see the section ‘Imposition of State Responsibilities in a Fragmented and Dispersed Manner’ in Chapter 3.
Convention does not have this concept and requires states to take the measures immediately.\textsuperscript{92}

By taking these together, the Istanbul Convention has a corrective function to the problem of states’ responsibilities being imposed in a dispersed manner, by articulating these responsibilities in a holistic manner and moving them to a secure legal ground. In thinking about this from a feminist perspective, it could be argued that the Istanbul Convention satisfies the radical feminist reading of domestic violence as a systematic and structural problem to be tackled through structural measures. In fact, as explained in the second chapter, while liberal and postmodern feminism failed to bring a legal formula to address the structural nature of the problem,\textsuperscript{93} the dominance theory has focused on the systematic nature of violence, through its reading of the women’s subordination and violence in a totalising manner. In this regard, the Istanbul Convention seems to satisfy this radical feminist reading with its 4(P)s principle. In fact, the Convention affirms through its 4(P)s structure that the violence is an endemic and systematic problem, and thus unless it is addressed under a structural framework with strong state interference, it cannot be resolved.

As the scope of this research does not allow for all of those measures to be analysed specifically or in-length, in the next section, the study instead focuses on one specific state obligation as placed under the prevention pillar. It also elaborates on the Convention with regards to the well-discussed tension in the literature between universalism and cultural relativism in the human rights law framework.\textsuperscript{94}

\textsuperscript{92} Ronagh J A McQuigg, \textit{The Istanbul Convention, Domestic Violence and Human Rights} (Routledge Research in Human Rights 2017)

\textsuperscript{93} It was argued in the second chapter that liberal feminism, as a consequence of its formal equality reading and emphasis on individualism, loses sight on the group-based and systematic nature of violence. Post-modernism, by questioning the women category in the first place, and not affirming a holistic reading of gender power dynamics in the context of violence, i.e. through its anti-essentialism critiques to any grand theories, failed to bring a legal formula addressing the systematic nature of violence. For a detailed analysis, see the sections ‘Liberal Feminism’ and the ‘Postmodern Feminism and Essentialism Critiques’ in Chapter 2.

a. Promoting Changes in the Cultural Patterns: Is the Istanbul Convention Universalist?

One essential responsibility that the Convention imposes on states is ‘to promote changes in the social and cultural patterns of the behaviour of women and men’ that are based on the idea of the inferiority of women. The drafters of the Convention justified the inclusion of this provision in the explanatory report by arguing that present behaviour patterns of women and men are often shaped by prejudices, stereotypes and gender-based customs or traditions, and as long as the state members remained passive in attempting to change such mentalities and attitudes, the prevention of gender-based violence against women would be an impossible project. Apart from this broad obligation, the Convention ensures in the same article that States cannot invoke culture, religion, tradition or so-called ‘honour’ as a justification for any acts of violence within its scope.

It can be seen in these regulations that the Istanbul Convention holds a firm stance against any potential cultural or traditional arguments, where they could be harmful to women and their equality. This picture inevitably recalls the well-discussed dichotomy between universalism and cultural relativism within international human rights law. It is important to consider whether the Istanbul Convention can be considered to be located within any of these camps. Universalism mainly refers to the conviction that there are certain moral, invariable, inherent and common values that all human beings in every society share, and thus when they are respected equally everywhere, this could lead to overall justice. To put it simply, there are values which are immune from culture and cultural differences. Cultural relativism, in contrast, is based on the view that there are a

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95 Article 12(1)

96 Explanatory Report (n 12) para 85

97 Article 12(5)

variety of notions of justice that are all equally authentic in their own cultural context, and therefore justice must be defined according to social and cultural contexts. 99

Considering that once women’s equality and safety is at stake, the Convention does not give any credit to any arguments relying on culture or tradition, even if they are well-ingrained and well-respected in a particular society, the Convention can be argued to be serving the universalist ideology. 100 This position of the Convention towards culture is not revolutionary: a similar approach has been confirmed by other human rights bodies on various occasions. In fact, Article 5 of CEDAW obligates states to ‘modify social and cultural patterns of conduct of men and women’ for the aim of eliminating prejudices and customary practices that are gender-biased against women. 101 In a similar vein to this, General Recommendation 19 establishes a link between gender-based violence and traditional attitudes by which women are regarded as subordinate to men or as having stereotyped gender roles, by expressing that these roles ‘may serve as a justification for such violence.’ 102 These statements have been practically confirmed by the CEDAW Committee in domestic violence cases. In AT v Hungary, 103 the Committee found that ‘persistence of entrenched traditional stereotypes regarding the role and responsibilities of women and men in the family’ in Hungary led to the state’s failure to act in cases of domestic violence, both generally and emblematically. 104 Apart from the CEDAW Committee, the Inter-American Commission reiterated in the case of


100 International human rights are often argued to be universalist. See Mountis (n 94) 114

101 CEDAW Article 5(a). CEDAW also obliges states to ‘to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women’ in Article 2(f). Comparable provisions can be found in the instruments from different jurisdictions: The Convention of Belem do Para (n 39) Article 8(b); UN General Assembly Declaration on the Elimination of Violence against Women (adopted 20 December 1993) A/RES/48/104 4(j); Council of Europe, Recommendation Rec(2002)5 of the Committee of Ministers (n 19) para 15; Vienna Declaration and Programme of Action, World Conference on Human Rights, UN Doc A/CONF. 157/23 (1993), Part II; Beijing Declaration and Platform for Action requires states to eliminate traditional, customary, and cultural practices harmful to women. See, Sally Engle Merry, ‘Constructing a Global Law- Violence against Women and the Human Rights System’ (2003) Law and Social Inquiry 941, 947

102 CEDAW Committee, General Recommendation 19 (adopted 1992) CEDAW A/47/38 para 11. Besides this, the Recommendation obliges states to take legislative measures to remove the defence of honour in regard to the assault of murder in para 24 (ii). It also requires states to address the gender-based stereotypes in para 11.


104 ibid para 9.4
Lenahan\textsuperscript{105} that states must adopt the required measures to modify the social and cultural patterns that have detrimental effects on women.\textsuperscript{106} Since the human rights law framework is seemingly sharing a similar and firm approach against harmful cultural and traditional practices against women, some have argued that human rights law has embraced a secular universalist approach.\textsuperscript{107}

At this point, the main question to be posed is whether universalism and cultural relativism are the concepts, or terminologies, that correctly reflect the underlying differences between the two approaches. It also needs to be reconsidered whether each of these approaches is correctly conceptualised in its current form of usage. Presently, universalism is often perceived as culture-blind liberalism, where all the differences that might arise from different values of different societies and cultural relativism are entirely ignored.\textsuperscript{108} Yet, this is mostly not the case. For example, human rights law, which is argued to be taking a universalist stance, has employed various guarantees for the rights of minority societies that have different set of values than the dominating societies.\textsuperscript{109} Furthermore, even if applying such a narrow reading of universalism to the Istanbul Convention, the Convention cannot be argued to adhere to an absolute universalism in that sense, as it does not reject the culture, tradition or religion overall; it merely requires states to disregard the aspects of those values which are derogatory towards women.

This oversimplified dichotomy should be reformulated so as to confirm that whenever culture or tradition is invoked to limit the rights and security of women, how to respond this claim is not a matter of rejection or appreciation of culture. Rather, what really differentiates these two approaches is where they stand in the clash between culture and

\textsuperscript{106} ibid para 126
\textsuperscript{107} Nayak (n 98) 120-121
\textsuperscript{109} It should be briefly noted that the extent to which the minority groups should have special rights has been a controversial question for which different suggestions are ensured. See Susan Moller Okin, \textit{Is Multiculturalism Bad For Women?} (Princeton University Press 1999) 11. For example, Will Kymlicka argued that the group rights should only be provided for the groups which are ‘internally liberal’. See Will Kymlicka, \textit{Liberalism, Community and Culture and Multicultural Citizenship} (Oxford University Press 1989) 162-182.
women’s equality. What universalism should be understood as is the confirmation that women’s equality is/must be positioned above any potential cultural claims, while cultural relativism should refer to the understanding that women’s equality can be sacrificed at the expense of cultural/traditional/religious values.\(^\text{110}\) In other words, these schools of thought mainly differ in what they prioritise. For universalism, women’s equality is the supreme value, while for the cultural relativism, culture is to be granted a higher position than women’s equality in the case of a clash in between them.

To avoid the confusion that stems from an artificial and misconceptualised universalism versus cultural relativism dichotomy, the clash must be presented as gender equality versus culture. In fact, when universalism is understood as secular culture-blindness, it can also constitute a ground for various inequality claims against women. For example, to restrict Muslim women in terms of clothes that manifest religious norms, such as the burka or headscarf, by relying on the secular universalist understanding, can be as harmful as the cultural relativist ideas to women’s equality.\(^\text{111}\) On the other hand, a cultural relativist claim in respect to the differences and values of minority people in society, or in non-Western states, actually ignores the cultural claims of sub-groups and their values within those communities.\(^\text{112}\) Therefore, it is difficult to argue that the dichotomy as understood so far operates consistently and in order to uphold the values it seeks to promote. Instead of taking the conventional meanings of universalism and cultural relativism, under which both can be easily employed to restrict women’s rights and freedoms for different political purposes, it is necessary to promote women’s equality in a substantial sense and place it as the central aim. In fact, both terms can be used as justificatory labels, depending on the desired political outcomes.\(^\text{113}\)

Delving into these artificial concepts of universalism and cultural relativism more, it can be seen that both envisage culture as a stagnant, solid, holistic notion.\(^\text{114}\) In fact, Sally Engle Merry argues that such a reading of culture infers a vision of culture which is

\(^{110}\) In her similar interpretation, Choudry uses the term ‘traditionalist’, instead of cultural relativist. See Choudhury (n 94) 233

\(^{111}\) See Dahlab v Switzerland App no 42393798 (ECtHR, 15 February 2001) where the applicant was a primary school teacher in Geneva and was banned to wear headscarf in her educational institution. The European Court of Human Rights rejected the applicant’s claim that her right to equality on the basis of sex (Article 14 of the European Convention on Human Rights) was breached in conjunction with her freedom of religion (Article 9).

\(^{112}\) Ghafournia (n 98) 26 Okin reminds that the groups are not homogenous as they are supposed. See Okin, Is Multiculturalism Bad For Women? (n 109) 12

\(^{113}\) Ghafournia (n 99)

\(^{114}\) ibid 26; Choudhury (n 94) 239; Anne Phillips, Gender and Culture (Cambridge: Polity Press 2010) 31
'static and homogenous, bounded, isolated, and stubbornly resistant'.\textsuperscript{115} She goes onto argue that such perception is in contrast to the anthropological models of culture that have developed over the last two decades, which refer to ‘a cultural system in constant and creative interaction with other societies and with transnational forces’.\textsuperscript{116} It is true that culture is a lively and dynamic notion that is flexible, changeable, and open to the effect of environmental elements, and thus to treat culture as having such a determinist and clear meaning would not be compliant with reality. In fact, rejecting a monolithic understanding of culture inevitably leads to the affirmation that the meaning of culture is considerably dependent on the person who describes it and the purpose attributed to it.\textsuperscript{117}

The picture in this sense is worrying, as culture is almost always invoked and defined by the elites of societies and power holders who are mostly men, almost never by women, and thus reflects the protection and maintenance of the present power structures and status quo.\textsuperscript{118} MacKinnon puts it clearly that the ‘reliance on local (cultural) differences is often simply a defence of male power in its local disguise.’\textsuperscript{119} This is confirmed in the recent General Recommendation 35 (2017) of the CEDAW Committee, which updates the General Recommendation 19 and states that that the discriminatory laws and policies against women are often justified in the name of culture and tradition.\textsuperscript{120} In fact, in the history of women and human rights, culture has rarely been invoked to grant or extend the scope of rights and freedoms for women.

For example, by looking at the accession of state parties to CEDAW, a very large majority of the restrictive reservations Islamic countries put forward were declared on the ground of religion as a component of culture.\textsuperscript{121} In the special context of domestic violence, in many trials culture has been used as a defence to acquit the abusers and

\begin{footnotes}
\item[115] Merry (n 101) 946
\item[116] ibid
\item[117] Choudhury (n 94) 231
\item[118] Cyra Akila Choudhury, ‘(Mis)Appropriated Liberty: Identity, Gender Justice, and Muslim Personal Law Reform in India’ (2008) 17:1 Columbia Journal of Gender and Law. 45, 92–98
\item[119] Catharine A Mackinnon, Are Women Human? (Belknap Harvard 2006) 53
\item[120] UN Cedaw Committee, ‘General Recommendation 35 on Gender-Based Violence against Women, Updating General Recommendation No. 19’ (adopted 2017) CEDAW/C/GC/35 para 7
\item[121] In fact, although few Muslim countries ratified CEDAW, all of those who did so have entered reservations to its substantive provisions on several grounds. Bangladesh, Egypt, Libya, Tunisia have all invoked Islam as the reason for making these reservations. See Mayer (n 98) 178.
\end{footnotes}
As feminist activist-scholars have made clear, the defences on the ground of ‘cultural relativism’ have been witnessed mostly in relation to sexuality, marriage, reproduction, inheritance, and power over children, which are the issues that play a larger part in women’s lives than men’s. However, those same rules of religion or culture invoked for women’s issues have never been used in other contexts such as commerce or crime. This is because women’s rights (and women) are seen as the guardians and transmitters of cultures on the ground that they are the primary source of education of culture to children, and therefore, they preserve the flow of culture to following generations. Many feminists have long fought against such justifications on the basis of culture and tradition. One scholar went even further to define cultural relativism as ‘the invariable alibi of tyranny’ against women. This again reveals how culture as a vague term can be utilised for the political purpose of restricting women’s equality, and not necessarily to promote the values of culture, which do not often have a static/clear meaning.

In the light of this information, it must be underlined that to dilute the matter as one of a tension between the so-called universalism and cultural relativism, in the sense of being culture-blind and culture-promoting respectively, is neither correct nor functional. Instead, what really creates such a tension is to the way in which they locate women’s equality and culture in a hierarchal scale. By confirming this, it would not be correct to define the Istanbul Convention as a universalist instrument in the sense that it entirely ignores cultural or traditional differences of some countries, or minority societies overall. According to the new formulation suggested here, the Istanbul Convention

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122 Ghafournia (n 99) 24. For a further discussion on the use of culture in gender-based violence cases in the context of Turkish jurisdiction, see Gülden Gürsoy Ataman, ‘Uses Of Culture And ‘Cultural Relativism’ in Gender Violence Discussions’ (2013) 13:2 Kadın Araştırmaları Dergisi 61, 73-78  
125 Choudhury, ‘Beyond Culture’ (n 94) 237  
simply must be classified as an instrument that favours women’s equality over any cultural or traditional value when they are in disagreement.

Such a reformulation is also practical in that it avoids any critiques brought against the Convention when the instrument is categorised as universalist. For instance, viewed as a universalists human rights law instrument, the criticism is that it disregards non-Western cultures and imposes cultural and imperialist Western values.\textsuperscript{128} In the Middle East, for instance, the cultural relativism arguments mainly stem from the perception that, while international rules are based on allegedly international values, they are in fact Western and independent from the values of the Middle East. Thus, Western condemnation of violations of women’s rights in other regions are claimed to reflect an ethnocentric approach to rights issues through Western cultural imperialism, suggesting that other cultures are being judged according to Western standards of justice, ethics, and morality.\textsuperscript{129} This argument of cultural imperialism has been particularly defended by post-colonial, critical race and third wave feminists.\textsuperscript{130} When the Istanbul Convention, as a human rights treaty, is trapped within the concepts of universalism/cultural relativism and is called universalist, it becomes open to critiques as an imposition of Western-originated values as a European treaty similar to those discussed previously. However, when it is considered to be an instrument that locates women’s equality as superior to the cultural claims, there is no space left for such critiques, as this formulation perceives culture holistically, without making a distinction between East and West.

It should therefore be highlighted that the Convention’s approach perceiving women’s equality as superior over any potential cultural claims resonates with the MacKinnon’s approach. In fact, as a response to claims criticising her dominance theory on the ground that she entirely excludes multiculturalism, she notes that sex equality has not been achieved in any known culture. Therefore, instead of asking the question of whose

\textsuperscript{128} Ghafournia (n 99) 26; Mountis (n 94) 115. It should be noted that the Istanbul Convention has already been subjected to a post-colonial feminist critique. Peroni argued that although the Convention achieves to escape from many post-colonial critiques (for example by defining all form of violence in its scope as violence against women without any distinction), its approach to ‘honour’ and ‘honour-crimes’ overly-emphasises culture through the assumption that dangerous honour assumptions only exist in certain cultures (Eastern) but not the others (Western). See Lourdes Peroni, ‘Violence Against Migrant Women: The Istanbul Convention Through a Postcolonial Feminist Lens’ (2016) 24:1 Feminist Legal Studies 49, 51, 56, 60, 61

\textsuperscript{129} Mayer (n 98) 176

\textsuperscript{130} Choudhury, ‘Beyond Culture’ (n 94) 229
culture is to prevail over the other cultures, feminism should be perceived as a project that questions the cultural validity of inequality of women across the world.\textsuperscript{131} In this reading, it is evident that the main purpose should be to address women’s inequality and thus to distract the law from achieving this purpose, i.e. by invoking the culture paradigm, is an utterly dangerous path to take for women’s protection.

5. The Istanbul Convention: A Convention with a Complex Nature

a. The Convention as a Gender Equality Convention: Taking the Dominance Approach?

The Convention’s entire structure is established on the confirmation that gender-based violence against women and the inequality of women are two issues that are strictly related to each other through an organic and structural link, and therefore are inseparable.\textsuperscript{132} In other words, the Convention is constructed on the confirmation that violence and inequality are two phenomena that feed off the existence and maintenance of each other, in a vicious cycle. For this reason, it declares all forms of violence against women as a form of discrimination against women.\textsuperscript{133}

One side of this cycle refers to the confirmation that gender-based violence contributes to the continuance of the subordinated position of women and this was hinted at in the interim report of the drafters. It was stressed that the forthcoming convention would perceive gender-based violence against women as an obstacle toward achieving full equality between women and men.\textsuperscript{134} This reading of violence against women is reflected clearly in the preamble of the Convention, which considers gender-based violence as ‘one of the crucial social mechanisms by which women are forced into a subordinate position as compared with men.’\textsuperscript{135} It is striking that in its equality understanding, which is employed in relation to violence, the Convention directly refers to the term of ‘subordination’ of women, in parallel with MacKinnon’s equality approach within her dominance theory.\textsuperscript{136}

\textsuperscript{131} MacKinnon, ‘Are Women Human?’ (n 119) 53
\textsuperscript{132} Allwood (n 70) 377; Feride Acar, ‘Linking Gender Inequality and Violence against Women: Istanbul Convention’ <https://rm.coe.int/1680631cab>, accessed 24 June 2017
\textsuperscript{133} Article 3(a) of the Istanbul Convention
\textsuperscript{134} Interim Report (n 12) para 8
\textsuperscript{135} The Preamble of the Istanbul Convention
\textsuperscript{136} As explained in the second chapter, MacKinnon moved the equality approach from sameness/difference to subordination of women/dominance of men by relying on historical power
The other side of the cycle refers to the fact that inequality between women and men constitutes a platform and thus provides the momentum for violence against women. This is underlined by the preamble of the Convention as:

‘violence against women is a manifestation of historically unequal power relations between women and men, which have led to domination over, and discrimination against, women by men and to the prevention of the full advancement of women.’

By confirming this power inequality as a key contributor to violence, the Convention particularly highlights the structural nature of violence against women as one of gender-based violence. It was not doubted in the eyes of the drafters that women and girls were exposed to a higher risk of gender-based violence than men, and this is boldly stated in the preamble. In other words, the Convention rejects a gender-neutral reading of violence from the very beginning. By confirming the structural and gendered nature of violence, the preamble makes it clear that the realisation of de jure equality is the key element in the prevention of violence against women. For this reason, the Convention puts it very clearly in the following sections that violence against women constitutes a form of discrimination against women and a human rights violation.

It is de facto equality that the Convention finds as essential for the elimination of violence. As the Convention affirms the strong link between violence and women’s unequal position in all settings of life, which includes not only legal but also socio-economic and cultural inequalities, it aims to contribute to women’s equality in general, beyond the context of violence. It is significant that it requires state parties to condemn all forms of discrimination against women, whether or not related to violence against women. In fact, in Article 1, which regulates the purposes of the Convention, two separated but interrelated aims are stated. Whilst one concerns the eradication of violence against women, the other one concerns the ‘contribution to the elimination of all forms of discrimination against women and promotion of substantive equality.


137 Peroni (n 128) 57

138 Art 3(a) of the Istanbul Convention

between women and men, by empowering women.\textsuperscript{140} Considering this, the Istanbul Convention can be considered as complementary to and supportive of CEDAW, in line with the promotion of equality between women and men.\textsuperscript{141} While CEDAW is an instrument that is entirely dedicated to the elimination of gender-based discrimination, the Istanbul Convention aims to eliminate violence against women which is, as the Convention affirms itself, impossible to be achieved without first ensuring equality for women. Therefore, it would not be wrong to reach the conclusion that the Istanbul Convention goes further than CEDAW, due to its twofold purpose in including both the elimination of violence and the promotion of equality.\textsuperscript{142} Owing to its strong emphasis on the latter, it is argued that the Istanbul Convention has a dual character in being both an anti-discrimination and anti-violence instrument.\textsuperscript{143}

The contribution to the ‘substantive equality between women and men, including by empowering women’, which is stated as one of the purposes of the Convention, needs to be highlighted.\textsuperscript{144} The Convention’s reference to substantive equality implies that such equality does not consist only of formal equality, and thus the eradication of direct discrimination would not satisfy the expectations of the Convention. In Article 4, the Convention enumerates the legal and other measures to be taken for this purpose, namely that of providing the right to equality in national legislations, the abolishment of discriminative laws and the prohibition of discrimination through effective sanctions. All these measures refer to a rather formal, namely de jure equality understanding.\textsuperscript{145} However, through the requirement of the ‘practical realisation’ of these legislative measures, the Convention points out that, unless states’ laws and their application result in equality in a practical sense on behalf of women, the equality would not be achieved in its substantial terms. This refers to substantive equality.\textsuperscript{146} This construction of equality is directly borrowed from CEDAW.\textsuperscript{147} For CEDAW, the criteria adopted to

\textsuperscript{140} Article 1(a) and (b) of the Istanbul Convention
\textsuperscript{141} Simonovic (n 21) 606
\textsuperscript{142} ibid 602-3
\textsuperscript{143} Feride Acar, ‘Linking Gender Inequality and Violence against Women’ (n 132)
\textsuperscript{144} Article 1(a) of the Istanbul Convention
\textsuperscript{145} For an analysis of de jure and de facto equality in the context of CEDAW, see Alda Facio and Martha I Morgan, ‘Equity or Equality for Women - Understanding CEDAW's Equality Principles’ (2009) 60:5 Alabama Law Review 1133, 1141. Facio and Morgan argue that, in a similar vein to the Istanbul Convention, CEDAW refers to de facto equality only as formal equality.
\textsuperscript{146} For an analysis of the link between progressive realisation and substantive equality, see Anu Saksena, ‘CEDAW: Mandate for Substantive Equality’ (2007) 14:3 Indian Journal of Gender Studies 481, 483
\textsuperscript{147} CEDAW Article 2(a) is worded in an almost exactly same manner, with Article 4(2) of the Istanbul Convention. CEDAW also specifically refers to the ‘practical realisation’.
assess equality is not based on the law, policies or institutions created to ensure opportunities for women, but on what is achieved by all these laws and policies. This concept is exactly what is targeted by the Istanbul Convention. CEDAW and the Istanbul Convention also share some other sub-measures employed for the sake of substantive equality, including their emphasis on women’s empowerment, as well as the confirmation that the special measures that are necessary to protect women from violence and discrimination cannot be considered as discrimination.

In the light of this equality reading, the Convention openly defines all types of violence against women, including domestic violence, as a form of discrimination against women. As analysed before, the recognition of domestic violence as a form of discrimination is not a novel development; various international and regional human rights law institutions have confirmed the discriminatory nature of the issue. Yet, as studied in-depth in the previous chapter, it was seen that there are differences in the way that this discriminatory nature of the problem had been confirmed. It was argued that the equality approach employed by the CEDAW Committee, DEVAW, the Convention of Belem do Para and the Inter-American Commission has been in line with the dominance approach developed by MacKinnon. In fact, these bodies further confirmed the discriminatory nature of domestic violence that stems from the historical power inequality between women and men. Under this understanding, there is no need for the proof of additional points, such as the discriminatory intention of the state, the difference in the way that women and men are treated before law, or statistics that reveal that women are subject to violence disproportionately to men. At the other end of the spectrum, it was argued that the reading of the ECtHR on equality has rather been a formal equality approach imposed by liberal feminism. Even though the Court recognised the indirect discrimination in the Opuz case, applied the same reading in most of the following cases, there were occasions where it either rejected the

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148 Facio and Morgan (n 145) 1147
149 Both the Istanbul Convention Article 1(b) and CEDAW Article 3 use the word ‘advancement’ of women in political, social, economic and cultural contexts.
150 Istanbul Convention Article 4(4), CEDAW Article 4(1)
151 Allwood (n 70) 377
152 See the section ‘Domestic Violence as Discrimination: Problematic Aspects of the Equality Reading Developed by Human Rights Law Bodies’ in Chapter 3.
153 Opuz v Turkey App no 33401/02 (ECtHR, 9 June 2009) The Court confirmed the indirect discrimination, by underlining the general and discriminatory judicial passivity in Turkey, albeit unintentional, (which) mainly affected women’ in para 200. In this regard, although there has not been a direct and intentional discrimination against women victims before the law, the affects of the judicial passivity is confirmed to disporportionately affect women and therefore, discriminatory against women.
examination of the discriminatory nature of domestic violence or required a certain amount of discriminatory state intention, as well as statistical proofs on the discriminatory nature of violence.\textsuperscript{154}

In the light of this, it is essential to position the Istanbul Convention within the spectrum of various equality approaches. It evidently employs a far broader equality understanding than the one developed by the ECtHR. The Convention explicitly recognises the discriminatory nature of violence, as the entire structure of the Convention is based upon the natural link between inequality and violence. In this context, any further requirements such as intention or evidential proof of the discriminatory effects of the problem are not necessary. Consequently, the equality approach of the Convention strongly challenges the liberal understanding of formal equality and employs a dominance model of equality, as suggested by MacKinnon. In fact, as analysed in-depth in the second chapter, MacKinnon argues that all forms of violence against women should be considered to be a form of sex discrimination.\textsuperscript{155} In fact, in her reading, equality is a matter of power distribution among the sexes. As there is historical power inequality between women and men, and as all forms of violence are a manifestation of this power inequality, violence is simply a matter of inequality.\textsuperscript{156} This thinking is entirely reflected by the Istanbul Convention, which straightforwardly recognises the discriminatory nature of violence, without any requirements of proof of the discriminatory intention of the state or unequal treatment of women before the law. Furthermore, the link between women’s inequality and violence is so strongly established that the Convention obliges states to eliminate all forms of discrimination against women alongside its anti-violence structure.

A similar reading has been employed by the UN and OAS bodies, as demonstrated in the previous chapter. However, what is significant about the Istanbul Convention is that this equality understanding is provided on legally binding ground, unlike the General Recommendations of CEDAW Committee or the verdicts of the Inter-American

\textsuperscript{154} See the section ‘Domestic Violence as Discrimination: Problematic Aspects of the Equality Reading Developed by Human Rights Law Bodies’ in Chapter 3. Particularly see \textit{Civek v Turkey} App no 55354/11 (ECtHR, 23 February 2016), where the Court failed to examine the applicant’s claim of the violation of Article 14 overall, and \textit{A v Croatia} App no 55164/08 (ECtHR, 14 October 2010), where the Court rejected the discrimination claim by requiring certain amount of discriminatory intention of the state in para 101.

\textsuperscript{155} MacKinnon, \textit{Feminism Unmodified} (n 41) 40-41; Sunstein (n 58) 833; Brill (n 58) 270

\textsuperscript{156} MacKinnon, \textit{Feminism Unmodified} (n 41) 40-41. For a comprehensive discussion of this point, see the section ‘Radical Feminism’ in the second chapter.
Commission on individual complaints, which are considered soft-law instruments.\textsuperscript{157} It needs to be restated that such an equality reading has been confirmed on legally-binding ground before through the Convention of Belem do Para.\textsuperscript{158} The Istanbul Convention achieves this for the first time in Europe by openly declaring domestic violence as a manifestation of the subordination of women and legally rejecting the arguments that domestic violence could be equally harmful for both women and men. Feride Acar views this emphasis on a gender-based view of equality and violence against women, in a legally-binding treaty, as revolutionary.\textsuperscript{159} In the light of this, it can be argued that a dominance model of equality finally takes a central role in the context of domestic violence in Europe. This highlights a strong shift within the context of violence against women from a liberal equality understanding towards the dominance model of equality in the structure of human rights law.

At the same time, the Convention’s statement on special measures may be evaluated as a potential derogation from the dominance approach taken by the Convention. As briefly stated above, the Istanbul Convention borrows from CEDAW in stating that ‘special measures that are necessary to prevent and protect women from gender-based violence shall not be considered discrimination under the terms of this Convention.’\textsuperscript{160} The dominance approach of MacKinnon reflects the full deconstruction of male supremacy from law and the reconstruction of a basis of equality that addresses women’s values without a comparison with men. In this context, the provision of special measures might look doubtful, since such measures are temporary in nature and what is ‘special’ is determined with reference to what everybody else (mainly men) has.\textsuperscript{161} It may thus be thought that the allowance of special measures still invokes a liberal understanding, in which the standard is set to the interests of men, and women are only permitted to have the ‘extra’ protection that men do not have in special circumstances. As can be seen, this line of approach still has a comparative essence. However, it needs to be underlined that the Istanbul Convention is different to the

\textsuperscript{157} See the section ‘Domestic Violence as Discrimination: Problematic Aspects of the Equality Reading Developed by Human Rights Law Bodies’ in Chapter 3.

\textsuperscript{158} The Convention of Belem do Para in Article 6(a) confirms the violence in its preamble as ‘a manifestation of the historically unequal power relations between women and men’. On this ground, it states that women’s right to be free from violence includes their right to be free from discrimination.

\textsuperscript{159} Acar, ‘CEDAW’dan İstanbul Sözleşmesi’ne’ (n 25) 71; Interview with Acar (n 13)

\textsuperscript{160} Article 4(4) of the Istanbul Convention

\textsuperscript{161} Hilary Charlesworth, ‘Concepts of Equality in International Law ’ in Grant Huscroft and Paul Rishworth (eds), Litigating Rights: Perspectives from Domestic and International Law (Hart Publishing 2002) 147
majority of human rights instruments, which are drawn in a gender-neutral sense, and where special measures are granted under certain circumstances as an exception. On the contrary, the Istanbul Convention overall is constructed through a gender-based perspective where the needs of women, when subject to violence, are fully taken into consideration. Therefore, the Convention does not handle the issue in a gender-neutral sense, where some special protections are provided to women only in exceptional cases. Each of the Convention’s detailed measures laid out in the 4(P)s approach is designated through the consideration of gendered structures and their effects on women in the case of violence. The fundamental essence of the Convention does not contain a comparative approach whereby what women need in the case of violence is determined in comparison to what men need in such case, rather all of its context is shaped through the consideration on women’s particular circumstances and gendered realities, so as to reconstruct the law on women’s own terms. This being the case, the special measures provision of the Convention should be considered as a strengthening factor for women’s protection in violence cases, instead of a sign of the liberal construction of women’s rights in comparison to the male standards.

The issue of ‘special measures’ is also highly relevant to the concept of intersectionality among women. In fact, the question of which women are entitled to those ‘special’ measures, on the grounds of what forms of particularity or vulnerability, inevitably raises the concept of intersectionality. As explained earlier, intersectionality in feminism is an approach requiring a more in-depth look at the particularities of women stemming from the crossing point of their characteristic grounds, which are mostly ignored due to the exclusion of intra-group differences in fragmented structures of the liberally constructed laws. Even, beyond the special measures aspect of the Istanbul Convention, the extent to which the Istanbul Convention is capable of addressing intersectional forms of discrimination in its general equality approach must be analysed. The next chapter which brings a theoretical analysis of the Convention will focus on this issue in-depth, through a comparative framework with the other human rights law mechanisms.

162 See the section ‘Intersectionality’ in Chapter 2.
b. Criminal and Civil Dimensions: Striking a Balance in the Fight against Domestic Violence

i. Criminal Law

Looking at the overall structure of the Istanbul Convention, it is seen that the drafters gave equal weight to both the criminal and civil measures to be taken by member states while addressing the problem of domestic violence against women. In the context of criminalisation, the Convention provides definitions for a number of different forms of violence, including psychological violence, physical violence, sexual violence including rape, stalking, forced marriage, female genital mutilation, forced abortion & sterilisation, and sexual harassment, and obliges states to criminalise all these forms of violence. Domestic violence is not specified within this list of forms of violence to be criminalised. Yet, the Convention defines domestic violence so as to include ‘all acts of physical, sexual, psychological or economic violence’. In this regard, the references to psychological, physical and sexual violence crimes are relevant for the case of domestic violence, as they can occur within the form of intimate partner violence. In fact, when these forms of violence occur ‘within the family or domestic unit or between former or current spouses or partners’, they should be considered domestic violence, according to the Convention. This means that the Convention requires state parties to criminalise sexual, physical and psychological forms of domestic violence. At this point, it is important to note that the Istanbul Convention does not oblige states to criminalise ‘economic’ domestic violence incidents. This might

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163 Interview with Acar (n 13)
164 Article 33
165 Article 35
166 Article 36
167 Article 34
168 Article 37
169 Article 38
170 Article 39
171 Article 40
172 Article 3(b)
173 Article 3(b)
174 McQuigg, *The Istanbul Convention, Domestic Violence and Human Rights* (n 92)
175 McQuigg presumes that the criminalisation of psychological violence might not be desirable for many states. (ibid) Westendorp criticises the criminalisation approach of the Convention on the ground that this presumes the idea that women victims would prefer to divorce after violence, which is mostly not the fact. She underlines that many women want to keep their relationship due to various factors, particularly economic ones. See Ingrid Westendorp, ‘The Istanbul Convention; New Perspectives for Victims of Domestic Violence?’ (8 June 2018) Maastricht University Blog <https://www.maastrichtuniversity.nl/blog/2018/06/istanbul-convention-new-perspectives-victims-domestic-violence> accessed 12 June 2018
raise the question of whether the Convention constructs a hierarchy among different types of harm in the context of domestic violence.\textsuperscript{176}

It should be underlined that the Convention does not oblige states to adopt a specific crime of domestic violence or any other forms of violence. It is also expressed in the explanatory report that the crimes should be presented in a gender-neutral manner, yet the instrument underlines that the state parties have the choice to introduce gender-specific provisions.\textsuperscript{177} Even though the Convention suggests that states take a gender-neutral line, it provides guidelines for them to address the gendered nature of violence. For example, the Convention’s regulation of aggravating circumstances can be argued to be a part of the guidelines through which the drafters wanted states to integrate the gendered aspect of the problem. In fact, most of the circumstances suggested to be taken into consideration as aggravating circumstances are explicitly related to the incidents of domestic violence.\textsuperscript{178}

Some of the instances that are suggested to be taken into account as aggravating include cases where the offence was committed repeatedly,\textsuperscript{179} against a person made vulnerable by particular circumstances,\textsuperscript{180} or against or in the presence of a child.\textsuperscript{181} Most importantly, by including the circumstance where an ‘offence was committed against a former or current spouse of partner as recognised by internal law, by a member of the family, a person cohabiting with the victim […]’, the Convention explicitly refers to domestic violence as an aggravating factor.\textsuperscript{182} In this context, it could be argued that by not obliging states to adopt a specific domestic violence crime, the drafters wanted to give states some freedom to choose the way in which their criminal law would be reformed. Yet, through aggravating circumstances, the Convention requires states to address the gendered reflection of violence, particularly domestic violence. In fact, all the said factors such as repetition of violence and putting victims into a vulnerable position are mostly the reflections of the gendered nature of violence.

\textsuperscript{176} McQuigg considers this as unsurprising as the criminalisation of economic violence and its standard regulation across Europe would be difficult, if not impossible. See McQuigg, \textit{The Istanbul Convention, Domestic Violence and Human Rights} (n 92)
\textsuperscript{177} Explanatory Report (n 12) para 153
\textsuperscript{178} Aggravating circumstances are regulated in Article 46 of the Convention. The fact that these factors are mostly relevant to domestic violence incidents in particular have clearly been stated in the Explanatory Report to the Convention. See Explanatory Report (n 12) paras 237-244
\textsuperscript{179} Article 46(b)
\textsuperscript{180} Article 46(c)
\textsuperscript{181} Article 46(d)
\textsuperscript{182} Article 46 (a)
Another essential point in terms of the criminalisation measures is that the Convention places one outstanding provision with regard to *ex parte* and *ex officio* proceedings as a part of the state obligation to effectively *prosecute* the offenders. It imposes a responsibility upon state parties to ensure that the investigations into or prosecution of certain types of violence, regardless of whether they occur in a public or private sphere, are not wholly dependent upon a complaint or report filed by a victim.\(^{183}\) In the explanatory report, while imposing this obligation, the drafters of the Convention make a distinction between crimes according to severity of the violent act. It is stated that this obligation of *ex parte* proceedings is essential for the acts resulting in *severely bodily harm* or *deprivation of life* in order to prevent the occurrence of any unrepairable harm, while leaving it to the states’ preference to apply it in less severe violent acts.\(^{184}\) By comparing this with the jurisprudence of the ECtHR on the matter, it can be argued that states are given more freedom in their determination of *ex parte* proceedings in the Istanbul Convention. In fact, the ECtHR has developed more detailed criteria, which do not necessarily require evidence of severe bodily harm or the death of the victim.\(^{185}\) What needs to be underlined here is that the Convention does not require victims to complain about the violence in order for states to have a responsibility to begin legal proceedings. This may lead to some feminist concerns in relation to the preservation of women’s agency and freedom of choice. The theoretical analysis of this aspect in the light of the dominance model will be made in the following chapter in-depth.

It should be pointed out that, overall, the criminalisation approach in relation to domestic violence had been adopted by other international and regional institutions before. The CEDAW Committee, in General Recommendation 19, stated that criminal penalties should be one of the measures taken to prevent family violence.\(^{186}\) In a similar vein to this, Rec (2002)5 required states to classify all forms of violence within the family as a criminal offence, and to revise and increase the penalties.\(^{187}\) In the guidance of these documents, the ECtHR and CEDAW Committee placed clear positive

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\(^{183}\) Article 55(1)

\(^{184}\) Explanatory Report (n 12) para 280. The same distinction is maintained in terms of the reservations. Article 78(2) of the Convention allows states to put reservation on Article 55, only if the acts subject to crime are minor and do not reach to the level of ‘severely bodily harm or deprivation of life.’ See Explanatory Report (n 12) 281

\(^{185}\) See Opuc v Turkey (n 153) para 138

\(^{186}\) General Recommendation 19 (n 102) para 24 (r) under the section of Special Recommendations.

\(^{187}\) Rec (2002)5 (n 19) para 55, under the section of additional measures with regard to violence within the family.
obligations on states to ensure that their criminal laws are of a particular standard with regard to the issue of domestic violence.\(^{188}\) It can be argued that the Istanbul Convention goes further than these bodies by requiring all these measures to be taken in combination with the effective prosecution guarantees under the (p)rosecution pillar, which require effective and timely response from law enforcement and \textit{ex parte} proceedings. In such a comprehensive structure, the Convention requires the reform of national criminal laws when necessary.\(^{189}\) However, as the analysis of the other judicial and quasi-judicial bodies was restricted to the provisions of the instruments they were supervising, their suggestions on domestic criminal law were not comprehensive and holistic. The Istanbul Convention, however, asks for a comprehensive revision of criminal laws from.\(^{190}\) While the measures suggested in the case-law of the ECtHR and the CEDAW Committee only concerned the states that were party to the cases, the Istanbul Convention obliges all members of the Council of Europe that are party to the Convention to adopt their criminal laws in accordance with its provisions. For this reason, Chinkin considers the Convention not only as a human rights law instrument, but also as a criminal law treaty.\(^{191}\)

\textbf{ii. Civil Measures}

In addition to its far-reaching provisions regarding criminal law measures, the Convention requires state parties to ensure adequate civil remedies that enable the victims to seek justice and compensation. These remedies are primarily against the perpetrator, but also in relation to state authorities if they can be deemed to have failed to address their duty to prevent violence and protect the victims of the violence.\(^{192}\) The analysis of all the measures of civil law exceeds the scope of this study. Therefore it is instead important to look at ‘special civil measures’ that the Convention obliges states to provide. The scope of such measures includes emergency barring orders and

\(^{188}\) Many domestic violence cases heard by the ECtHR indicated problems in relation to the criminal legal framework and their implementation of the respected states. For this reason, the Court found violations of relevant rights and suggested states to address these problems. For example, see para 153 of \textit{Opuz v Turkey} (n 153); \textit{Valiuliene v Lithuania} App no 33234/07 (ECtHR, 26 March 2013) paras 79-87. In the context of the CEDAW Committee, see \textit{AT v Hungary} (n 103) para 3.4


\(^{190}\) ibid


\(^{192}\) Article 29 of the Istanbul Convention; Explanatory Report (n 12) para 150
restraining or protection orders. Emergency barring orders constitute a civil law remedy, which aims to provide physical distance between a perpetrator and the victim for a certain period of time, in situations of immediate danger. This mostly happens through a ban on the perpetrator to enter or to be present within a set distance of the victim’s residence. The Istanbul Convention requires state parties to be equipped with the power to issue such orders on behalf of the victim when she is under an immediate risk of violence.

The restraining or protection orders are drawn with a broader content so as to include not only the prohibition of the perpetrator to contact to the victim, but also to prohibit, restrain or proscribe a certain behaviour by the perpetrator. What is intended by the protection orders is the provision of a fast legal remedy to the victims and therefore, to prevent the commission of violence and to ensure the protection of the victim. A restraining or protection order may be considered complementary to a short-term emergency barring order. In the literature, there are some views that call for the clarity of making a distinction between the protection orders; those that require the partners to separate and those that do not. It seems that, the Istanbul Convention pursues a similar line of thinking by creating a distinction between emergency barring orders (requiring the partners to separate) and the restraining or protection orders (which do not necessarily require such a separation).

It is true that various human rights institutions did consider the question of whether the states had provided these measures in their legal framework and, if they did, whether they had implemented them effectively. For example, the failure of the states to legally ensure a civil protection orders was interpreted as a failure to protect the victims of domestic violence by the CEDAW Committee in AT v Hungary and VK v Bulgaria. Furthermore, in the Lenahan case, heard by the Inter-American Commission, it was seen that, the US Court concluded that the failure of police officers

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193 Articles 51 and 52 of the Istanbul Convention
194 Explanatory Report (n 12) para 264; Suzan van der Aa, ‘Protection Orders in the European Member States: Where Do We Stand and Where Do We Go from Here?’ (2012) 18:2 European Journal on Criminal Policy and Research 183, 196
195 Article 52 of the Istanbul Convention
197 AT v Hungary (n 103)
199 Jessica Gonzalez et al v United States (Lenahan) (n 105)
to arrest a perpetrator of domestic violence where he had violated a protection order, was not against the law. This was even though an arrest warrant should have been issued under Colorado law. Therefore, an existing gap between formal guarantees and their implementation could be seen. In the face of this, the Inter-American Commission decided that ‘the failure to protect the victims from domestic violence by adequately and effectively implementing the restraining order at issue, (…) constituted a form of discrimination [against the victims] In order to prevent this scenario, the Istanbul Convention obliges states to ensure that ‘breaches of restraining or protection orders are subject to effective, proportionate and dissuasive criminal or other legal sanctions. Also, it can be argued that the Istanbul Convention aims to provide a more secure ground for the granting of civil remedies to victim, as a legally binding treaty. In fact, protection orders used to be considered in a rather disorganised and on non-legally-binding basis by different international and regional human rights institutions in domestic violence cases. Feride Acar argues that the Convention spelling out these remedies clearly is one of the most positive aspects of the Convention in the special context of domestic violence.

It is worthy to point out that both the criminalisation and civil approaches have been subject to critique on various grounds from both theoretical and practical perspectives. The theoretical analysis of the criminalisation approach in the light of the MacKinnon’s dominance approach will be looked at in the following chapter. The practical efficiency of both approaches is going to be analysed in-depth in the sixth chapter, which addresses the case of Turkey. At this point, it would suffice to state that the Istanbul Convention requires state parties to strike a fair balance between their criminal and special measures in the context of domestic violence, without sacrificing one or the other.

200 Ibid para 160. For a critique of this, see Mandeep Talwar, ‘Improving the Enforcement of Restraining Orders After Castle Rock v Gonzales’ (2007) 45:2 Family Court Review 322, 322-3, 331
201 Jessica Gonzalez et al v United States (Lenahan) (n 105) para160
202 Article 53(3) of the Istanbul Convention
203 Even though the CEDAW Committee and the Inter-American Commission found breaches of rights due to the states’ failure to issue protection orders for domestic violence victims, the declarations of these bodies are only binding on state parties to the cases.
204 Interview with Acar (n 13)
6. Similar but Different: The Enforcement of the Istanbul Convention

One aspect of the Istanbul Convention that needs to be brought into focus is the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), which was established as the monitoring body of the implementation of the Convention by state parties. Before proceeding to analyse it, it should be underlined that GREVIO is the first enforcement mechanism in Europe specifically devoted to violence against women, and second in the world after the MESECVI, which is a follow-up mechanism of Belem do Para, established in 2004. GREVIO is a unique platform expected to generate invaluable data arising out of its in-depth analysis of the national and international legal regulations and to exchange good practices regarding the elimination of violence against women, including domestic violence. Looking at the way in which the Convention embodies this mechanism, it can be seen that GREVIO is set within a similar procedure to the UN human rights treaty bodies, including the CEDAW Committee, even though it has limited but important differences. It should be reiterated that, as GREVIO is currently at an early stage of the monitoring process, there is not much existing data to allow comprehensive research on how its monitoring tasks are being implemented.

The main similarities with the UN-based treaty bodies are that GREVIO exercises its monitoring largely through a state reporting procedure; it provides its final report not only on the ground of the information submitted by states, but by also relying on the reports submitted by NGOs in their shadow reports, it is entitled to adopt General

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206 Article 66 of the Istanbul Convention establishes GREVIO.
207 MESECVI is established by the OAS in 2004 as a follow-up mechanism to the Convention of Belem do Para and it conducts its monitoring through state reporting procedure, and as a sum of the state reports, it issues hemispheric reports. See Susana Chiarotti, ‘The Responsibility of Local Government in the Prevention of Violence against Women in Cities’ in Ana Falu (Ed), Women in the City: On Violence and Rights (Women and Habitat Network of Latin America/ Ediciones SUR, 2009) 65. Two hemispheric reports have been issues so far. See <http://www.oas.org/en/mesecvi/hemisphericreports.asp> accessed 3 May 2018
209 As of today, GREVIO has sent the first questionnaires to sixteen states and published its final report on six country reports. Fort he timetable of GREVIO on the country evaluation, see <https://www.coe.int/en/web/istanbul-convention/country-monitoring-work> accessed 24 October 2018
210 Article 68 (1);(2);(3);(4)
211 Article 68(5); Explanatory Report (n 12) para 353
Recommendations to further elaborate on the provisions of the Convention\textsuperscript{212} and it is entitled to conduct an inquiry procedure when immediate attention is needed to prevent or limit the scale of serious violations of the Convention.\textsuperscript{213}

It is important to further analyse the differences between the procedure that is set for GREVIO and the UN treaty bodies. In this regard, there are four points to mention. First, there is a procedural difference in the discussion of country reports. The Istanbul Convention obliges GREVIO to select specific provisions at the beginning of each round and to make the evaluation on the basis of these specific issues.\textsuperscript{214} This is different than the evaluation procedures of all the UN treaty bodies, including the CEDAW Committee, in which the review on the compliance of states with all provisions of instruments is being made. This arrangement of the Istanbul Convention seems very advantageous, as GREVIO is able to pursue its evaluation in a greater depth with regard to each issue than would otherwise be possible.\textsuperscript{215}

The second difference arises in the context of the inquiry procedure. A similar special inquiry procedure is granted to the CEDAW Committee. However, such a procedure did not exist in the text of CEDAW, but was given to the Committee on the basis of the Optional Protocol. Looking at the Istanbul Convention, it can be seen that the special inquiry procedure is contained in its main text. Therefore, it binds all state parties, unlike the case of CEDAW, where only the states which are party to the Protocol (but not all state parties to CEDAW) can go through this procedure. What is even more significant is that the Istanbul Convention does not allow state parties to enter a reservation on this procedure.\textsuperscript{216} It can be evaluated that the drafters were committed to grant a strong supervisory authority to GREVIO in cases requiring urgent interference.

The third, and according to Acar, one of the most crucial differences, is that GREVIO conducts evaluative country visits between receiving the state report and preparing its draft report.\textsuperscript{217} She states that the experts agreed to visit all state parties in the first

\textsuperscript{212} Article 69
\textsuperscript{213} Article 68(14)
\textsuperscript{214} Article 68(3)
\textsuperscript{215} McQuigg, ‘What Potential Does the Council of Europe Convention on Violence against Women Hold as Regards Domestic Violence’ (n 16) 955
\textsuperscript{216} ibid
\textsuperscript{217} Article 68(9); Interview with Acar (n 13) ; Article 68(9)
evaluation procedure in order to meet the governmental officials and the representatives of civil society interlocutors to have a closer sight of the situation.218

The fourth and the most substantial difference is that GREVIO is not equipped to receive individual communications, unlike the CEDAW Committee or many other UN treaty bodies. It should be emphasised here that the only other regional instrument specifically devoted to violence against women, i.e. the Convention of Belem do Para, grants a limited individual complaints mechanism. Such complaints can only concern the provisions that impose immediate obligations to prevent, punish and eradicate violence against women and can only be lodged at the Inter-American Commission on Human Rights, but not at MESECVI.219

It might be thought that since domestic violence is an unseen crime that happens behind closed doors, and since a very few number of individual cases of domestic violence were lodged at the other treaty bodies, this approach would not lessen the effectiveness of the Convention to a considerable extent.220 Therefore, GREVIO may be expected to fill the gap arising out of the lack of such an individual mechanism through its adoption of comprehensive general recommendations.221 It is argued that as the consideration of the courts in an individual communication is inherently limited to the facts of each case, to adopt general recommendations on the matter, which are not restricted to a certain case or state, would allow the matter to be addressed in a more efficient and comprehensive way.222 Moreover, due to the fact that domestic violence mostly goes unnoticed and it is not an individual phenomenon, some have expressed their doubts

218 Interview with Acar (n 13)
219 According to the Article 12 of the Convention of Belem do Para, the Inter-American Commission on Human Rights can only receive individual complaints within the scope of Article 7, which is imposing state obligations to be realised immediately. The Commission is not entitled to receive complaints of violations of Article 8 (progressive obligations) or Article 9 (intersectionality obligations). MESECVI, on the other hand, is not entitled to receive individual complaints. Rashida Manjoo and Jackie Jones (eds), The Legal Protection of Women From Violence: Normative Gaps in International Law’ (Routledge 2018)
220 McQuigg, ‘What Potential Does the Council of Europe Convention on Violence against Women Hold as Regards Domestic Violence’ (n 16) 947 and 956. By relying on her experience as a member of CEDAW Committee, Acar argued that the numer of domestic violence cases lodged at the CEDAW Committee was not small proportionate-wise. She noted that the majority of violence against women cases were concerning domestic violence and sexual violence. (Interview with Acar (n 13))
221 McQuigg, ‘What Potential Does the Council of Europe Convention on Violence against Women Hold as Regards Domestic Violence’ (n 16) 947
222 ibid 957
towards the reliance on adversarial litigation strategy to tackle domestic violence, and argued that alternative approaches should be discovered to solve the problem.\textsuperscript{223}

However, instead of questioning the hypothetical inefficiency of the individual communication if it were provided, it should be questioned whether having such a procedure would lessen the efficiency of the enforcement of the Convention to any extent. In other words, what would be lost in authorising GREVIO to receive individual complains? As has been referred to throughout this study, the jurisprudence of the CEDAW Committee and the Inter-American Commission of Human Rights has contributed extensively to the human rights law mechanism. This has been done through the interpretation of the broad provisions of the instruments in the context of domestic violence incidents, therefore addressing the issue of domestic violence in a more efficient way. For example, the CEDAW Committee had a chance to elaborate upon the provisions of CEDAW, which originally did not have any reference to violence. It also applied its abstract general recommendations to the specific dynamics of domestic violence in each individual complaint. Furthermore, even though the violation declarations of these bodies did not have legally-binding effect on the states in concern, they were very effective in enabling states to make legal and institutional changes in their legal framework, as seen in the case of Maria de Penha,\textsuperscript{224} which was heard by the Inter-American Commission.\textsuperscript{225} Finally, if GREVIO had been entitled to receive individual communications, it would have had another space in which to develop more explanations on the provisions of the Convention, besides its general recommendations.

Granting GREVIO the ability to receive individual complaints may bring up the question of whether a clash between the case-law of GREVIO and the ECtHR is likely to happen and if so, how to resolve this tension. Before answering this, how the interaction between the ECtHR and the Istanbul Convention has proceeded, in other words, how the ECtHR has received the Istanbul Convention so far should be mentioned. Owing to the ‘living instrument’ principle that the ECtHR adheres to, the Court takes into account the other regional and international legal developments in its

\textsuperscript{223} Van Schaak and Scheingold in ibid 957
\textsuperscript{225} It should be reminded that, on the basis of the recommendations received in Maria de Penha, Brazil adopted the Maria de Penha Law. See Paula Spieler, ‘The Maria da Penha Case and the Inter-American Commission on Human Rights: Contributions to the Debate on Domestic Violence Against Women in Brazil’ (2011) 18:1 Indiana Journal of Global Legal Studies 121, 138
interpretation of the scope of rights. This has been the case in the ECHR’s approach in domestic violence cases. For example, in *Opuz*, the Court referred to an extensive list of instruments from the UN and the Inter-American System, including General Recommendation 19 and the case-law of the CEDAW Committee, as well as the OAS Convention of Belem do Para and the case-law of the Inter-American Commission, while elaborating how the ECHR should have been applied for the case. Since the adoption of the Istanbul Convention, the ECHR has made references to the Istanbul Convention by presenting it as a guideline in the determination of the state responsibilities. Acar expressed her confidence that ECHR will be referring to the Convention even more over the course of time, noting the human rights framework is a holistic organism whereby the instruments are in constant interaction with each other.

In this context, the approach of the ECHR appears to receiving the Istanbul Convention as a complementary and inspiring instrument to ECHR, but not contradictory.

The case may be different if GREVIO gets to decide on individual complaints. Considering that the Istanbul Convention is a far more comprehensive instrument regarding domestic violence compared to ECHR and sets a higher bar of standards for state obligations, GREVIO is likely to ask for measures that goes well beyond the scope of ECHR. For example, GREVIO would interpret all forms of gender-based violence as a straightforward breach of prohibition of discrimination owing to its equality reading, as analysed earlier. In contrast to this, as examined in the third chapter, the ECHR has failed to find a violation of Article 14 (right to equality) in some domestic violence cases.

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226 The ECHR invoked the ‘living instrument’ principle for the first time in *Tyrer v The United Kingdom* App no 5856/72 (ECHR, 25 April 1978) para 32.
228 *MG v Turkey* App no 646/10 (ECHR, 22 March 2016) paras 93, 94, 106; *Halime Kılıç v Turkey* App no 63034/11 (ECHR, 28 June 2016) paras 114-5; *Talpis v Italy* App no 41237/14 (ECHR, 2 March 2017) para 129; *Bălșan v Romania* App no 49645/09 (ECHR, 23 May 2017) para 79
229 Interview with Acar (n 13)
230 See the section ‘The Convention as a Gender Equality Convention: Taking the Dominance Approach?’ in Chapter 4.
231 *A v Croatia* App no 55164/08 (ECHR, 14 October 2010); *Halime Kılıç v Turkey* App no 63034/11 (ECHR, 28 June 2016)
‘This Convention shall not affect obligations arising from other international instruments to which Parties to this Convention are Parties or shall become Parties and which contain provisions on matters governed by this Convention.’

In the explanatory report of the Convention, the drafters elaborated this article by stating that the Convention harmoniously coexists with other treaties – whether multilateral or bilateral – or instruments dealing with matters which the Convention also covers.\(^\text{232}\) This statement does not say much other than expressing that the drafters were particularly careful about the Convention not to interfere with the judgements or comments of the other institutions. However, the drafters went on to state that the main aim of the Convention is to strengthen the protection for victims by assuring them of the highest level of protection.\(^\text{233}\) The word ‘highest’ here is important. It can be argued that whatever approach provides the higher protection, regardless of whether it is of the Istanbul Convention or any other instrument, should prevail. In taking a victim-centred approach, where the best interests of victims are prioritised, to suggest otherwise would be problematic for the purpose of this thesis.

It could also be argued that the ECHR constitutes lex generalis in the context of violence against women, while the Istanbul Convention constitutes lex specialis, owing to being a law specifically dealing with violence, across the Council of Europe. This being the case, in accordance with the lex specialis derogat legi generali principle,\(^\text{234}\) the provisions of the Istanbul Convention and the GREVIO’s interpretation should prevail over the ECHR. In arguing this, it should not be ignored that the extensive positive obligations requiring financial sources in the Istanbul Convention would go well beyond the scope of the ECHR, which is liberally constructed and predominantly negative rights oriented. Although this is the case, the ECtHR should aspire to catch up the standards of the Istanbul Convention by using its ‘positive obligations’ or ‘due diligence’ principles in the biggest extent possible.

\(^\text{232}\) Council of Europe Explanatory Report to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (11 May 2011) CETS 210), para 363
\(^\text{233}\) ibid para 364
\(^\text{234}\) This phrase conveys that in resolving a conflict between two norms, the more specific law prevails over the general law. See Nancie Proud’homme, ‘Lex Specialis: Oversimplifying A More Complex and Multifaceted Relationship?’ (2007) 40:2 Israel Law Review 356, 382
Overall, GREVIO resembles the UN treaty bodies in its monitoring procedure, including the CEDAW Committee, despite certain differences. This similarity inevitably causes doubts on its efficiency, especially considering that the UN treaty bodies have been suffering from various functional problems. These problems have been subject to numerous studies that brought different suggestions for a more efficient supervision of the enforcement of the instruments.\(^{235}\) Alongside the problems on the side of the supervisory bodies, such as the unevenness of the concluding observations in their length and the restricted time that the CEDAW Committee has had for their meetings,\(^{236}\) the most problematic aspect has been the states’ reluctance and failure to report to the Committee. In fact, state parties have prevalently failed to report to the Committee at all or they have reported late or insufficiently.\(^{237}\) In relying on her long experience of being a member of the CEDAW Committee, Schöpp-Schilling states that many state parties have failed to address the issues of legal reform or adopt programmes to improve the situation of women, even though they ratified CEDAW years ago.\(^{238}\)

This brings the general problem concerning the enforcement of human rights instruments to the fore, especially through the fact that states’ compliance with their international obligations largely depends on their political will.\(^{239}\) Although these instruments guarantee a wide range of rights for individuals, these rights are being violated by the states. In these cases, the international human rights law mechanism mostly fails to declare effective sanctions for the violating states. This is simply due to the fact that the statements and decisions of the bodies that are exercising monitoring cannot go beyond shaming or gentle persuasion, since they are not authorised to order financial fines (except the ECtHR), imprisonment and so on in the case of a breach. In


\(^{236}\) Ronagh J A. McQuigg, ‘The Responses of States to the Comments of the CEDAW Committee on Domestic Violence’ (2007) 11:4 The International Journal of Human Rights 461, 473

\(^{237}\) Schöpp-Schilling (n 235) 204; Merry (n 101) 958

\(^{238}\) Schöpp-Schilling (n 235) 204

other words, they have no official teeth.\textsuperscript{240} For this reason, human rights law is frequently criticised by scholars in that ‘it operates more in rhetoric than in reality.’\textsuperscript{241}

The question to be posed hereupon is how can the Istanbul Convention overcome these problems that are occurring on a similar enforcement system of the existing instruments. It is true that these problems seem likely to be experienced by GREVIO and that the lack of an individual complaints mechanism is a negative aspect that contributes to this presumption. GREVIO also does not have a judicial body such as the ECtHR, which can issue fines on the states that violate their responsibilities. However, there are promising aspects of the Convention in terms of its efficiency to promote the commitment of states to take appropriate measures to protect and empower women when domestic violence is at stake. First of all, it cannot be disregarded that GREVIO has many tools, including the evaluation of state reports, the adoption of general recommendations and a special inquiry procedure which drives state parties to comply with the obligations arising out of the Convention. Furthermore, considering that the ECtHR has always taken into account the other regional and international legal developments in its interpretation of the scope of rights (in order to make the ECHR a ‘living instrument’), it is evident that the Istanbul Convention will also be referred to by the Court in cases regarding violence against women.\textsuperscript{242} Secondly, the adoption of the Convention and GREVIO should be evaluated not only as a legal development, but as a political commitment of Europe to fight against gender-based violence under a stronger legal framework. GREVIO and its works put violence against women, including domestic violence, to the global agenda which will ultimately ensure gender-based violence to be taken more seriously. However, it remains to be seen whether GREVIO will develop inventive and more efficient methods on its monitoring process as the first supranational machinery devoted to the issue of violence against women in Europe.

\textsuperscript{240} Ronagh J A. McQuigg, ‘The Responses of States to the Comments of the CEDAW Committee on Domestic Violence’ (n 236) 473-4
7. Conclusion

This chapter has demonstrated that the Istanbul Convention has succeeded in filling the three main gaps that previously could not be addressed by other human rights instruments while dealing with domestic violence. First of all, through the Istanbul Convention, domestic violence obtains for the first time the identity of an independent human rights violation in a legally-binding treaty in Europe. Secondly, the Istanbul Convention employs a strong concept of equality in its understanding of domestic violence on a legally-binding basis. Thirdly, the Convention achieves to move state measures which other bodies used to articulate in a fragmented way to a holistic structure through its 4(P)s principle and to a legally secure foundation.

All of these achievements of the Istanbul Convention strongly challenge the liberal conceptualisation of domestic violence and, in fact, satisfy the radical feminist reading of the problem. By defining domestic violence against women as an independent human rights violation, the Istanbul Convention challenges the male standard of rights which stems from the construction of rights within liberal philosophy. In fact, the Convention recognises the unique harm that arises out of domestic violence in its own terms, instead of leaving it to be addressed under different rights that are fundamentally constructed to serve to male interests. This is in compliance with radical feminism, which advocates for a legal structure where harms against women are recognised independently and without proximity to male interests.

In this analysis, it has also become evident that the Istanbul Convention employs the equality approach of the dominance theory of MacKinnon. In fact, the Convention recognises all forms of violence against women, including domestic violence, as a form of discrimination against women without requiring any proof of states’ intention to discriminate or the unequal treatment of women before law. The Convention does this by confirming the link between the historical power inequality against women and all forms of violence contained within its scope, and this entirely mirrors the dominance theory. This is in contrast to the liberal formal equality understanding, which would require states’ intentional discrimination against women or the treatment of women differently than men for a discrimination claim to be successful in a domestic violence case. Furthermore, the Convention employs a dominance equality understanding on a
legally-binding basis, which has not happened before within the human rights law structure, except under the Convention of Belem do Para.

It has also been revealed that by articulating state responsibilities in a comprehensive and holistic way through its 4(P)s policy, the Convention addresses the structural nature of violence, which had faded from gender-neutrally-drawn liberal rights. In fact, owing to the formal equality understanding of liberal philosophy, domestic violence loses its aspect of being a group-based problem of women and tends instead to be addressed individually in each case. In contrast to this, the radical feminist reading emphasises the systematic and structural nature of violence. The Istanbul Convention aims to address the structural nature of violence by obliging states to take all measures holistically, with a gender-sensitive policy, and by establishing co-operation between each state actor. As the previous chapter argued, comprehensive state measures to be taken to address domestic violence have never been imposed in a legally-binding treaty before. Taking all these three points together, it would not be wrong to argue that the Istanbul Convention heralds a shift from a liberal to a radical feminist conceptualisation of domestic violence within the human rights law structure.

This chapter has also indicated that the Convention may be criticised as taking a universalist stance by ignoring the multicultural aspects of violence against women. However this research has argued that the Convention must be considered as an instrument that situates women’s equality higher than any cultural justifications, instead of being placed in the spectrum between the artificial poles of universalism or cultural relativism.

The chapter has also demonstrated that the implementation mechanism of the Istanbul Convention is not immune from the problems that other human rights law instruments have been commonly experiencing. It is evident that the monitoring body of the Convention, GREVIO, is established in a fairly similar framework to the UN treaty bodies and, therefore, the general problems surrounding these bodies, such as states’ failure to report in a timely or sufficient manner, are likely to be also experienced by GREVIO. Moreover, the fact that GREVIO is not authorised to receive individual complaints contributes to the concerns on the effectiveness of the Convention’s monitoring system. It remains to be seen whether the Istanbul Convention will set up more innovative monitoring mechanisms and broaden the scope of its tasks, or whether
the CoE will create an individual complaint mechanism through a Protocol. This is, according to Acar, highly likely to occur sometime in the future, in a similar way to the experience of CEDAW.243

243 Interview with Acar (n 13). In fact, the Optional Protocol to CEDAW (adopted 6 October 1999, entered into force 22 December 2000) UNTS 2131 83 authorised the CEDAW Committee to receive complaints (referred to as communications) from individuals or group of individuals claiming to be victims of a violation of any of the rights set forth in CEDAW by the state party in Article 2.
CHAPTER 5

THE ISTANBUL CONVENTION: A RADICAL FEMINIST READING

1. Introduction

The previous chapter has demonstrated that the Istanbul Convention is capable of addressing three main gaps that previously existed within human rights law framework, in the context of domestic violence. It is argued that in filling these gaps, the Istanbul Convention challenged the liberal construction of rights, therefore indicating a shift from a liberal to a radical feminist conceptualisation of domestic violence in international human rights law. This chapter aims to take the analysis of the Convention in the light of the radical feminism further, in order to securely conclude that the Convention constitutes a radical feminist instrument.

Pursuing an answer to this broad question, the chapter focuses on two main critiques developed by radical feminists against the liberally-constructed nature of rights. The first is the public/private dichotomy and the second one is the individualistic nature of human rights. In fact, it was underlined in the second chapter that these two components of the structure of rights are the direct implications of liberalism and that they have been more strongly challenged by radical feminism compared to other feminist approaches. This research has also demonstrated in the third chapter that the public/private dichotomy has been weakening on the basis of the due diligence principle. This chapter investigates whether the Istanbul Convention takes this challenge further than the other human rights instruments. Furthermore, it questions whether it could be argued that the Convention delivers a stronger challenge than CEDAW to the individualistic nature of rights.

Confirming that the Convention achieves this, the chapter also addresses the potential critiques that would arise against the Convention’s challenge to the liberal construction of rights. It analyses whether the strong interference of the Convention to the private sphere could be detrimental to women’s freedom and agency in different contexts. Moreover, it questions whether an emphasis on a collective understanding of rights could raise the risk of the prioritisation of group concerns over individual ones.
This chapter also aims to bring a theoretical analysis to the criminalisation approach of the Istanbul Convention, which came to the fore in the preceding analysis. It was argued that the Istanbul Convention obliges states to criminalise certain types of domestic violence against women, alongside civil law remedies. However, the criminalisation approach has led to a divide among feminists. While some argued that the criminalisation of gender-based violence was inherently in contrast to feminist ideals and values, others emphasised that it was in compliance with feminist thoughts, as it could be an empowering tool for women if applied for egalitarian purposes. This chapter handles these discussions within the radical feminist theory, and particularly the dominance model. It should be underlined that this part of study is only limited to the conceptual analysis of the criminalisation; its practical efficiency will be examined in the following chapter, when looking at Turkey as a case study. In the light of all these conceptual examinations, this section argues that the Istanbul Convention raises a strong radical feminist voice.

1. A Blow to the Public/Private Dichotomy: Too Much Intervention in Women’s Privacy?

As explained in the second chapter, modern liberal theory imposes a free, autonomous, reasonable model of the human as the subject of rights, since the legal doctrine is based upon a liberal political philosophy within international human rights law. Uncovering this concept of autonomy, it is seen that liberal ideology places an emphasis on individuals being free from state power and interference. This is done by having a private sphere where they can exercise their autonomy freely, as long as it is not harmful to the privacy of the other individuals. In fact, protection of individuals from state tyranny underlies liberalism as the basic purpose. This understanding inevitably brings about the division between the public and private spheres since, while individuals are to be protected from state tyranny in the former, they are to be left free in the latter. This separation is visible throughout the entire human rights law structure, as analysed previously.

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Feminist responses to the issue vary considerably across different schools, as demonstrated in the second chapter. In fact, many liberal feminists stand in line with this dichotomy, since they fear that melting the line between the public and private would authorise states to introduce more regulation. This could therefore interfere with the privacy of women so as to destroy their personal freedom, as seen in the context of pornography. These feminists perceive women as autonomous and self-controlling individuals just like men and they believe that as long as this liberal autonomy is provided to women in public in the same way with men, justice would be achieved across sexes. For this reason, the vast majority of liberal feminists’ writings have not dealt with the issues of women occurring in private sphere, like domestic violence, rape, or sexual assault; instead, they focused on the ones pertaining to the public sphere, such as the right to equal pay, equal access to education, women’s right to vote, and so on. It should be reminded here that this research has argued that radical feminism brings the most prominent theoretical ground to challenge the dichotomy, as domestic violence turns out to be a political problem in a real sense, due to its monolithic explanation of violence as a matter of power inequality between women and men. As can be seen, this critique mainly stems from their acknowledgement of the subordination of women as a group in all life settings, and this confirmation establishes a firm ground to invoke for state interference into the private sphere, where women are located in a secondary position. MacKinnon, leading the dominance theory within radical feminism, has been one of the biggest critics of this division; she has advocated for the use of law, particularly the right to equality guarantees, so as to bring greater public regulation in the private sphere of home and family, including the issue of domestic violence against women.

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4 Ibid 831; Ward and McGlynn underline that one of the founders of liberal theory, John Start Mill, did not write on the issues of domestic violence or prosecution. He only mentioned domestic violence in his writings about marriage. See Ian Ward and Clare McGlynn, ‘Women, Law and John Stuart Mill’ (2016) 25:2 Women’s History Review 227, 233
5 For a detailed discussion on this, see the section ‘Public/Private Dichotomy’ in Chapter 2.
6 Charlesworth and Chinkin, Boundaries of International Law (n 1) 43; Catharine A Mackinnon, Are Women Human? (Belknap Harvard 2006) 4
For the last three decades, the public/private dichotomy has been eroding within the international human rights law instruments, judicial and quasi-judicial bodies, on the basis of the principle of due diligence, even before the adoption of the Istanbul Convention. As analysed in-depth in the third chapter, the principle of due diligence has constituted the ground for the CEDAW Committee, ECtHR, and the Inter-American Commission on Human Rights to find states in violation when they failed to address domestic violence against women. However, as previously discussed, none of these bodies have confirmed the legally enforceable right to be free from violence for women. Most of the developments have occurred in soft-law instruments and as they did not have a specific violence instrument, they could only find the violation of different rights when states had failed to address domestic violence, and they could not impose comprehensive legally-binding measures to be taken by states to eliminate the problem.

The Istanbul Convention takes these steps much further. Above all, by declaring domestic violence against women as an explicit human rights violation for the first time in Europe, as a legally binding treaty, the Convention delivers the biggest blow to the dichotomy ingrained in international human rights law. In fact, doing this, the

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9 For a comprehensive analysis of this point, see the ‘Imposition of State Responsibilities in a Fragmented and DispersedManner’ section in Chapter 3.
10 Article 3(a) of the Istanbul Convention
Convention gives the message that there is no distinction within the human rights law structure between gendered issues happening in public and private spheres, in terms of state responsibility. Assisting this declaration through its 4Ps structure (detailed measures for (p)revention of violence, (p)rotection of victims, (p)rosecution of perpetrators and adoption of gender-based (p)olicies), the Convention addresses every piece of the legislation that state parties establish for the elimination of domestic violence. The Convention ensures guidance for states, from education curriculum to the training of law enforcers, from criminal law reform to establishing shelters and crisis centres. In other words, the Convention does not confine itself to invoke state responsibility in the private sphere by declaring that if the state had failed to address violence in domestic sphere, it would have violated the human rights of victims. It goes far beyond this by providing a detailed and comprehensive guidance for states on how to address the problem and its roots. This approach does not leave space for state parties to avoid addressing the problem by focusing on the private nature of domestic violence. It should also be noted that the Istanbul Convention provides the first definition of the principle of due diligence on a legally binding ground, although in the exact same terms as the other bodies. Therefore the principle which has been used to invoke state responsibility for the acts of private individuals has moved to legally secure ground for the first time. Overall, the Convention’s approach is in full compliance with the argument of feminists like MacKinnon that state and law must get involved to the maximum extent, in order to resolve women’s issues in the private sphere.

It is beyond doubt that the starting point of the Convention, as well as its underlying philosophy, is based on the destruction of state passivity in the private sphere towards

11 Article 14
12 Article 15
13 The section of ‘substantive law’ (Articles 29-48) together with the ‘prosecution pillar’ (Articles 49-58) of the Istanbul Convention.
14 Article 23 and 25
15 For example, the drafters of the Convention stated that Article 11 regulating ‘Data Collection and Research’ ‘requires Parties to undertake to support research efforts in order to pursue further knowledge of the root causes and effects of the problem, incidences and conviction rates, as well as of the efficiency of measures taken in implementation of the Convention.’ See, the Explanatory Report to the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (11 May 2011) CETS 210 (Hereinafter, Explanatory Report) para 77
16 Article 5(2) of the Istanbul Convention states that ‘Parties shall take the necessary legislative and other measures to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention that are perpetrated by non-State actors’.
17 See MacKinnon’s discussion about sex work and pornography in the ‘Public/Private Dichotomy’ section in Chapter 2.
the acts of non-state actors, i.e. perpetrators of violence. In the face of this strong invocation of state interference to the private sphere of women, the question to be posed becomes whether this approach holds a potential threat to women’s freedom in their private settings. In fact, this is a concern of many feminists, that such a comprehensive authority given to the states could be abused by the state itself so as to limit women’s freedom in different contexts including sexuality, marriage etc.\(^\text{18}\)

For example, Karen Engle contends that the critiques towards this dichotomy slowly ingrain the message that ‘private’ is necessarily bad for women. She refers to the liberating potential of the dichotomy for women by constituting the ground for their right to abortion, and to sexual and bodily freedom.\(^\text{19}\) She goes on to argue that this over-emphasis on the division between public and private spheres promotes the lack of interest in important parts of women experiences that belong to the ‘public’ sphere.\(^\text{20}\) Moreover, it is commonly highlighted by feminists that the dichotomy is not a monolithic institution having the same and consistent eliminative effect on women in each context. It is rather a slippery slope which functions to ensure the protection of women in many instances, therefore the full abandonment of the public/private dichotomy so as to extend legal regulations to all private activities would not be a useful strategy on behalf of women.\(^\text{21}\)

Applying these concerns to the specific context of the Istanbul Convention, it needs to be addressed whether the Convention holds a potential threat to the rights and agency of women in the private sphere. This refers particularly to the assertive obligations imposed upon states to regulate violence against women in domestic settings. Returning to the discussions on a potential withdrawal from the public/private dichotomy, it would be impossible to disagree with the fact that the implementation of the dichotomy does not always contribute to the maintenance of the gendered constructions that have destructive effects on women. Looking beyond women’s issues, Catherine Moore examined how the right to privacy affirmed by the ECtHR and the Human Rights Committee promoted the right of gay men to exercise their sexuality, therefore

\(^\text{19}\) Engle (n 2) 121
\(^\text{20}\) ibid
\(^\text{21}\) Charlesworth and Chinkin, \textit{Boundaries of International Law} (n 1) 59
contributing to the erosion of the gendered heterosexualism that is well-ingrained in both domestic laws and international human rights law.22 The rejection of the freedom of those individuals in their personal life had served to protect the regulation of state preference, status quo, heterosexualism and the dominant culture.23

Confirming the variable effects of the public/private dichotomy on different individuals and different contexts, the next step is to investigate the way in which this correlates to the issue of domestic violence. As Chinkin argued, the question to be asked is in each context is ‘Who does denial of state responsibility for the actions of non-state actors protect- the state, individual freedom of action, or the most powerful who are able to remain outside the scope of international regulation?’24 In the context of domestic violence, the states’ reluctance to interfere with the issue obviously protects the perpetrator at an individual level and the culture of male dominance that is being manifested through violence at an institutional level. In fact, as repeatedly stated, this research perceives equality as a matter of power distribution, and domestic violence as a reflection of male dominance and women’s subordination, in a parallel line to the theory of MacKinnon. Affirming this, the binary concept of public and private spheres, where the latter is understood as the field of non-interference by law, merely serves to protect the patriarchal culture, status quo and the power holders who are men in the case of domestic violence, in contrast to the case of homosexual men mentioned above.25

It should also be reiterated that under the same liberal construction of the dichotomy, states regulate various issues staying within the private sphere of women’s life, such as marriage and property rights, while they have been historically reluctant to bring regulations for domestic violence.26 Taking into consideration this manipulative nature

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23 ibid 104
26 The ‘family’, as the ultimate symbol of the ‘private’ sphere, is subject to legal supervision, at least in relation to rights as to marriage, consent, and child-rearing. See Article 23 of the International Covenant
of the dichotomy, states should not use this as an excuse for not interfering in cases of domestic violence, which is entirely gendered and harmful for women, and the Istanbul Convention seems on the same line with this sort of thinking, in a rightful way.\textsuperscript{27}

2. The Shift from an Individual Rights to a Collective Rights Understanding

As stated in the second chapter of this study, the model of the human within international human rights law is based on the idea of individualistic, autonomous and rationally maximising agents, which also lies as a foundation of liberal political philosophy.\textsuperscript{28} In other saying, the content of rights are presupposed to be shaped only by individual interests and therefore, rights are constructed so as to be initially claimed individually and equally by right holders. In this understanding where individuals are posited as atomistic, rights lose sight of social relations by only considering them extrinsic and accidental. As individuals are the basic and sole constituents of society, social phenomena are to be explained by reference to actions of individuals and therefore, groups and collective goods can never be a source of value.\textsuperscript{29}

This individualistic nature of human rights has been the constant target of numerous feminists on the ground that within this neutral-seeming individualism, the whole legal system becomes a source of promoting male interests.\textsuperscript{30} Put simply, the individual in human rights law is merely individual men. Explaining how individualism particularly

\textsuperscript{27} It should be underlined that the attitude of the Istanbul Convention is in compliance with the recent approach of the ECtHR in domestic violence cases, where it was stated that right to privacy of women does not necessarily mean to leave women alone in their privacy, since domestic violence cannot be considered as a part of their private life, but is a factor impeding them to seize their freedom in privacy. See \textit{Bevacqua and S v Bulgaria} (n 8) para 83


\textsuperscript{29} Peterson, ‘Whose Rights?’ (n 28) 312

serves male interests, feminists have focused on various components of individualism and its differing effects. The second chapter briefly demonstrated some reflections of this individualism on rights. Hereupon, it is important to remind and particularly focus on two of them: firstly, the liberal focus on individual rights obscures the systematic pattern of disadvantage and exclusion that characterise women’s subordination. In fact, in this atomistic approach, there is not any consideration of or any interference with the power inequality between individuals. As argued before, MacKinnon has developed the approach which most criticises the individualistic nature of rights, compared to other feminist schools, through her dominance theory based on the confirmation of the subordination of women as a group, due to historical and systematic power inequalities. In fact, she formulates a legal equality understanding on this group-based approach. She expresses that:

‘Women are men’s equals as groups. Real equality rights are collective in the sense of being group-based in their essential nature. Individuals may suffer discrimination one at a time, but the basis for this injury is group membership.’

Applying this reading to the context of gender-based violence, MacKinnon states:

‘The abuse is neither random nor individual. The fact that you may know your assailant does not mean that your membership in a group chosen for violation is irrelevant to your abuse. It is still systematic and group-based.’

In the construction of rights, gender as one of the most prominent facilitators of this power inequality is not referenced on any ideational or practical dimension. Gender inequality as a social construction is deeply entrenched in economic, social, cultural life across the world, yet human rights, in their origin, are not designated to address power inequalities stemming from gender dynamics. In fact, human rights law instruments

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31 Lacey (n 30) 20; Susan Moller Okin, ‘Political Liberalism, Justice and Gender’ (1994) 105:1 The University of Chicago Press 23,42
32 Lacey (n 30) 39
33 Catharine A Mackinnon, Are Women Human (n 6) 5
34 ibid 22
37 Hilary Charlesworth, Christine Chinkin and Shelly Wright, ‘Feminist Approaches to International Law’ (1991) 85:4 American Journal of International Law 613, 635. It may be thought that the critique of Charlesworth, Chinkin and Wright is outdated. It should be noted at this point that the statement is referring to the architecture and the initial logic of rights. This would not mean to ignore the attempts of
were originally established in a gender-neutral, in other words, in a gender-symmetrical way. Gender-based domestic violence against women is one of the reflections of gender inequality and patriarchal force, as expressed repeatedly in this study, and it is one issue that international human rights law had failed to address up until two decades ago within this individualist construction. In fact, the instruments which have been subject to this study are mostly gender-neutral and have kept their silence on gender-based violence, except the Convention of Belem do Para.\textsuperscript{38} The second component of individualism is in a cause and effect relation with the first one mentioned-above: collective interests of women or any other politically disadvantaged are excluded from the scope of protection of rights.\textsuperscript{39} In the language of human rights law, the legal subject is an individual therefore the possibility that women could be sharing a common interest, through the similar detrimental effects of gendered constructions on them, is entirely disregarded.\textsuperscript{40}

This research has revealed that for at least the last four decades, this hyper individualism originating from liberal philosophy has been easing off within international human rights law. In fact, the UN has adopted various political documents\textsuperscript{41} and legally binding conventions\textsuperscript{42} covering various aspects of women’s rights, and all of these culminated in CEDAW, which is considered as the women’s bill of rights.\textsuperscript{43} Focusing on the elimination of discrimination against women through the confirmation of women’s collective interest as an international human rights law instrument, it could be claimed that CEDAW is located in between a universal conception of human rights and a woman centred political focus.\textsuperscript{44} It forms a collectivist challenge to liberal individualism.\textsuperscript{45} In fact, CEDAW is constructed to defeat two reflections of individualism which potentially have detrimental effects on women. First

human rights bodies—which have been the overall subject of this thesis— to reinterpret the very same rights so as to respond to the gendered dynamic of life subordinating women.


\textsuperscript{39} Suhaila and others (n 28) 107

\textsuperscript{40} ibid


\textsuperscript{42} For example, one was the UN Convention on the Political Rights of Women (adopted 20 December 1952, entered into force 7 July 1954) A/RES/640(VII)

\textsuperscript{43} Howard-Hassmann (n 41) 435

\textsuperscript{44} Lacey (n 30) 22

\textsuperscript{45} Roth (n 36) 189
of all, it aims to ensure substantial equality by transforming structural gender relations leading to the subordination of women.\textsuperscript{46} Structural disadvantages that women are being collectively subject to constitute the focal point of the Convention on its determination of measures to be taken by state parties. Therefore, the Convention’s approach involves the structural factors affecting individuals and their choices, by challenging the presupposition of individuals as independent from social phenomena. Secondly, CEDAW explicitly confirms that women share a collective interest by simply holding groups of women as right holders and legal subjects in their own context.\textsuperscript{47}

Yet the Istanbul Convention takes this shift to a further extent. By defining violence against women, including domestic violence, as an explicit human rights violation and being specifically devoted to the elimination of gender-based violence, the Convention goes one step further than CEDAW with regards to the confirmation of collective remedies for women as a group. In fact, the Istanbul Convention focuses on more specific women’s issues compared to the broader aim of CEDAW, which is the promotion of substantive equality between women and men. It confirms that women across Europe and the world can be collectively affected by a more particular socially constructed problem, i.e. violence. Considering that the Convention defines domestic violence so as to contain both gender-based and gender-neutral forms, and it expressly states that women victims are at the centre of its focus,\textsuperscript{48} the Convention’s confirmation of women’s shared interest in the specific context of the eradication of domestic violence becomes more evident.

It also should be underlined that many states have made reservations on various provisions of CEDAW on the basis of religion, particularly Islamic sharia law.\textsuperscript{49} Although some of these reservations have been criticised by the CEDAW Committee in


\textsuperscript{47} Lacey (n 30) 49

\textsuperscript{48} Article 2(2) of the Istanbul Convention.

\textsuperscript{49} Although few Muslim countries ratified CEDAW, all of those who did so have entered reservations to its substantive provisions on several grounds. Bangladesh, Egypt, Libya, Tunisia have all invoked Islam as the reason for making these reservations. See Ann Elizabeth Mayer ‘Cultural Particularism as a Bar to Women’s Rights: Reflections on the Middle Eastern Experience’ in Julie Peters and Andrea Wolper (eds), \textit{Women’s Rights, Human Rights: International Feminist Perspectives} (Routledge, 1995) 176, 178. Also refer to the ‘Universalism vs Cultural Relativism: Is the Istanbul Convention Universalist?’ section in chapter 4.
arguing that they are in contradiction with the object and purpose of the Convention,\textsuperscript{50} the text of CEDAW allows for a broad scope of reservations from state parties.\textsuperscript{51} This could be interpreted as a type of sacrifice of CEDAW from the collective group interests of women, particularly the ones from Islamic countries. In contrast, the Istanbul Convention grants a far limited space for reservations to state parties (only seven provisions) and neither of the listed provisions refers to forms of violence underpinned by socio-cultural factors or religious practices.\textsuperscript{52} This indicates that the Istanbul Convention recognises more firmly and inclusively the collective interest of a broader group of women to be free from violence, with no tolerance to justifications on the ground of culture and religion.

There are numerous potential critiques which could arise against this group-based approach, in which collective remedial rights are promoted. One of the main concerns in this regard would be the potential competition between the rights of individuals and groups having collective interests, which might result in the prioritising of the latter over the former.\textsuperscript{53} It is argued by some theorists that traditionally, the doctrine of human rights has been to protect individuals from the power of groups, whether or not that power is institutionalised.\textsuperscript{54} They go on to argue that by bringing this perception of collective interest, the law would jeopardise the individual rights and interests of people who are considered to belong to the group, since group rights are often rights claimed against, or over, individuals.\textsuperscript{55}

Confirming the legitimacy of this concern, whether the so-called competition between individual and group rights would arise depends on which approach the Istanbul Convention would take when facilitating this group-based right to be free from violence. Specifically, there are two approaches in this regard: the corporate and

\textsuperscript{51} A number of reservations were entered in the context of the Article 5(1) of CEDAW which requires state parties ‘to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.’ See Olga Jurasz, ‘The Istanbul Convention: a new chapter in preventing and combating violence against women’ (2015) 89:9 Australian Law Journal 619, 626
\textsuperscript{52} Article 78(2); (3) of the Istanbul Convention. The listed provisions do not refer to forms of violence against women underpinned by religious or social factors. Jurasz (n 51) 626
\textsuperscript{53} Peter Jones, ‘Human Rights, Group Rights, and Peoples’ Rights’ (1999) 21:1 Human Rights Quarterly 80, 81
\textsuperscript{54} ibid 82
\textsuperscript{55} ibid 81-2
collective conception of group rights.\textsuperscript{56} In the corporate conception, the holder of the right is deemed as the group, conceived as a single, integral entity. The right is not held jointly by the several individuals who make up the group, but by the group as a unitary identity.\textsuperscript{57} In the collective understanding, however, a group right is held jointly by the individuals composing the group. The group has no interest or presence that cannot be explicated as that of its members. This being the case, even though group and individual rights are conceptually different, the collective understanding perceives them to stem from the same values and concerns in a complementary, but not a competitive way.\textsuperscript{58}

This approach originates from the idea that the most vital issues to human beings relates to ‘goods’ and ‘bads’ that people experience collectively, rather than individually, and to legally ignore this would lead to an unrealistic justice.\textsuperscript{59}

In the face of these two different approaches, it is visible that the Istanbul Convention conceptualises the right of women to be free from domestic violence in a collective, rather than corporate way. In fact, the Convention does not derogate from an individual woman’s right to be free from violence or does not create a tension between the other rights of women in concern. The Convention does not constitute any impediment for women to apply to the monitoring body of other international organisations and argue for the violation of their specific rights. The only reason leading the Convention to bring women together under a legally-binding structure, as domestic violence victims, is to point out the structural nature of violence affecting women collectively.\textsuperscript{60} When women’s right to be free from domestic violence is drawn in an individual fashion, the gendered facet of the issue is fades away on a legal platform. By confirming the right of women to be free from domestic violence, the Convention achieves to fulfil the collective need of women arising out of the gendered constructions, and therefore gets closer to the collective remedial rights approach, instead of a liberal individualism.\textsuperscript{61}

\textsuperscript{56} Peter Jones, ‘Group Rights and Group Oppression’ (1999) 7:4 The Journal of Political Philosophy 353
\textsuperscript{57} Jones, ‘Human Rights, Group Rights, and Peoples’ Rights’ (n 53) 86
\textsuperscript{58} ibid 88
\textsuperscript{59} ibid 81
\textsuperscript{60} Explanatory Report to the Convention (n 15) states in para 25 that ‘(The Convention) firmly establishes the link between achieving gender equality and the eradication of violence against women. Based on this premise, it recognises the structural nature of violence against women and that it is a manifestation of the historically unequal power relations between women and men.’
\textsuperscript{61} Howard-Hassmann (n 41) 433-4
It also proves that group and individual rights are not necessarily in a competition, they can rather be complementary. In fact, instead of igniting a clash between women’s right to be free from violence and other rights, it aims to empower women and enable them to practice their other rights in an efficient way. As revealed in the previous chapter, the Convention obliges states to promote substantive equality between women and men, including by empowering women.\(^{62}\) It also should be reiterated that the Convention is constructed on the confirmation that without addressing the structural inequality between women and men at institutional level, there is no way to eliminate violence against women at an individual level. Even this aspect of the Convention sufficiently proves how women’s group-based and individual rights to be free from domestic violence are complementary, since respect and concern for the individual drive both.\(^{63}\)

This approach of the Istanbul Convention bears a resemblance to CEDAW. In fact, CEDAW does not create dissolution between the universal rights of individual women and their collective right to have substantive equality. Rather, it affirms that tackling the special needs of a particular group, in this case women, is a precondition to the realization of the universal human rights of individual women making up the group.\(^{64}\) The complementarity and continuity identified in the relationship between women’s collective and individual rights is similar to the Istanbul Convention. This being the case, to argue that the Istanbul Convention holds a revolutionary approach with regards to women’s rights within the human rights law framework would not be accurate: it does not invent a solid women’s group right to be free from domestic violence, which is independent from the existence and rights of individuals, in contrast with the corporate conception.\(^{65}\) It rather employs a collective conception of rights. Therefore, the concerns on the potential clashes and competition between group and individual rights lose validity in the context of the Convention. Instead, what the Convention achieves is to shift from a hyper individualism, where the individual is perceived to be independent, alone, self-reliant and self-controlled,\(^{66}\) to a collective remedial rights approach, which contains the social constructions and their influence upon individuals.

\(^{62}\) Article 1(b)
\(^{63}\) Jones, ‘Human Rights, Group Rights, and Peoples’ Rights’ (n 53) 90
\(^{64}\) Lacey (n 30) 49
\(^{65}\) Jones, ‘Human Rights, Group Rights, and Peoples’ Rights’ (n 53) 86
\(^{66}\) Howard-Hassmann (n 41) 433-4
The second critique towards this collectivist approach may come from anti-essentialist perspectives that question ‘whether women constitute a sufficiently unitary group for it to make sense to constitute them as a collective subject of special rights’, as analysed in the second chapter. In fact, the critique of essentialism always comes to the fore against any collective or group-based approaches to rights that unify women under the category of ‘woman’ and suggest large-scaled policies. In applying this to the Istanbul Convention, the question would then transform into whether the Convention envisages women as one unitary, homogenous group, so as to embrace that there is a female essence.

It is true that the Istanbul Convention is established on the confirmation of gender as the main determinant in the power relations between women and men, and women as a category being influenced from these relations in a particular way leading to their subordination. It needs to be recalled that, as said in the second chapter, one of the implications of essentialism of women is the affirmation of gender as a biological and innate feature. Looking at the Istanbul Convention, it becomes clear that this is not how gender is envisioned by the drafters. Article 3(c) defines gender as ‘socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men.’ It is apparent in this provision that the Istanbul Convention does not ground gender on biological givens, in contrast, renders it as a product of social constructions. Delving into more depths of this definition, as argued in the previous chapter, the part referring to the society’s determination of appropriate roles for women and men, underlines that gender is not founded only through individual traits, but is a result of constant interaction between society and individuals. In this regard, it is also apparent that power relations, as both the cause and result of gender constructions, are not considered fixed, biological or stable.

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67 Lacey (n 30) 50. For a lengthy discussion on anti-essentialism critiques, see the ‘Postmodern Feminism and Essentialism Critiques’ section in Chapter 2.
69 Lorena Sosa, Intersectionality in the Human Rights Legal Framework on Violence against Women: At the Centre or the Margins? (CUP 2017) 134
70 The previous chapter argued that this approach is parallel to the Candace West and Don H Zimmerman, ‘Doing Gender’ (1987) 1:2 Gender and Society 125, 125, 130, 149 and the concept of performativity developed by Judith Butler. See Judith Butler, Gender Trouble (Routledge 2007) 25-34
In the context of the Convention’s confirmation of the ‘woman category’, it should be underlined that the use of categories are not always harmful, rather they can be quite empowering on legal and political grounds for the individuals that are the members of the said category. For example, Crenshaw suggests that:

‘(…) to say that a category such as race or gender is socially constructed is not to say that that category has no significance in our world. On the contrary, a large and continuing project for subordinated people -and indeed, one of the projects for which postmodern theories have been very helpful- is thinking about the way power has clustered around certain categories exercised against others. This project attempts to unveil the processes of subordination and the various ways those processes are experienced by people who are subordinated and people who are privileged by them. It is, then, a project that presumes that categories have meaning and consequences.’

This approach of Crenshaw, referred to as the ‘positive deployment of identity categories’ by Conaghan, is what led international human rights law to achieve representation, integration and more importantly, to address the structural subordination that groups have traditionally been subjected to. If the confirmation of women as a category is removed for fear of overlooking the differences among them, the law loses the chance to mobilise the reforms, and therefore to address women’s problems in the first place. On the contrary, the confirmation of a collective identity based on basic needs and rights reflects a collective agenda of women against oppression and exploitation. By not confirming it, however, the possibility of enacting holistic measures to defeat a gendered issue such as domestic violence, which is prevalent across the world, is missed out and this leads to worse results.

One point to be highlighted is that some gendered issues tend to be more universal than others and ‘women’ may well be an appropriate category in the international context. Domestic violence is surely one of them, due to being well-proven to be prevalent across different cultures and societies. For example, in the case of female genital

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72 Joanne Conaghan, ‘Intersectionality and the Feminist Project in Law’ in Emily Grabham, Davina Cooper and others, Intersectionality and Beyond: Law, Power and the Politics of Location (Routledge 2009) 25
73 Charlesworth and Chinkin, The Boundaries of International Law (n 1) 55
74 Jane Krishnadas in Suhaila and others (n 28) 107
75 Charlesworth and Chinkin, The Boundaries of International Law (n 1) 55
mutilation, in which other identity factors such as religion, ethnicity and culture are more involved, to come up with a universal category of women would be more challenging.\textsuperscript{76} Having said this, one point to be reiterated is that all the progress realised with the purpose of advancing women’s rights within the human rights law framework has been achieved thanks to feminist activities in which ‘women’ as a category has been taken as the subject of rights. If the law had continued struggling with the question of ‘who are “women” anyway?’, there would not have been any grass-root activism and therefore, we would probably not have had CEDAW to begin with.\textsuperscript{77} The categorisation of women on the basis of their collective interests has opened the door for the effective use of the law with regards to women’s issues through a gendered perspective, even though it has not guaranteed the full realisation of their rights.

Confirming the efficacy of the use of the woman category is not to deny that the process of categorization, in other words naming, is itself an exercise of power, yet this power is not a one-way street and can and has been used as a resistance strategy by disempowered groups by granting them a social location.\textsuperscript{78} In this regard, the struggle is not to vacate or destroy these locations, i.e. categories, but rather to challenge the power that leads categories to have social and material consequences, namely, that makes them oppressed or oppressive.\textsuperscript{79} Doing this, developing tools responding to the intersection of multiple dimensions of identity is essential. Here is where intersectionality theory comes to the fore.

ii. The Istanbul Convention and Intersectionality

A key issue that is commonly raised in the context of group-based understanding of rights is whether the members of the said group are considered to have a single-faceted identity and whether intra-group differences are excluded on this platform where groups


\textsuperscript{78} Crenshaw, ‘Mapping the Margins’ (n 71) 1297

\textsuperscript{79} ibid 1297
are envisioned separate from each other.\textsuperscript{80} The second chapter provided a comprehensive explanation on the intersectionality theory that was coined by Crenshaw in 1989\textsuperscript{81} and since then, has been a popular concern among feminists. It needs to be analysed whether the Istanbul Convention is capable of recognising the violent experiences of women which occur at the intersecting points of their different characteristic grounds, i.e. race, sexuality, class and so on.

At the beginning of this analysis, it must be underlined that in its equality provision, the Convention keeps the scale of women’s identity dimensions broad. In Article 4(3) it obliges state parties to implement the provisions of the Convention,

\begin{quote}
‘without discrimination on any grounds such as sex, gender, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, sexual orientation, gender identity, age, state of health, disability, marital status, migrant or refugee status, or other status.’
\end{quote}

It is noteworthy to mention that this is the first time that sexual orientation and gender identity are recognised explicitly as protected grounds in a legally binding treaty. It is a positive development that the Convention does not engage only with gender, but also includes other dimensions of women’s identities within its scope. This does not readily mean that the Convention brings an intersectional approach while addressing violence against women, or more specifically, domestic violence. However, this is important to the extent that the drafters have indicated their recognition of the listed facets of women’s identity, and experiences influenced from these factors thereof.

Before putting the Istanbul Convention under the spotlight, it needs to be underlined that intersectionality is far from having an agreed definition or methodology.\textsuperscript{82} Although there has been an increase in the intersectional critique towards international human

\textsuperscript{81} Kimberle Crenshaw, ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’ (1989)1 University of Chicago Legal Forum 139
\textsuperscript{82} Sosa (n 69) 14; Gauthier de Beco, ‘Protecting the Invisible: An Intersectional Approach to International Human Rights Law ‘ (2017) 17 Human Rights Law Review 633, 639
rights law since the 1990s,\textsuperscript{83} it is still very much debated what is aimed to be achieved by intersectionality and what criteria should be employed for a successful application of the concept. The difficulties associated with developing a consistent and comprehensive analytical framework and interpretative consistency have led some to argue that intersectionality has not reached to be a theory,\textsuperscript{84} but is called an approach, a feminist paradigm,\textsuperscript{85} or a research paradigm.\textsuperscript{86} As a further example, Wendy Brown called intersectionality as a ‘legal strategy’ by distinguishing it from a ‘theory’ by arguing that the intersectionality concept does not illuminate power and subject production.\textsuperscript{87} While challenging the neat single axis approach resulted from the liberal grounds of law, intersectionality has been constantly challenged with difficulties in its theorisation.

There have been varying, sometimes contradicting, suggestions for the methodology of an intersectional approach. To name a few, Sandra Fredman called for a ‘capacious approach’,\textsuperscript{88} Lorena Sosa advocated the concept of ‘structural intersectionality’,\textsuperscript{89} Shreya Atrey suggested both ‘intersectional integrity’\textsuperscript{90} and ‘contextual comparison’\textsuperscript{91}, while Johanna E Bond supported the notion of ‘qualified universalism’,\textsuperscript{92} all of which put forward a different set of criteria and methodology for the term.

\textsuperscript{83} Ivona Truscan and Joanna Bourke-Martignoni, ‘International Human Rights Law and Intersectional Discrimination’ (2016) 16 The Equal Rights Review 103, 106
\textsuperscript{84} Shreya Atrey, ‘Book Review: Intersectionality in the Human Rights Legal Framework on Violence against Women: At the Centre or the Margins? By Lorena Sosa’ (2019) 41:2 Human Rights Quarterly 535, 536
\textsuperscript{85} Jennifer C Nash, ‘Re-thinking Intersectionality’ (2008) 89:1 Feminist Review 1
\textsuperscript{86} Ange-Marie Hancock, ‘When multiplication does not equal quick addition: Examining intersectionality as a research paradigm’ (2007) 5:1 Perspectives on Politics 63
\textsuperscript{87} Explaining why intersectionality fails to do so, she referred to the example of sexualisation of African-American women, arguing that the discussions on intersections of sex, race and class are not capable of explaining the particularities of the phenomenon. She stated that this particular sexualisation stems from deracination experiences specific to African-Americans, in combination with their particular histories of slavery, genocide, colonialism and immigration. Therefore, in each context, the power that produce race is a result of combination of different things, and thus for example, race in US is different to the one in France. See Katie Cruz and Wendy Brown, ‘Feminism, Law, and Neoliberalism: An Interview and Discussion with Wendy Brown’ (2016) 24 Feminist Legal Studies 69, 79.
\textsuperscript{88} Sandra Fredman, Intersectional Discrimination in EU Gender Equality and Non-Discrimination Law (European Commission 2016) 29
\textsuperscript{89} Sosa (n 69)
\textsuperscript{90} Shreya Atrey, ‘Lifting as We Climb: Recognizing Intersectional Gender Violence in Law’ (2015) 5:6 Onati Socio-Legal Series 1512, 1519-1520. In developing this term, Atrey gets the inspiration from right to integrity that is ensured in CERD. She explains that while ‘intersectional’ part in her approach addresses the unique nature of each intersecting discrimination case, the ‘integrity’ part manages to handle the wholesome nature of the implications of intersecting forms of discrimination on an individual.
\textsuperscript{91} Shreya Atrey, ‘Comparison in intersectional discrimination’ (2018) 38 Legal Studies 379
In overviewing the existing literature on this matter, there are a few essential points that this study suggests in defining and conceptualising intersectionality. First of all, the categorisations or names that are called to address intersectional discrimination should not promote stereotypes against certain groups by depicting them as weak, vulnerable or needy.\footnote{Fredman (n 88) 33, 86} This, in fact, only serves to fix certain individuals into a permanent category by ignoring the changing nature of power relations.\footnote{Fredman (n 88) 30-35} This takes us to the second point which is the necessity to avoid adding up new and infinitive subgroups, such as Black women, disabled minority women or lesbian women, which does nothing but falling into the trap of strict categorisation that intersectionality aimed to challenge in the first place. Conaghan expresses a similar concern that intersectional theory has evolved to be overly bound up with identity politics by serving to retain the stereotypical values attained to certain categories.\footnote{Conaghan, ‘Intersectionality and Feminist Project in Law’ (n 72) 30} Instead of focusing on the identity paradigm, as in who are those people experiencing the subordination, the intersectional discourse and method should lean its focus onto the power relations that create different and unique experiences in each specific circumstance.\footnote{Fredman (n 88) 31} Needless to say, any intersectional approach should also avoid connecting the vulnerability or specific experience of some women to innate and biological characteristics, as this leads to the simplest form of essentialism.\footnote{Sosa (n 69) 250-6} Overall, an intersectional approach in law should aim to detect and redress the root and structural causes of the intersectional discriminatory practices instead of being fully occupied by identity politics.\footnote{Truscan and Bourke-Martignoni (n 83) 107; Conaghan, ‘Intersectionality and Feminist Project in Law’ (n 72) 29; Fredman (n 88) 31}

In order to find out what the Istanbul Convention adds to the previous international human rights tools in terms of responding to the intersectional experiences of domestic violence victims, what has been achieved before the Istanbul Convention came to the fore should be analysed. Before moving onto the approach and jurisprudence of CEDAW Committee, ECtHR and Inter-American Commission which established the main points of comparison in this study, one issue should be emphasised, which arises as a common approach across all international and regional human rights mechanisms. The theoretical framework of human rights and the fragmented structure of the
international human rights law led to the adoption of instruments that are separated through rigid lines of characteristics, with separate UN conventions on gender, convention of race, disability and so on.\textsuperscript{99} This reinforces the impression that human rights law envisaged right holders to have a monolithic identity and was not originally capable of comprehending experiences of individuals that are associated with the intersecting facets of various identity surfaces.\textsuperscript{100} This has led, and is still leading, human rights monitoring bodies to struggle when they encounter the claims of discrimination arising from multiple grounds of characteristics at the same time.\textsuperscript{101}

However human rights law bodies have been taking positive steps in responding to such claims over the last two decades. Starting with CEDAW, it can be seen that there is not any direct reference to the intersectional or compounded discrimination in its text. There is no doubt that the Convention embraces the idea of a ‘woman’ category. Looking at the overall text of CEDAW, there can be seen some references to women’s other identities beyond their gender, for example, women being considered as wives,\textsuperscript{102} women living in rural areas,\textsuperscript{103} women in poverty,\textsuperscript{104} apartheid and racial discrimination against women.\textsuperscript{105} This meant that, although the text did not include the term straightforwardly, it had a potential to apply to intersecting aspects of discrimination against women.\textsuperscript{106}

The first General Recommendation (GR) in which the CEDAW Committee articulated the concept of intersectional discrimination against women into CEDAW’s scope was 2010 dated GR 28 in which the Committee provided an extensive guideline on the scope of the Article 2 of CEDAW,\textsuperscript{107} which is a provision that all violence against women and domestic violence cases were handled within. GR 28 dedicated a paragraph to intersectionality, which is described as a ‘basic concept for understanding the scope

\textsuperscript{99} Bond (n 92) 74, Beco (n 82) 644
\textsuperscript{100} Bond (n 92) 72-3
\textsuperscript{101} Truscan and Bourke-Martignoni (n 83)113
\textsuperscript{102} CEDAW Articles 7, 11(2), 16(1)
\textsuperscript{103} CEDAW Article 14(1)
\textsuperscript{104} CEDAW preamble expresses its concern that ‘women in situations of poverty have the ‘least access to food, health, education, training and opportunities for employment and other needs.’
\textsuperscript{105} CEDAW preamble
\textsuperscript{106} Fredman (n 88) 35
of the general obligations for states’ parties contained in Article 2’. The CEDAW Committee has adopted four GRs which are directly applicable to different forms of violence against women: GR 12, General Recommendation 12: Violence against Women (adopted 1989) CEDAW A/44/38, 14, General Recommendation No. 14: Female Circumcision (adopted 1990) CEDAW A/45/38 and the recent GR 35, General Recommendation 35 on Gender-based Violence against Women, Updating General Recommendation No 19 (14 July 2017) CEDAW/C/GC/35 which updated the GR 19. In looking at the CEDAW Committee’s statements in these texts, GR 12 lacked any reference to intersectionality or intersecting discrimination. GR 14 which was specifically handling state obligations in the context of female genital mutilation, similarly, did not mention any terms around intersectional or intertwining discrimination, but recognised the special influence of some structural causes of violence, such as economic pressure and culture, which may affect women in different extents. GR 31 openly takes an intersectional approach by stating that harmful practices, including female genital mutilation, child marriage and crimes committed in the name of so-called honour

‘(...) are grounded in discrimination on the basis of, among other things, sex, gender and age, in addition to multiple and/or intersecting forms of discrimination that often involve violence and cause physical and/or psychological harm or suffering.’

Among all, the most progressive one is 2017 dated GR 35, which reminds states to take intersectional forms of discrimination into account while designing and implementing all aspects of measures in addressing violence against women.

One other important pillar of the CEDAW Committee’s work is the individual complaints concerning domestic violence that it received. It can be argued that the Committee’s approach in the individual complaints were not as progressive as in the GRs, since many points of opportunities were missed articulate the intersectionality as a method in its analysis. For example, in AT v Hungary, the facts indicated an interdependent relationship between the claimant’s condition of being economically

\[\text{\underline{footnotes}}\]

108 ibid para 18
110 General Recommendation No. 14: Female Circumcision (adopted 1990) CEDAW A/45/38 and Corrigendum
111 Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child on harmful practices (adopted 2014) CEDAW/C/GC/31-CRC/C/GC/18
112 General Recommendation 35 on Gender-based Violence against Women, Updating General Recommendation No 19 (14 July 2017) CEDAW/C/GC/35
113 Sosa (n 69) 63
114 GR 31(n 111) para 15
115 GR 35 (112) paras 12, 23, 28, 38(b), 41, 43, 48, 49, 50
dependent and a single parent of a disabled child. The Committee found a violation of CEDAW on the ground that the claimant has been unable to flee to a shelter because none are equipped to accept her together with her children, one of whom is fully disabled.\textsuperscript{117} This implicit reference to intersectionality did not go beyond this single sentence and did not inform the specific recommendations made by the Committee to address in particular the situation of women like the claimant who are in a unique position as economically dependent estranged spouses with disabled children.\textsuperscript{118}

Similarly, the Committee ignored the fact that the perpetrators of domestic violence were not Austrian citizens in the \textit{Goekce} and \textit{Yildirim} cases,\textsuperscript{119} whose residency status were dependant on their wives, and this particular circumstance made it even more difficult for the victims to initiate legal proceedings.\textsuperscript{119} Again, in \textit{VK v Bulgaria,}\textsuperscript{120} the applicant and her violent husband had migrated to Poland for the sake of the husband’s job, yet the Committee did not give consideration to the special problems that potentially arose from the applicant’s migrant status.\textsuperscript{122} In a more positive line than this, in \textit{Isatou Jallow v Bulgaria}\textsuperscript{123} where the victim had migrated to Bulgaria to meet her partner, the Committee noted her migrant status and illiteracy in Bulgarian as limiting her protection from violence.\textsuperscript{124}

In the context of the CEDAW Committee’s approach within these limited examples, it can be argued that although there has been some progress in addressing the absence of intersectionality in CEDAW, this progress has neither been linear nor consistent. Even in the most positive steps taken, the Committee’s approach has not employed a comprehensive analysis of multiple and intersecting aspects of discrimination and has not attempted to standardise a certain methodology and address the structural causes of such discrimination.

\textsuperscript{117} ibid para 9.4  
\textsuperscript{118} Atrey, ‘Lifting as We Climb’ (n 90) 1522  
\textsuperscript{119} Sosa (n 69) 91  
\textsuperscript{120} \textit{VK v Bulgaria} (CEDAW Committee, 2011) Com No 20/2008 UN Doc CEDAW/C/49/D/20/2008 (2011)  
\textsuperscript{121} Sosa (n 69) 91  
\textsuperscript{123} ibid para 7.5
Before proceeding onto the Council of Europe, one other UN instrument is worth to be mentioned due to its contributions towards the recognition of the gendered aspects of racism, i.e. the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). Although there is not a direct reference to intersectionality in the text of CERD, its monitoring body, the CERD Committee, has taken positive steps in addressing the intersection of racism and sexism within the scope of CERD in the last decades. For example, in its 2000 dated GR 25, the CERD Committee stated that ‘there are circumstances in which racial discrimination only or primarily affects women, or affects women in a different way, or to a different degree than men.’ It also noted that women may experience specific forms of racial discrimination - for instance, sexual violence, rape or forced sterilisation - which occur as a consequence of both their race and their gender. After this move, the direct involvement of Kimberle Crenshaw herself into this process has been essential in the future developments to follow. In fact, Crenshaw has written the background paper on Race and Gender Discrimination for the UN 2001 World Conference against Racism (WCAR) held in Durban which was a significant platform for expressions of an explicit feminist intersectionality.

Crenshaw was a high profile participant at both the UN WCAR main conference and the NGO Forum. She also served as a rapporteur for the Conference’s Expert Group on Gender Discrimination, which contributed significantly towards the Durban Declaration and Program of Action (DDPA). She further coordinated NGO efforts to ensure the inclusion of gender in DDPA. DDPA considered gender inequality as a fundamental component of in many racism cases and obliged states to ‘apply a gender perspective, recognizing the multiple forms of discrimination which women can face’. Since then, this Declaration has been specifically called on countries to attend in their periodic

127 ibid para 1
128 ibid paras 2-3
130 UN Durban Declaration and Plan of Action, Adopted at the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Violence (8 September 2001) endorsed by the GA resolution 56/266 of 15 May 2002; Bakan and Abu-Laban (n 129) 223-4
131 Bakan and Abu-Laban (n 129) 224
132 Durban Declaration (n 130) 4
reports by the CERD Committee. With the acceleration gained through this occasion, both the CEDAW Committee and the CERD Committee has employed intersectionality increasingly in their comments. Furthermore, CERD and CEDAW Committee adopted a General Recommendation / Comment on harmful practices in 2014.

Moving onto the ECHR, Article 14 and Protocol 12 to the ECHR, which ensures the prohibition of discrimination enumerates various protected grounds that states are banned to discriminate on, such as ‘sex, race, colour, language, religion political or other opinion, national or social origin, association with a national minority, property, birth or other status.’ What is important here is that the provisions do not provide an exhaustive list of grounds; it completes this list with ‘or other status’ meaning that any other identity aspects can be included into the scope of this provision subject to the approval of the ECtHR. There have been cases where the ECtHR has included grounds which were originally none numerated, such as ‘sexual orientation’, ‘disability’, ‘employment’, ‘military rank’ and so on, using this ‘other status’ cluster. The Court also accepted the grounds, such as language, religion, nationality, culture and race as overlapping and interconnected in one occasion, which points out an intersectional approach.

In looking at the domestic violence cases lodged at the ECtHR, it becomes apparent that the Court has never made any explicit reference to intersectionality, intersectional or multiple discrimination, rather it mostly classified the forms of discrimination that happens on multiple grounds under the ‘special vulnerability’ paradigm. For example,

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133 Bakan and Abu-Laban (n 129) 25
134 Buxton-Namisnyk (n 80) 119
135 Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child on harmful practices (adopted 2014) CEDAW/C/GC/31-CRC/C/GC/18
137 Keina Yoshida, ‘Towards Intersectionality in the European Court of Human Rights: The Case of B.S. v Spain’ (2013) 21 Feminist Legal Studies 195; Sosa (n 69) 125
138 Fretté v. France App no 36515/97 ( ECtHR, 26 February 2002) para 32
139 Glor v. Switzerland App no 13444/04 (ECtHR, 30 April 2009)
140 BS v Spain App no 47159/08 (ECtHR, 24 July 2012)
141 Engel and Others v the Netherlands App nos 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72 (ECtHR, 8 June 1976)
142 Timishev v Russia App nos 55762/00 and 55974/00 (ECtHR, 13 December 2005) para 55
143 Yoshida (n 137)
in Opuz case,\textsuperscript{144} the Court considered the victim to be in a vulnerable position due to her Kurdish origin pointing out the social situation of women in Southeast part of Turkey.\textsuperscript{145} In this analysis, the Court only used this information to confirm that the victim was fitting into the vulnerability box, but fell short of analysing how structural circumstances were affecting her differently than Turkish women living in other sides of the country. Similar to this, in Eremia case,\textsuperscript{146} the Court considered the victim to have been in a ‘particularly vulnerable’ position since her husband was a police officer and the support that he received from his colleagues made the victim’s attempts to get protection more difficult.\textsuperscript{147}

In this approach of the Court, it is evident that the Court has not tended to classify women who are under a more disadvantaged position as vulnerable in a strict and innate manner, rather it pays attention to the social circumstances surrounding the victims in its evaluation.\textsuperscript{148} This suggests that the Court is not trapped by biological determinism. However, the Court’s taking a vulnerability path instead of a comprehensive intersectional one has its own limits. In fact, in this way the Court loses the chance to develop a consistent methodology in examining intersectionality, such as what comparators should be employed and for what reasons, or whether the avoidance of comparisons overall is possible and so on. Furthermore, when vulnerability is not grounded on a comprehensive analysis, it has a potential to contribute to the stereotypes

\[144\] Opuz v Turkey (n 8)
\[145\] ibid para 194
\[146\] Eremia and others v The Republic of Moldova App no 3564/11 (ECtHR, 28 May 2013)
\[147\] Ibid para 40. For a comprehensive analysis of the ECtHR’s interpretation of intersectionality in the context of violence against women, see Sosa (n 69) 122-131. For an overview of the recent approach of the ECtHR towards intersectionality in a broader context, see Yoshida (n 137); Pablo Castillo-Ortiz, ‘Gender, intersectionality, and religious manifestation before the European Court of Human Rights’ (2019) 18:1 Journal of Human Rights 76. Costailla-Ortiz demonstrates that Muslim Males have been more successful in their claims involving intersectionality compared to Muslim women before the Court. See also Kati Nieminen, ‘Eroding the protection against discrimination: The procedural and de-contextualized approach to S.A.S. v France’ (2019) 19:2 International Journal of Discrimination and the Law 69. Nieminen criticises that the Court has failed to apply an intersectional approach in SAS v France, noting that the capabilities of the intersectionality in addressing structural discrimination is limited in the first place. (page 80-81)
against certain groups, and it also fails to address the root causes of the discrimination at hand.  

Moving onto the Convention of Belem do Para from the Organization of American States, there is not a direct reference to multiple or intersectional discrimination in its text. In a similar vein to the case-law of the ECtHR, the Convention of Belem do Para takes the ‘special vulnerability’ approach. In Article 9, the Convention recognises the vulnerability of certain women by obliging the state parties to

> 'take special account of the vulnerability of women to violence by reason of, among others, their race or ethnic background or their status as migrants, refugees or displaced persons. Similar consideration shall be given to women subjected to violence while pregnant or who are disabled, of minor age, elderly, socioeconomically disadvantaged, affected by armed conflict or deprived of their freedom'.

It is apparent in this article that the vulnerability concept is established both on physical / biological / embodied features such as pregnancy, disability, age and physical deprivation and socially constructed disadvantages, such as racial, ethnical, socio-economic, migrant status related. In analysing the domestic violence cases that were lodged at the Inter-American Commission, neither any reference to intersectionality nor vulnerability can be seen in the case of Maria de Penha. However, in Lenahan case, where the applicant was from an indigenous and migrant origin, the Commission recognised the multiple discrimination that she was experiencing by stating that 'certain groups of women face discrimination on the basis of more than one factor during their lifetime, based on their young age, race and ethnic origin, among others, which increases their exposure to acts of violence’ and calls for ‘special protection’. The analysis of the Commission here is more analytic and in tune with the intersectionality approach suggested earlier, since instead of facing the risk of

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149 Sosa (n 69) 17. On the other hand, Peroni and Timmer argued that ‘special vulnerability’ can be a tool for a more substantive reading of equality guarantees. See Lourdes Peroni and Alexandra Timmer, ‘Vulnerable groups: The promise of an emerging concept in European Human Rights Convention Law’ (2013) 11:4. International Journal of Constitutional Law 1056, 1057

150 Sosa (n 69) 151


153 ibid para 91
essentialising certain groups of women as ‘vulnerable’, it takes note of the relationship between different socially constructed grounds and its impact on individuals. However this approach again fell short to bring an analytical framework to be applicable for the following cases in a standardised manner, as it is not clear whether the analysis will be based on comparator groups or rather it will be analysed contextually without any comparisons.

In the light of this analysis that overviewed the approaches developed by the CEDAW Committee, ECtHR and the Inter-American Commission towards cases where women are disadvantaged on multiple grounds, it can be claimed that none of them has managed to bring up a consistent and comprehensive method which also addresses the root causes of the intersectional discrimination cases that they received. Having said this, now the study can focus on the Istanbul Convention in a comparative perspective. Surprisingly, neither in the final text of the Convention nor in its explanatory report, is there an explicit reference to intersectionality, intersectional discrimination or multiple discrimination. However, the Convention indicates some implicit forms of concern towards intersectional discrimination that women victims of violence may be experiencing. First of all, in a parallel line to CEDAW, the Istanbul Convention clearly states that ‘special measures that are necessary to prevent and protect women from gender-based violence shall not be considered discrimination’. The extent of the scope of these ‘special measures’ as in whether they are applicable to the intersectional forms of disadvantage needs to be confirmed in the GREVIO country reports and recommendations. In addition to this, the Convention has also deployed a ‘vulnerability’ paradigm in the same line with the case-law of the ECtHR and the text of Belem do Para, yet in two manners that slightly differ from each other.

While explaining the general preventive measures and the aggravating circumstances, the Istanbul Convention refers to the needs of persons ‘made vulnerable by particular circumstances’. In choosing this term instead of mentioning ‘vulnerable people’ or ‘vulnerable groups’, the drafters may have been tried to avoid essentialising certain group of people as inherently or biologically vulnerable, and instead they tried to emphasise the fact that certain social and structural causes put these persons in a

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154 Article 4(4)
155 Article 12(3) and Article 46(c)
vulnerable position.\textsuperscript{156} On the other hand, while enumerating general protective measures, the Convention directly refers to ‘vulnerable people including child victims’\textsuperscript{157} which sounds like categorising certain people as vulnerable without any reference to the social circumstances and the power relations they yield.

In looking at the Explanatory Report to the Convention, which can provide more insights about the motivation of drafters in making this distinction, it can be seen that while explaining person’s being made vulnerable by particular circumstances, the drafters directly refers to ‘vulnerable persons’ by reminding the states to take into account the need of these individuals in their preventive measures and adoption of aggravating circumstances.\textsuperscript{158} This means that the drafters used ‘persons made vulnerable by particular circumstances’ and ‘vulnerable person’ in an interchangeable way. In this context, it can be argued that the drafters did not really intend to underline the ‘social and structural circumstances’ causing vulnerability, but instead categorised some people as vulnerable straightforwardly without much consideration or explanation on the surrounding social circumstances. This is also evident that listing these said individuals, the drafters came up with a certain list, including ‘pregnant women, women with young children, persons with disabilities, women living in rural and remote areas, substance abusers, women from national and ethnic minority groups, migrants, refugees, gay men, lesbian women, bi-sexual and transgender persons as well as HIV positive persons, homeless persons, children and elderly’.\textsuperscript{159} This indicates that the vulnerability reading of the drafters were focused on who these vulnerable people are, instead of suggesting a method for determining what power relations and interactions make people vulnerable in each different case. Furthermore, it can also be seen that some of the individuals included in the list are considered vulnerable due to their physical / biological / embodied nature such as pregnant women, disabled women, HIV positive persons etc. All these point towards a superficial intersectionality reading which has the risk of essentialism by categorising them vulnerable, and also doing this on the basis of their embodied nature. Although in the rest of the Explanatory Report,

\textsuperscript{156} Sosa (n 69)\textsuperscript{135}  
\textsuperscript{157} Article 18(3)  
\textsuperscript{158} Explanatory Report to the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (11 May 2011) CETS 210, paras 87, 120, 238  
\textsuperscript{159} ibid para 87
there are numerous references to vulnerability in different contexts, they do not bring any further or different reading of intersectionality.\footnote{ibid 252, 276, 293, 298, 315}

It needs to be underlined that, considering the fact that the Istanbul Convention is a relatively recent instrument, the lack of an explicit reference to intersectional discrimination within its text is disappointing. Considering that the intersectionality concept has been developing particularly during the last decade and there have been explicit references to intersectionality in other jurisdictions, such as the General Recommendation 28 of the CEDAW Committee,\footnote{CEDAW Committee GR 28 (n 107)} this oversight seems even more surprising.

However in the light of the small number of country first evaluation reports issued by GREVIO so far, it can be argued that GREVIO has paid far more significant consideration to the intersectional forms of discrimination than the text of the Convention itself requires, albeit in a slightly inconsistent manner. First of all, GREVIO mentioned ‘multiple forms of discrimination’ and vulnerability without a single reference to ‘intersectionality’ or ‘intersectional discrimination’ in its first two reports which evaluated Austria and Monaco,\footnote{GREVIO, ‘Baseline Evaluation Report: Austria’ (27 September 2017) GREVIO/Inf (2017) 4, paras 1, 4, 80, 148 and 186; GREVIO, ‘Baseline Evaluation Report: Monaco’ (27 September 2017) GREVIO/Inf(2017) 3, paras 1, 4, 16, 17 133 and 134.} however in all the following reports, i.e. Albania, Denmark, Montenegro and Turkey, it deployed the term ‘intersectional discrimination’ alongside a comprehensive analysis of intersecting forms of discrimination against victims on different characteristic grounds.\footnote{GREVIO, ‘Baseline Evaluation Report: Albania’ (24 November 2017) GREVIO/Inf(2017) 13, paras 15-18 and appendix 1, page 66; GREVIO, ‘Baseline Evaluation Report: Denmark’ (24 November 2017) GREVIO/Inf(2017)14, para 31. GREVIO, ‘Baseline Evaluation Report: Montenegro’ (25 October 2018) GREVIO/Inf(2018)5 , paras 17-21; Appendix 1, page 62. GREVIO, ‘Baseline Evaluation Report: Turkey’ (15 October 2018) GREVIO/Inf(2018)6, paras 13-23, 47; 62, 92, Appendix 1 pages 111-114} For example, in its Austria report, it suggested Austria to provide information on the prevention and protection measures available for minority language speakers, but did not name the disadvantages that migrant women experience as intersectional discrimination.\footnote{GREVIO Austria report (n 162) para 25 in Appendix I} On the other hand, in its report on Albania, GREVIO included ‘older women, Roma and Egyptian women, women with disabilities, migrant women, lesbian, bisexual and
transgender women, as well as asylum seeking women in its intersectional discrimination section, by obliging the authorities to collect data on the forms of violence that these vulnerable groups experience. In the context of Denmark, GREVIO pointed out that current NGOs do not represent community-grown grassroots organisations that advocate for the rights and needs of specific groups of migrant women. It also underlined the special vulnerability of women who do not hold a residence permit and asylum seeker women who travel alone, within the intersectional discrimination context. In its Montenegro report, GREVIO particularly highlighted the circumstances where Roma, Egyptian, disabled women and women living in rural areas become more vulnerable to violence and face more challenges for the protection compared to the other victims.

The country report that GREVIO has provided the most extensive analysis of intersectional forms of discrimination has been the report on Turkey. In fact, relying on available data, GREVIO highlighted the intersectional discrimination against women living in rural areas, Kurdish women, women with disabilities, lesbian, bisexual and transgender women in Turkey by providing the context of these disadvantages in a detailed manner, and obliged Turkish authorities to take more effective preventive and protective measures, developing special programmes and collecting data on the violence against victims belonging to these groups. With regards to specific articles, such as Article 7 (comprehensive and coordinated policies), Article 9 (NGOs and civil society), GREVIO referred to the intersectionality in the experiences of children as both victims and witnesses of violence, refugee women, migrant women, including the undocumented ones in addition to the other groups of individuals. One point, however, merits attention that, although GREVIO underlined the special vulnerability of bisexual and transgender women to violence in Turkey, these groups of people were

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165 GREVIO Albania report (n 63) para 16
166 ibid Appendix page 66
167 GREVIO Denmark report (n 163) paras 30-31
168 ibid para 11
169 ibid para 233
170 GREVIO Montenegro report (n 163) paras 18-20 and Appendix page 62
171 GREVIO Turkey report (n 163) paras 14-23
172 Ibid Appendix 1 page 111
173 Ibid para 23
174 Ibid para 23
175 Ibid paras 45, 47 and 62
not included in its list of suggestions to Turkey regarding the people that it should protect in its next steps.

In the light of this analysis, it becomes apparent that GREVIO has been trying to close the normative gap regarding intersectionality in the text of the Istanbul Convention. The extent to which GREVIO will be expanding its intersectionality analysis remains to be seen. Considering that the Council of Europe Gender Equality Strategy 2018-2023\textsuperscript{176} devotes a special attention to intersectionality by highlighting the importance of handling intersecting grounds of discrimination that requires a shift in the debate from a mere multiple discrimination approach towards inclusion of multiple identities and intersectionality,\textsuperscript{177} GREVIO does not seem to have any option to stray away from a comprehensive application of the concept in its future. In fact, the said strategy calls intersectionality as a ‘transversal issue across the priority objectives’\textsuperscript{178} indicating that intersectionality should be one of the most central concerns in connection to all issues covered within the scope of gender equality.

At this point, it is worth recalling the suggestions made above for an efficient application of intersectionality in the context of domestic violence. First of all, GREVIO should make less reference to who the people that are subjected to intersectional discrimination are, such as women with disabilities, Black women, minority women etc., and instead should try to develop a standard and consistent analytical framework in how to examine the intersection of power relations on different social grounds in each specific case. This would avoid the risk of stereotyping certain group of women as vulnerable. It also should avert from connecting the vulnerability or specific experience of some women to innate and biological characteristics, as this approach is prone to causing an essentialist view.

### iii. Trusting Law: A Contradiction?

After this analysis of the Istanbul Convention in the context of two reflections of the liberal nature of rights, i.e. the public/private dichotomy and the individualistic nature of rights, one critical point needs to be elaborated before concluding that the Istanbul

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\textsuperscript{177} ibid para 21
\textsuperscript{178} ibid
Convention, as a piece of law, is a radical feminist instrument. At the beginning of this analysis, it was argued that many feminists, particularly radical feminists, described the liberal nature of rights as the reason for the failure of human rights law to address women’s issues and therefore leading the rights to be male rights. One could argue though that these feminists are contradictory in criticising the male-centeredness of law on one hand, whilst arguing that the Istanbul Convention challenges this maleness as a piece of law, on the other. To put it differently, to what extent is this maleness absolute or something that can be modified according to radical feminism? Is it contradictory for radical feminism to criticise the maleness of law and yet to still trust the law?

Some feminists argue that even though law is historically and presently male-gendered, this nature is not absolute and legal reform can address women’s issues effectively and change basic social inequalities thereto. At the same time, there are feminists who claim that this is unlikely to change the maleness of the law, since the law is inherently constructed on the reproduction of patriarchal power relations. MacKinnon has clearly located herself in the first camp as she trusts the law and advocates for more extensive use of it, adopting legal reforms and pursuing litigation to balance the power inequality between women and men. In this context, to argue that the law can be reformulated so as to challenge its original maleness is not a contradictory act within radical feminist theory. To criticise the maleness of law neither means to declare the absoluteness of the male nature of law, nor to point out the necessity of the full-abandonment of law. It is rather the pre-condition for any law reforms to be made in order to make it more inclusive and effective for women. One does not necessarily have to be a liberal feminist to be able to defend the efficiency of law. Liberal feminists are the ones arguing that the law in its current liberal form can effectively address women’s issues. Radicals like MacKinnon, however, argue that the law can be a platform for the fight for women’s equality only when it is not liberally constructed, and this is

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180 Anleu (n 179) 423-4, 427

181 Catherine A Mackinnon, *Feminism Unmodified: Discourses On Life And Law* (Harvard University Press 1989) 43; Harris (n 1) 296-7

182 Charlesworth and Chinkin, *The Boundaries of International Law* (n 1) 38-40
achievable. In a similar vein to this, Conaghan contends that even though gender is deeply woven to the fabric of law, it is not inherent in any absolute sense.\footnote{Conaghan, \textit{Law and Gender} (n 179) 245}

Confirming this, however, a purely legal study such as the present one cannot answer the question of whether the Istanbul Convention, like any other law, is capable of making a social change by altering societal dynamics that allow male dominance to be reflected as gender-based domestic violence. It can only be argued that the law can be adopted to avoid serving male interests, and the Istanbul Convention, through its challenge to the liberal essence of rights, can be illustrative in this regard.

\section*{3. The Criminalisation Approach: An Abandonment of Radical Feminism?}

As revealed in the previous chapter of this study, the Istanbul Convention imposes a strong obligation upon states to criminalise various types of violence against women, including psychological violence,\footnote{Article 33} stalking,\footnote{Article 34} physical violence,\footnote{Article 35} sexual violence (including rape),\footnote{Article 36} forced marriage,\footnote{Article 37} female genital mutilation,\footnote{Article 38} forced abortion and forced sterilisation.\footnote{Article 39} As these types of violence can fit into the definition of domestic violence provided by the Istanbul Convention, it appears that the Convention obliges states to criminalise certain types of domestic violence.\footnote{In Article 3(b) the Convention defined domestic violence so as to include ‘all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim.’ See the section ‘Criminal and Civil Dimensions: Striking a Balance in the Fight against Domestic Violence’ and the sub-section ‘Criminal Law’ in Chapter 4.} The Convention does not confine itself to merely spelling out this obligation; it also complements this requirement with detailed measures that it introduces under the prosecution pillar needed to be realised by state parties.\footnote{These measures are regulated under Chapter IV of the Convention- Investigation, Prosecution, Procedural Law and Protective Measures.} It should be reminded that those measures are not necessarily restricted to criminal proceedings; they are expected to be respected in civil law proceedings too. However, as the Convention obliges state parties to criminalise a wide-range of types of violence against women, including domestic violence, it can be thought that the drafters mainly envisaged criminal proceedings...
while designating those measures in relation to the effective prosecution of the perpetrators. Due to its heavy focus on criminalising violence, the Istanbul Convention is of a hybrid nature, as it can be regarded as a criminal law treaty, as well as an anti-violence treaty and an equality treaty.\(^{193}\)

Owing to its criminalisation approach, the Convention becomes open to many critiques on the ground of feminist legal theory. Criminalisation as a legal method to fight against gender-based inequalities and violence has been extensively discussed within feminist literature and has been met with heavy critiques.\(^{194}\) One of the most prominent objections to criminalisation is its inherent individualist view of addressing justice.\(^{195}\) In other words, criminal law views the violence as an act occurred between particular individuals at a particular time, disregarding the social circumstances and structural dynamics leading to the act in concern. It is merely interested in bringing justice at an individual level for each particular case by losing the sight of the root causes of violence.\(^{196}\) To put it simply, in the case of a gendered domestic violence incident, what the criminal law sees is a violent act perpetrated by an individual man against an individual woman. As a result of this, it is argued that the patriarchal social structures and social injustice amounting to the disproportionate victimisation of women are entirely ignored, and therefore the law is boiled down to a level where it cannot help eradicate institutionalised gendered structures, which should be the main purpose of law.\(^{197}\) It is contended that this would not contribute to the empowerment of women in society overall and would not eliminate the subordination of women, the main cause of violence.\(^{198}\) Rather, gender-based violence is perceived in the same way as a case of murder, theft or any other criminal issue which does not necessarily involve the impact of gender. Considering that particularly radical feminism relied on the concept of


\(^{195}\) Bonita Meyersfeld, Domestic Violence and International Law (Oxford and Portland, Oregon 2010) 103


\(^{197}\) ibid

\(^{198}\) ibid
structural and group-based subordination of women in explaining violence against women, it might be argued that the criminalisation approach clashes with the radical theorisation of violence.

Although it is true that criminal law is inherently individualist, it is doubtful whether it would fail to empower women. On the contrary, criminal law can be utilised to achieve this goal, and thus can be considered as an effective tool in the eyes of radical feminists. As radical feminists ensure a monopolised understanding of violence that is the simple reflection of the power imbalance between women and men, a firm state interference is necessary in order to correct this situation that negatively affects women as a whole. In the radical reading of domestic violence, women do not have power, while men do, and this power gap is exacerbated by domestic violence itself. By criminalising domestic violence and punishing the perpetrators, the state actually plays the role of neutralising this power inequality on behalf of women.\textsuperscript{199} In each conviction of domestic violence perpetrators, the state once again gives the message that violence cannot be tolerated, and that when it happens, the state mechanism is there to punish the perpetrator. This in turn contributes to the destruction of the institutionalised male dominance.\textsuperscript{200} In fact, Houston argues that the wave of criminalising intimate violence in the USA has been informed by radical feminist thinking, since it took its source from the recognition of domestic violence as a mechanism for the maintenance of male control, as argued by radical feminists.\textsuperscript{201}

Furthermore, it should be emphasised that criminal law is not necessarily a fixed entity that promotes male interests.\textsuperscript{202} As a parallel to the way in which this research challenges the idea of the \textit{absolute} maleness of international human rights law, neither state nor its criminal law necessarily has to prioritise male concerns. The criminalisation of domestic violence against women can be an attempt of states to challenge the hegemony of male interests. The criminal law is an entity that can be improved towards empowering women through a gender-specific lens, taking into account the problems

\textsuperscript{200} ibid 567
\textsuperscript{201} ibid
that women could encounter in criminal justice system that is established in a gender-neutral way.\textsuperscript{203}

This is what the Istanbul Convention tries to achieve. Even though the Convention does not oblige states to adopt a specific offence of gender-based domestic violence, its measures established under the prosecution pillar are designed to address all potential problems that a woman victim of violence could face during criminal or civil proceedings and to adopt them so as to make the whole criminal justice system more effective for women. For example, the Convention requires state parties to ensure that investigations and judicial proceedings are carried out without undue delay,\textsuperscript{204} to ensure that a risk assessment is carried out by all relevant authorities in order to manage the risk,\textsuperscript{205} to protect the rights and interests of victims including their special needs as witnesses,\textsuperscript{206} to ensure detailed protection measures during proceedings including the possibility of avoidance of the contact between victims and perpetrators when necessary,\textsuperscript{207} to ensure that legal aid is provided for victims to enable them accessing to justice without financial burdens,\textsuperscript{208} and so on. What is essential here is that the Convention reminds that in adopting all of these measures, state parties have to put the human rights of the victims at the centre of their concern, and to hold a gendered understanding of violence legislating and implementing all these measures.\textsuperscript{209} This being the case, it would be really difficult to argue that such a criminal justice system, as envisaged by the Convention, can be rendered as an entity serving to male interests and failing to empower women.

Catharine MacKinnon expressed her concern on the reliance on the liberal protection of women’s rights by referring to police power, like many other feminists.\textsuperscript{210} This statement has been interpreted in different ways, including the rejection of the

\textsuperscript{203} ibid
\textsuperscript{204} Article 49(1)
\textsuperscript{205} Article 51
\textsuperscript{206} Article 56(1)
\textsuperscript{207} Article 56(1)(g)
\textsuperscript{208} Article 57. In the Explanatory Report (n 15) in para 295, the drafters expressed clearly that ‘Article 57 does not give the victim an automatic right to free legal aid. It is for each Party to decide the requirements for obtaining such aid.’
\textsuperscript{209} Article 49(2)
\textsuperscript{210} Catharine A. MacKinnon ‘Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence’ (1983) 8:4 The University of Chicago Press 635, 644
theoretical congruity between feminism and reliance on criminal justice system. Yet there is a nuance being missed here. MacKinnon was reluctant to trust any legal institution or framework constructed through liberal philosophy, in which there is no consideration on gender, which actually protecting male interests. In other words, gender-neutral is actually male. Otherwise, according to MacKinnon, a state tool like police power can be used adapted for feminist purposes, since masculinity in state power can be subverted if the right steps are taken. Therefore, Mackinnon has faith in a criminal justice system which is adopted to integrate gender into its measures and procedures.

However, she confirms that criminal law cannot be the only source, since ‘battering is a social problem of sex inequality, its legal solutions should lie through sex equality law.’ Hereupon, it becomes necessary to remind that the Istanbul Convention does not miss this aspect. It contains two approaches, specifically the equality and criminalisation lenses. As revealed before, the Convention constitutes an equality treaty through its recognition of violence as a form of discrimination, and the obligation it imposes upon state parties to ‘promote substantive equality between women and men by empowering women’, whether or not in relation to violence. In the light of foregoing, it could be argued that as long as a criminal justice framework addresses the gendered nature of the violence, it could be an empowering tool for women and serve radical feminist interests. In the next chapter, the Turkish criminal law will be examined to demonstrate whether this has been achieved in a practical sense.

One other essential critique against the criminalisation of gender-based violence is that it does not respect women’s agency in addressing violence, therefore it is not in harmony with the feminist purpose of empowering women. It is argued that in criminal proceedings, a hierarchy is constructed in which the judge is located as the

211 Gruber, ‘Rape, Feminism, and the War on Crime’ (n 196) 582
212 Catherine A Mackinnon, Feminism Unmodified (n 181) 34
214 Mackinnon, Are Women Human? (n 6) 32
215 Article 1(b)
decision-maker and women lose control on the verdict and the future of the relation. This critique has been particularly raised in the context of no-drop policies, mandatory arrestment policies and *ex parte* proceedings, where women are granted limited, if any, space to lead and initiate the proceedings. Some scholars strongly argue against the criminalisation approach, arguing that it deprives women of their agency that had been taken away by the perpetrator before, and that the state just takes over the paternalist role of the perpetrator in such measures. This critique could also be posed against the Istanbul Convention due to its provision of *ex parte* and *ex officio* proceedings, which oblige states to ensure the commencement and continuation of proceedings in cases of domestic violence resulting in *severely bodily harm* or *deprivation of life*, even where the victim withdraws their complaint, as demonstrated in the previous chapter. The drafters expressed the aim of this provision to enable the criminal proceedings to be carried out without placing the onus on the victim to initiate such proceedings and secure convictions.

It had been stated in the explanatory report that the purpose of the drafters was to make a clear distinction between serious offences of physical violence resulting in severe bodily harm or deprivation of life and other minor offences. It can be seen that the drafters openly rejected giving women the option to initiate the proceedings when the case concerned a serious offence of physical violence. Taking the position of the critics, could it be argued that the Convention takes a paternalistic attitude, thus decreasing women’s agency and disempowering them, in contrast to the radical feminist understanding?

The question of women’s agency in relation to criminalisation measures has been discussed at length among scholars for years: the question of ‘what if they (victims) want to stay (in the relationship)?’ has frequently been asked and answered in

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217 Epsteint (n 216)
219 Article 55
220 Explanatory Report (n 15) para 279
221 Explanatory Report (n 15) para 281
significantly different ways. One notion that could help address this tension between granting women agency and firm state interference is that of ‘false consciousness’, developed by Catharine MacKinnon at the beginning of the 1980s. Within this concept, she argued that women’s beliefs and perceptions are shaped by patriarchy, a system dominating the life of women, and therefore women mostly fail to see that the violence that they are subject to is a form of male dominance. She contended that ‘the perspective from the male standpoint enforces women’s definition, encircles her body, circumlocutes her speech, and describes her life.’ Women’s failure to commence or continue criminal proceedings is simply understood as the extension of the patriarchal male dominance on which the dominance theory is founded, therefore to dismiss the view of these unseeing women would not be in conflict with the theory that MacKinnon developed. As MacKinnon perceived all types of violence against women as a violation that women suffer as a group, and as she suggested that the only solution to this problem would be to liberate all women, she argued that a battered woman suffering false consciousness and refusing the criminal justice intervention to investigate the abuse could be blamed for allowing male dominance in general to continue.

It is difficult to ignore the fact that the criminal law itself and some of its measures such as ex parte and ex officio proceedings have a paternalistic essence. On the other hand, the fact cannot be disregarded that the primary reasons why women fail to report or withdraw the complaint are other reflections of patriarchal structures. If the states hesitate to interfere, they would miss opportunities to protect women from various forms of harm, including lethal ones. In fact, numerous empirical research reveal that the reasons why women reject to commence proceedings or drop their complaints in the

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224 Catharine A. MacKinnon ‘Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence’ (n 210) 636


226 ibid 238
case of domestic violence are mostly that they are frequently under threat from perpetrators, they are under societal pressure to adopt the role of keeper of family, they lack sufficient economic power to survive without their partners and so on.\textsuperscript{227} In the same line with this, as analysed in the previous chapter, the ECtHR developed in its jurisprudence that states should continue proceedings under certain circumstances, even if that means disregarding the reluctance of women to commence or continue the proceedings.\textsuperscript{228} As this is the case, to expect states to interfere in incidents of domestic violence, in contrast to the will of victims at certain circumstances, should not be rendered as taking their agency away from them, but it could be a chance given to women to change perceptions that could lead to serious harm to their bodily and psychological integrity. Rather, such state assistance would facilitate a chance for women to develop real agency in the post-violence era. It should also be underlined that the concept of false consciousness questions whether the will of women to not report is really their will. It does not take women’s agency away from women and gives it to another individual such as the judge or the partners, nor does it blame women individually for not being conscious. Rather, this concept places patriarchy, viewed as a meta-societal norm, at the centre of women’s failure to address the problem. The criminalisation of violence and its tools can provide space for women to develop their own voice and agency outside patriarchal structures by challenging these very structures through each prosecution of the perpetrators.

4. Conclusion

This chapter has argued that the Istanbul Convention challenges the public/private dichotomy and the individualistic nature of rights to a greater extent than other human rights law instruments handled in this study, particularly CEDAW. In fact, by declaring domestic violence as an independent human rights violation and bringing the most detailed state measures in a wide spectrum through its 4(P)s policy upon this, the Convention delivers the strongest blow to the dichotomy in the context of domestic violence. Similarly, by recognising women’s collective interest in the more specific


\textsuperscript{228} Opuz v Turkey (n 8) para 145
issue of violence, in contrast with CEDAW’s broader scope of discrimination, the Istanbul Convention goes one step further than CEDAW in challenging the liberal individualistic nature of rights. Furthermore, by not permitting any reservations on the ground of culture or religion, unlike CEDAW, the Istanbul Convention brings a more inclusive collective rights understanding which does not exclude any groups of women, particularly the ones from Islamic states.

It is also argued that this challenge to both reflections of liberal philosophy does not have any detrimental effects on women. Even though maintaining the distinction between the public and private spheres can serve to protect women’s privacy rights in many contexts, the focus should be placed on each specific circumstance, to assess whom does this distinction favour. In the case of domestic violence, it is obvious that state passivity would benefit the perpetrators, patriarchal structures, and preserve the power status quo. Furthermore, while states traditionally regulate many areas of women’s privacy such as marriage and sexuality, states’ reluctance to interfere in cases of domestic violence would only prove that this distinction is an artificial construction used by the states in accordance with their political interests.

In terms of the group-based rights understanding that the Convention brings, it is evident that the Convention employs a collective conception of group rights, but not a corporate one, since it does not create a tension between women’s individual rights and group rights, so as to eliminate the former at the cost of the latter. In fact, it does not pose any threat to women’s other rights and freedom: on the contrary, it confirms that women’s individual right to be free from violence is only possible when women as a group are empowered in all spheres of life. Therefore individual and group rights are not competitive but complementary. As such, the concerns that group rights deteriorate women’s individual freedom and rights at the expense of the collective rights do not have a ground in the context of the Istanbul Convention.

It is also argued that within such a framework of detailed measures in the special context of violence against women, it is more difficult for the Convention to essentialise the idea of women and to disregard the specificities of their identity intersecting with their gender, in comparison to a generic gender-neutral instrument. In the light of the foregoing, as this study started from the confirmation that radical feminism brings the strongest critique against the public/private dichotomy and the individualistic nature of
human rights among the other feminist approaches, and as the Istanbul Convention addresses these radical feminist concerns effectively, the Istanbul Convention should be considered as a radical feminist instrument.

Additionally, this research has argued that the Convention’s imposition of the obligation to criminalise various types of violence, including domestic violence, is in harmony with the radical feminist approach. As domestic violence is a reflection of the power imbalance between victims and perpetrators, the state becomes obliged to firmly interfere in the situation to neutralise this power gap by criminalising the perpetrators. It is also argued that the criminal law is not a fixed entity which necessarily enforces male privileges; rather, criminal law can be adopted to align with women. The prosecution measures brought by the Convention are visibly committed to achieve a women-friendly criminal justice system. Moreover, some tools of the criminal law such as *ex parte* and *ex officio* proceedings are in conformity with the perception of false consciousness developed by MacKinnon, in that women mostly fail to initiate or continue the proceedings due to the impacts of patriarchal structures on them. Therefore, to employ a state assistance, particularly through *ex parte* proceedings, must not be considered as taking women’s agency from them, but as a challenge to those patriarchal structures.

Confirming the radical feminist nature of the Convention, its practical impacts are mostly dependent on the way in which the state parties implement the Convention at a domestic level. For this reason, this research moves to Turkey as a case study in the next chapter to investigate how these doctrinal and theoretical findings on the Convention have and should be implemented in a practical sense. The analysis of Turkey is also indicative of the potential problems which would arise in the implementation of such a radical feminist instrument as the Istanbul Convention.
CHAPTER 6
THE IMPLEMENTATION OF THE ISTANBUL CONVENTION: TURKEY AS A CASE STUDY

1. Introduction

Turkey holds a special importance in terms of its implementation of the Istanbul Convention,\(^1\) since it was the first country that signed and ratified it.\(^2\) Moreover, the representatives of Turkey took an active part during the drafting process of the Convention, and whose efforts considerably contributed to the final text of the Convention. Following the ratification of the Convention, the Turkish government made several statements underlining the way in which the Istanbul Convention was being taken seriously by the state, specifically since it had been the first signatory and ratifying country among all Council of Europe member states.\(^3\) In contrary to these political promises of the government, however, we can observe an increasing media coverage on the incidence of domestic violence against women,\(^4\) and on state officials’ controversial declarations on gender equality in general.\(^5\) At the same time, Turkey did enact a new law and developed new policies in order to comply with the provisions of the Istanbul Convention aiming to eliminate violence against women.\(^6\) In the face of this clash between Turkey’s legal promises and the concerning number of gender-based violence incidents occurring, Turkey presents an interesting case study. In particular, it could give valuable insights on the question of whether the Istanbul Convention can be

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\(^1\) The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (adopted 8 April 2011, entered into force 1 August 2014) CETS 210

\(^2\) Turkey signed the Convention by 11 May 2011 and ratified it by 14 March 2012. The Istanbul Convention entered into force by 1 August 2014 following the eighth member state of the Council of Europe ratified it.


\(^4\) According to the research conducted by the Branch Office of Prevention of Violence against Women and Children in 2014, the number of women injured in male-violence cases in 2013 was 36% more than 2012. See Inci Boyacıoğlu, ‘Dünden Bugüne Türkiye’de Kadına Yönelik Şiddet ve Ulusal Kadın Çalışmaları: Psikolojik Araştırmalara Davet’ (2016) 19 Türk Psikoloji Yazıları 126, 126-7


deemed as a reliable source for change in the special context of domestic violence against women. Considering that the Turkish Constitution openly supersedes international agreements on human rights and individual freedoms over the Turkish laws in the case of an incompatibility between them, to analyse the legal steps taken as a consequence to the ratification of the Istanbul Convention becomes vital.\(^7\)

Another internal clash that Turkey has been experiencing makes it a unique case study. Turkey has always remained in the double bind between its modernised western laws on one hand, and its own eastern-originated culture and traditions on the other, and women’s rights have been one of the issues that have been affected most from this tension. In fact, with the foundation of the Turkish Republic, the country has found itself in a rapid modernisation process leading to a secular western legal framework prevailing over the non-secular laws and eastern and Muslim identity of its predecessor, the Ottoman Empire.\(^8\) This separates Turkey from many of the other state parties to the Istanbul Convention.\(^9\) While conducting analysis on Turkey, the research is keeps these unique cultural dynamics of the country at the background, and tries to address the potential clash between universalism and cultural relativism, which would arise out of these dynamics, referred to in the fourth chapter of this thesis.

In the light of the foregoing, this chapter proposes to answer the question of whether Turkey has been implementing the Istanbul Convention effectively in the special context of domestic violence against women and if not, how can this be achieved. The study of Turkey is hoped to constitute a platform on which the doctrinal and theoretical

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\(^7\) 2709 Numbered Constitution of Turkish Republic (adopted 18 October 1982, entered into force 9 November 1982) (amended by 2017) Article 90


\(^9\) As a component of cultural difference, religious difference of Turkey to the other members of Council of Europe should be mentioned: The state parties who are non-European Union members are Albania, Andorra, Bosnia and Herzegovina, Georgia, Monaco, Montenegro, San Marino and Turkey. Among these, only Albania and Bosnia and Herzegovina has more Muslim citizens than the other religions. (almost 58% and approximately 45% respectively.) See <http://worldpopulationreview.com/countries/albania-population/> and <http://worldpopulationreview.com/countries/albania-population/> accessed 24 November 2017. In Turkey, however, over 90% of citizens define themselves Muslim. See, <https://www.worldatlas.com/articles/religious-beliefs-in-turkey.html> accessed 24 November 2017
analysis of the Istanbul Convention made in the previous chapters can also be elaborated in terms of its applicability in a specific country. In this regard, the comments of GREVIO in its first evaluation report of Turkey, which was released in 15th October 2018, will be used as an important source in this chapter’s analysis of Turkey’s implementation of the Convention up to this date.10 Having said that the Istanbul Convention is a radical feminist instrument, the analysis of Turkey will indicate potential problems that could arise in the implementation of such a radical feminist instrument as the Istanbul Convention and will answer how should these problems can be addressed. Doing this, the chapter will mostly follow the structure of the fourth chapter, which put the Istanbul Convention under the spotlight.

2. The Picture of Gender-Based Domestic Violence against Women in Turkey and Turkish Law: Pre and Post Ratification of the Istanbul Convention

Unsurprisingly, Turkey is not an exception to the outrageous prevalence of gender-based domestic violence against women, perpetrated by their male partners all over the world.11 Again, in a parallel vein to the global picture of the issue, women are predominantly the victims of domestic violence in Turkey.12 Becoming aware of the disproportionate effects of domestic violence on women took long in Turkey, since up until quite recently, there had been neither a comprehensive research nor the collection of data with regards to the problem.13 There are two far-reaching studies presenting the qualitative data on the rates, types and reasons for domestic violence against women across the whole country, which were conducted in 2008 and 2014.14 According to the

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11 Global estimates published by WHO indicate that worldwide, almost one third (30%) of women who have been in a relationship report that they have experienced some form of physical and/or sexual violence by their intimate partner in their lifetime. See, ‘Violence against Women: Key Facts’ (29 November 2017) [http://www.who.int/mediacentre/factsheets/fs239/en> accessed 3 February 2018
12 90% of domestic violence victims are argued to be women and children in Turkey. Women constitute the majority of victims in the context of the each types of domestic violence, including physical, sexual, psychological and economic violence. See Merve Akın, ‘Aile içi Şiddet’ (2013) İUHFM 71:1, 27, 30,36
one of 2014, 36% of women are subject to physical violence,\textsuperscript{15} 12% to sexual violence,\textsuperscript{16} 38% to both sexual and physical violence,\textsuperscript{17} 44% to emotional violence,\textsuperscript{18} and 30% to economic violence\textsuperscript{19} from their husbands, male partners or ex-partners in Turkey.\textsuperscript{20} On the basis of research analysing the rates of domestic violence against women across the European Union countries, the average of all European women suffering from male partner violence is 22%.\textsuperscript{21} Therefore, the rate of domestic violence against women in Turkey supersedes the one in Europe.

Turkey is also familiar with gendered practices stemming from its own traditional and cultural values, such as arranged marriages, marriages in result of elope, polygamy and religious marriages, which are increasing the risk of domestic violence against women, unlike many European countries.\textsuperscript{22} In fact, within these practices, women lose the agency to take decisions and therefore become more restricted within family structures. These practices originate primarily from the \textit{honour culture} that is dominant within the country and which promotes the patriarchal structure. Men are perceived as the protector of family honour, thus having control on the sexual behaviours of women. When women act in contrast to those structures, men are perceived to be entitled to react in violent manners.\textsuperscript{23} Comparing the data collected in 2014 with the one of 2008, we cannot reach the conclusion that the rates of domestic violence have increased during the last decade. However, it is evident in this comparison that the type of male violence that women have been subjected to is more violent and harmful than before. At this point, it should be reiterated that these two analyses cannot be taken as the mere

\textsuperscript{15} The report of ‘National Research on Domestic Violence against Women in Turkey - 2014’ (n 14) 83
\textsuperscript{16} ibid 83
\textsuperscript{17} ibid
\textsuperscript{18} ibid 92
\textsuperscript{19} ibid 97
\textsuperscript{20} ibid 82
\textsuperscript{21} EU Agency for Fundamental Rights, ‘Violence against women: an EU-wide Survey’ (2014)
\textsuperscript{22} Boyacıoğlu (n 4) 130. Also, as underlined by CEDAW Committee in its 2005 dated Turkey report, forced marriage, early marriage and honour killings are prevalent in the country. See, the CEDAW Committee, ‘Concluding Comments: Turkey’ (15 February 2005) CEDAW/4/TUR/CC/2-5 para 29.
\textsuperscript{23} Boyacıoğlu (n 4) 132. Some social psychologists classify the cultures in three groups: as dignity culture, face culture and honour culture and Turkey is considered to belong to the last group: See, Nuray Sakalli-Uğurlu and Metin Akbaş, ‘Namus Kültürlерinde “Namus” Ve Namus Adına Kadına Şiddet: Sosyal Psikolojik Açıklamalar’ (2013) 16:32 Türk Psikoloji Yazıları 76-91.
basis of information, since there are various other surveys pointing out different amounts of gender-based domestic violence in Turkey, sometimes in far higher levels.24

Before the ratification of the Istanbul Convention, Turkey had been exposed to various criticisms from the CEDAW Committee with regards to its regulations on gender-based domestic violence.25 The CEDAW Committee consistently criticised Turkey on the grounds that the patriarchal attitudes and deep-rooted traditional and cultural stereotypes regarding the roles and responsibilities of women were pervasive and these behaviours contributed to the perpetuation of violence against women.26 It was also underlined that no sufficient protection services such as shelters for battered women had been provided,27 and that discriminatory provisions against women were still present within the legal framework.28 It is noteworthy to mention that in its last state report, the CEDAW Committee expressed its concerns on the potential negative effects of the policies developed following the attempted coup on women’s rights,29 and the rise of patriarchal attitudes within state authorities and society.30 It particularly underlined discriminatory and offensive statements made by high-level representatives of the Government against women who did not adhere to the stereotyped traditional roles.31 Turkey has also been exposed to criticism due to similar reasons within the European structures: the persistence of all types of violence against women, including domestic violence,32 the need to increase the numbers of shelters for battered women,33 and the

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24 According to one research, there is both physical and verbal violence in 85% of Turkish families, see Akın (n 12) 28. According to another research, 59.7% women suffer from physical violence, 47.4% from verbal violence and 21.4% from emotional violence of their partners in the family, see Tijen Harcar ve diğerleri, ‘Kadına Yönelik Siddet ve Türkiye’de Kadına Yönelik Siddetin Durumu’ (2008) 2:4 Toplum ve Demokrasi 51, 65
25 Turkey ratified CEDAW by 20 December 1985. It also ratified the Optional Protocol to CEDAW by 30 July 2002.
27 The CEDAW Committee 2005 Report to Turkey (n 22) para 27; The CEDAW Committee 2010 Report to Turkey (n 25) para 22; The CEDAW Committee 2016 Report to Turkey (n 5) para 32(d)
28 The CEDAW Committee 2010 Report to Turkey (n 26) para 14
29 The CEDAW Committee 2016 Report to Turkey (n 5) para 7. The attempted coup d’etat took place in 15th July 2016, organised by a group of professional soldiers, and was supressed by law shortly after.
30 ibid para 28
31 ibid para 28
33 ibid para R
failure to take sufficient steps with regards to the development of women’s rights have been highlighted on many occasions. It should also be noted that Turkey was ranked as 131st among 144 states in terms of gender equality in the survey conducted by the World Economic Forum in 2017.

Violence against women, particularly domestic violence, started to become an issue in Turkey during the 1980s, among small-scaled women organisations and feminist activists. The 1980s marked the era of women starting to raise their voice collectively under the roof of NGOs and organising numerous local and countrywide protests against domestic violence, in a parallel line to the global rise of second-wave feminism. By the 1990s, women started to use government agencies to transform society in a more institutionalised manner and therefore, to put violence against women on the state agenda.

The first legal regulation on domestic violence in Turkey was enacted in 1998, through the adoption of the 4320 Numbered Law on the Protection of Family (hereinafter 4320 Law). In fact, up until the adoption of the 4320 Law, the issue used to be handled under the relevant provisions of the Constitution, Civil and Criminal Laws and some other laws, as there was no specific law addressing domestic violence directly. Here, it should be underlined that within European countries, there is no homogeneity regarding the legal regulation of domestic violence.

37 Altınay and Arat (n 13) 17
38 ibid 17-22
40 Article 5 (Fundamental aims and duties of the State); Article 10 (Equality before the law); Article 12 (Nature of Fundamental Rights and Freedoms); Article 17 (Personal inviolability, corporeal and spiritual existence of the individual); Article 19 (Personal liberty and security); Article 41 (Protection of the family, and children’s rights) of the Constitution of Turkish Republic (n 7)
41 The relevant provisions are going to be analysed in the following parts of this chapter.
including the area or specific types of law under which domestic violence against women should primarily be handled.\textsuperscript{43}

Driving forces in the adoption of the 4320 Law related to the responsibilities of Turkey arising out of the international human rights law instruments, as well as the critiques received from international bodies. Specifically, the recommendations given within the Beijing Action Platform at the 4\textsuperscript{th} World Conference on Women,\textsuperscript{44} as well as the CEDAW Committee’s criticism against Turkey in its 1996-dated report on the insufficiency of the measures taken to fight against violence against women, ignited the government to adopt this law.\textsuperscript{45} Undoubtedly, the long-lasting feminist campaigns and the Constitutional provision requiring the state ‘to protect the peace and welfare of the family, especially mother and children’\textsuperscript{46} also constituted the push needed for the adoption of such a law.\textsuperscript{47} This law, however, failed to introduce a comprehensive definition of violence and only protected a limited group of subjects.\textsuperscript{48} Even though in 2007, amendments had been made in order to expand its scope for domestic violence victims\textsuperscript{49}, it still did not go further than being a framework law and remained weak with regards to the effective prevention of violence.\textsuperscript{50}

Following the ratification of the Istanbul Convention, Turkey adopted the 6284 numbered Law on the Protection of Family and Prevention of Violence against Women (hereinafter 6284 Law),\textsuperscript{51} in 2012 in order to comply with its obligations imposed by the Convention, and this Law abolished the aforementioned 4320 Law. The content and

\textsuperscript{43} Women against Violence Engagement (WAVE), ‘Violence against Women Comparative Report: Italy, Spain and Turkey’ (2015-2016) TR 2010/0135.01-01/339, 15
\textsuperscript{45} Altunay and Arat (n 13) 27. The report that is referred to is the CEDAW Committee, ‘Second and Third Periodic Reports of State Parties’ (6 September 1996) CEDAW/C/TUR/2-3
\textsuperscript{46} Article 41 of the Constitution of Turkish Republic (n 7)
\textsuperscript{47} Altunay and Arat (n 13) 27; Eray Karınca, ‘Kadına Yönelik Aile İçi Şiddete İlişkin Hukuksal Durum ve Uygulama Örnekleri’ (TC Başbakanlık Kadının Statüsü Genel Müdürlüğü 2008) 13
\textsuperscript{48} Ebru Ceylan, ‘Türk Hukukunda Aile İçi Şiddet Ve Kadına Karşı Şiddetin Önlenmesiyle İlgili Yeni Düzenlemeler’ (2013) 109 TBB Dergisi 13, 19-20
\textsuperscript{49} Through the 5636 Numbered Law (adopted 26 April 2007, entered into force 4 May 2007)
\textsuperscript{50} This was highlighted by the CEDAW Committee in its 6th country report to Turkey that the 4320 Law was not a comprehensive national law on violence against women. See the CEDAW Committee 2010 Report to Turkey (n 26) Para 22. Necla Öztürk, ‘Ailenin Korunması Ve Kadına Karşı Şiddetin Önlenmesine Dair Kanunun Getirdiği Bazı Yenilikler Ve Öneriler’ (2017) 8:1 İnönü Üniversitesi Hukuk Fakültesi Dergisi 1, 4; Ali Haydar Yaşçoğlu, ‘6284 Sayılı Ailenin Korunması ve Kadına Karşı Şiddetin Önlenmesine Dair Kanun ve Uygulamada Karşılaştılan Sorunlar’ (2017) 19 Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi 913, 917-918
\textsuperscript{51} See (n 6)
implementation of the 6284 Law is going to constitute the focal point of this chapter. It is a common practice that a particular international human rights law instrument on which a Turkish law is based upon is referred in the explanatory report of that domestic law. However, it is interesting that the Istanbul Convention is cited as the basis for the 6284 Law within the law itself. Therefore, it is beyond doubt that the 6284 Law was adopted as the main tool to be used for the effective implementation of the Istanbul Convention in the Turkish context. For this reason, the chapter draws its analysis mainly from the 6284 Law. It also holds a comparative approach between the 4320 and 6284 Laws in order to clearly demonstrate the steps taken by Turkey to meet the requirements of the Convention.

3. A Comparison of the Definition of Domestic Violence in Turkish Law with the Definition Adopted in the Istanbul Convention

Before examining the definition of domestic violence provided in the 6284 Law, which was adopted for the implementation of the Istanbul Convention, the title of the said law must be analysed as it is indicative of the state’s perception of violence. The title is named as ‘The Law on the Protection of Family and Prevention of Violence against Women’, whereas the title of the Istanbul Convention only refers to ‘preventing and combating violence against women, including domestic violence’ without any reference to family. The 6284 Law does not only integrate the family into the name of the law, but also it refers to the protection of family first before mentioning the prevention of violence against women. Similarly, the previous 4320 Law (1998), which used to regulate violence against women and was abolished by the 6284 Law, included the protection of family in its title. The fact that the 4320 Law only referred to family and entirely avoided the term of violence against women in its title was heavily criticised by

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53 Article 1 of the 6284 Law (n 6). It should be stated that Law 6284 is not the only example in this regard in Turkish legislation, even though it is quite exceptional. For example, in the Article 1 of the 6415 Numbered Law on The Prevention of Financing Terrorism, the UN International Convention for the Suppression of Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 2002) UNTS/2178/197 has been cited.
54 This has been pointed out by various academics and organisations. See Uğur (n 52) 343; Arif B Özbilen and Mualla B Soygüt-Arslan, ‘6284 Sayılı “Ailenin Korunması ve Kadına Karşı Şiddetin Önlenmesine Dair Kanun”un Değerlendirilmesi’ (2012) 22 Istanbul Ticaret Üniversitesi Sosyal Bilimler Dergisi 365, 385; Berrin Akbulut, ‘6284 Sayılı Kanuda Siddet ve Istanbul Sözlesmesinin TCK Acısından Degerlendirilmesi’ (2014) 5:16 TAAD 141, 150
55 The 4320 Law (n 39)
feminists, scholars and women’s NGOs at the time, and interestingly, a similar tendency to supersede the protection of family over women can be seen in the title of the current law. It needs to be highlighted that in the draft bill, the 6284 Law was named as the ‘Protection of Women and Family Members from Violence’, with the name later changing to its present form without the involvement of women’s NGOs or the other stakeholders. This led to numerous critiques, including the one from the Platform to End Violence, consisting of 237 women’s NGOs, on the ground that the government insisted to perceive the prevention of violence against women only as adjacent to its policies to protect the family, instead of rendering it as a matter of the protection of women.

In fact, the way in which the protection of family lies at the expense of women influences gendered structures. In fact, the effect of familial structures over women in general has been subject to comprehensive debates and analyses not only in a practical sense, but also within the theoretical foundations of feminism. Many feminists have been highly critical of the idea of the traditional family, arguing that the family is neither a natural nor a neutral institution, as it seems. Families are not natural orderings, since they are social institutions backed up by laws. Families are not neutral either, since they are part of a system that reproduces social and economic inequality

56 Akbulut (n 54) 145; Emel Badur, ‘Ailenin Korunması Alanındaki Son Gelişmeler’(2009) 84 TBBD 63, 65. Another research revealed that numerous judges and prosecutors expressed that they did not consider the law as a gender-equality law, but merely as a law primarily aiming to protect family, owing to its title, see Gökçeçek Ayata ve diğerleri, Ailenin Korunmasına Dair Kanun Kimi Ve Neyi Koruyor? : Hâkim, Savcı, Avukat Anlatıları (İstanbul Bilgi Üniversitesi Yayınları 2011) 917-8
60 Nussbaum underlines that family is an institution, in which women are not instrumentnalised as an end in themselves, but as an adjunct or instrument of the needs of others. Therefore she calls family as a major site of the oppression of women. See Martha Nussbaum, Women and Human Development: The Capabilities Approach (CUP 2000) 243. Similarly, Carol Pateman suggests that marriage is a contract between parties, and the liberal construction of this contract is based on the subjection of women, so that women’s use of contracts helps perpetuate their oppression. See Carol Pateman in Nancy J Hirschmann, ‘Reviewed Work: The Sexual Contract by Carole Pateman’ (1990) 18:1 Political Theory 170, 170
against women. One of the most prominent liberal feminists, Susan Moller Okin, went further, defining family as the linchpin of gender injustice.

It is true that the family is an institution constructing gendered roles and transmitting them to new generations. This happens on various grounds, including the reproductive nature of women. The biological fact that women are mothers translates into social roles that are non-factual, such as women as mothers are nurturing and self-sacrificing within the family structures, and women’s unpaid labour on child and home care within the family leads to the inequality of women both at home and in public life. This cycle subordinating women is defined as the ‘cycle of vulnerability’ by Okin, through which women’s unequal position in the home interacts with women’s unequal position in the workplace. In this reading, it would not be wrong to argue that the family turns out to be one of the facilitators of women’s subordination in MacKinnon’s reading. In fact, in her theorisation, subordination is a simple reflection of the unequal power distribution between women and men, with the family institution as one generator of this inequality.

The stance to prioritise the protection of family over the protection of women in the title of the 6284 Law, as if families are fundamentally neutral and natural institutions, as well as the presumption that the protection of family is necessarily going to promote the protection of women, is worrying. On the contrary, the protection of women from violence and the protection of family could be conflicting aims. In a similar vein to this line of thinking, GREVIO has expressed its regret because Turkey’s efforts to promote gender equality has been closely intertwined with the policies aimed at protecting family, by warning Turkey against ‘promoting policies which look at women exclusively through the prism of marriage and motherhood or which channel a preferred societal model of a woman as a married fertile woman’. It has also reminded the State

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64 Michaele Ferguson, ‘Vulnerability by Marriage: Okin’s Radical Feminist Critique of Structural Gender Inequality’ (2016) 31:3 Hypatia 687, 695
65 Okin (n 63) 25
66 ibid 147
67 GREVIO report on Turkey (n 10) para 38
68 ibid para 97
that this sort of approach, in which women’s traditional family-oriented roles are supported, may work against Turkey’s attempts to prevent violence.69

Analysing the 6284 Law further, it can be seen that there are certain differences in the way that the main concepts are defined in this law, when compared to the Convention. The Istanbul Convention defines three violence-related concepts, which are ‘violence against women’, 70 ‘domestic violence’71 and ‘gender-based violence against women’.72 The 6284 Law, however, refers to ‘violence’,73 ‘domestic violence’74 and ‘violence against women’.75 At first glance, the fact that Turkish law does not explicitly refer to gender-based violence against women in draws attention. Looking at the violence against women as described in the 6284 Law, it can be seen that this definition combines the two concepts of ‘violence against women’ and ‘gender-based violence against women’ present in the Istanbul Convention. In fact, the definition of violence against women in Turkish law includes the confirmation of violence as ‘a violation of human rights and a form of discrimination against women’, in the same way as the Convention does in referring to violence against women.76 It also describes it as ‘violence that is directed against a woman because she is a woman or that affects women disproportionately’, which is the definition of ‘gender-based violence against women’ in the Istanbul Convention.77 Therefore, the conceptualisation of violence against women in the 6284 Law seems to satisfy the definitions of both ‘violence against women’ and ‘gender-based violence against women’ in the Istanbul Convention. However, the question which needs to be posed is why did the drafters of the Turkish Law hesitate to define the term ‘gender-based violence’ separately, in a similar vein to the Istanbul Convention, and rather preferred to integrate it into the definition of violence against women? Why was ‘gender’ not a preferred word?

At this point, another striking difference between the Convention and Turkish Law is visible. As analysed in the fourth chapter, the Istanbul Convention provided the first

69 ibid
70 Article 3(a) of the Istanbul Convention (n 1)
71 ibid Article 3(b)
72 ibid Article 3(d)
73 Article 2(d) of the 6284 Law (n 6)
74 ibid Article 2(b)
75 ibid Article 2(ç)
76 ibid Article 2(ç) of Turkish Law and Article 3(a) of the Istanbul Convention
77 Article 2(ç) of the 6284 Law (n 6) and Article 3(d) of the Istanbul Convention
definition of ‘gender’ on an international, legally-binding ground, i.e. ‘the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men’.\textsuperscript{78} Turkish law, however, lacks the definition of gender in spite of the pressure from various women’s NGOs, as well as from members of Parliament from the opposition party during the drafting process.\textsuperscript{79} This negatively affects the implementation of the Convention by Turkey,\textsuperscript{80} and raises suspicion on the political commitment of the drafters to eradicate all types of gender-based violence in society. This reluctance can only be interpreted as the state’s lack of will to eradicate violence against women through radical measures so as to alter the gendered roles subscribed to women, which are mostly the main cause of violence against them.

For example, looking at the relevant laws of Italy and Spain, the types of violence against women are mainly treated under the term of ‘gender-based violence’, instead of domestic violence or violence against women.\textsuperscript{81} This approach openly underlines the unequal power relations between women and men as the main cause and result of violence against women and therefore, addresses the issue as a structural problem.\textsuperscript{82} Whilst the 6284 Law states that violence against women constitutes a form of discrimination against women,\textsuperscript{83} it misses an opportunity to highlight the relation between violence and inequality, thus giving the impression that violence against women is an individual issue, rather than a structural one. Considering that the Istanbul Convention and radical feminism perceive violence as a natural reflection of inequality and a structural problem, this overshadows Turkey’s commitment to implement the Convention in the line with a radical feminist approach. In fact, this reluctance rather leans towards a liberal perspective where gender as a concept is entirely excluded.

Unpacking the definition of domestic violence provided by the 6284 Law, it can be seen that, in a parallel line to the Istanbul Convention, the phenomenon is defined in a two-folded manner so as to include both intimate partner violence and inter-generational violence, which occurs between parents and children for the most part.\textsuperscript{84} The Turkish Law identifies domestic violence as ‘any kind of physical, sexual, psychological and

\footnotesize{\textsuperscript{78} Article 3(c) of the Istanbul Convention\textsuperscript{79} Uğur (n 52) 345\textsuperscript{80} Ceylan (n 48) 25; Özbilen and Soygüt-Arslan (n 54) 377, 385; Akbulut (n 54) 152; Uğur (n 52) 345\textsuperscript{81} WAVE, ‘Violence against Women Comparative Report: Italy, Spain and Turkey’ (n 43) 15,16\textsuperscript{82} ibid 16\textsuperscript{83} Article 2(c) of the 6284 Law (n 6)\textsuperscript{84} Article 3(b) of the Istanbul Convention}
economic violence that occurs within the family or domestic unit between the victim and the perpetrator, whether or not they share the same residence, or the violence that occurs between people that can be considered family members, in a gender-neutral sense.  

It should be reminded that the Istanbul Convention requires states to pay particular attention to women victims of gender-based violence. At this point, the question to be posed becomes whether Turkey meets this obligation or whether it holds an equal distance towards all victims of domestic violence. Looking at the 6284 Law, there is no provision explicitly declaring that women victims of violence, including domestic violence, are at the centre of the concern of the Law. However, it is evident in the title of the law, which is ‘the law on the protection of family and prevention of violence against women,’ that when violence is at stake, it is women whom the law primarily aims to protect. Furthermore, the 6284 Law makes it clear in its first provision that its purpose is to protect four groups of people; women, children, family members and the victims of stalking, who are subjected to violence or under the risk of being subjected to violence.

This being the case, women are protected within the scope of law just because they are women. In other words, women are protected outside the realm of family or domestic violence and are protected under any circumstance. Children are granted the same protection as women. However, men can benefit from the protection of the law only if they are the family members or the victims of stalking who are subjected to or under the risk of being subjected to violence. Therefore, it could be easily argued that women are ensured a broader and more explicit protection from violence within the framework of the 6284 Law. One point needs to be underlined that whereas ‘engaged couples’ had been included in the protected groups in the draft of the Law, this term was not

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85 Article 2(b) of the 6284 Law (n 6)
86 It should be reiterated that this aspect of the Convention is being pursued in a practical sense. Acar expressed that before sending the first questionnaires to the state parties, all members of the monitoring body of the Convention unanimously agreed that the questions to be posed to states would investigate the measures taken to address only women victims, regardless their approach to gender-neutral violence: Interview with Feride Acar, President of Group of Experts on Action against Violence against Women and Domestic Violence and the Retired Professor of the Faculty of Economic and Administrative Sciences in METU (Ankara, Turkey, 18 January 2017)
87 Article 1(1) of the 6284 Law (n 6)
88 Özbilen and Soygütlü-Arslan (n 54) 370
introduced within the final text.\textsuperscript{89} This could reveal that the real intention of the drafters was to ensure a broader protection for women than men in the case of violence. In fact, if ‘engaged couples’ had been included, such men could have had a direct protection from violence. However, as the term was not confirmed in the Law, engaged men are not protected since they cannot be considered as family members.\textsuperscript{90} Moreover, since engaged couples rarely share the same domicile in Turkey, they are not protected as people in the same domestic unit according to the definition of domestic violence. On the contrary, if it is an engaged woman subjected to violence, she would be explicitly protected due to her being a woman, without having to fit into any other categories.

Furthermore, the Law 6284 is far more progressive than the previous 4320 Law by prioritising women’s protection. In the 4320 Law, the people to be protected within the scope of the law were determined as ‘one of the married partners, children or the other family members living in the same residence’ and in the rest of the law, no specific attention on women was given at any point.\textsuperscript{91} Considering this negligence on the disproportionate gendered impacts of violence on women in the 4320 Law, the 6284 Law seems far more aware on the disproportionate effects of violence on women, in harmony with the Istanbul Convention.

When the domestic violence definition included in the 6284 Law is examined in more detail, it becomes prominent that the term is drawn with ambiguous terms, shadowing its content, in contrast to the fairly clear definition provided by the Istanbul Convention. First and foremost, this definition does not include ‘former or current spouses or partners’, as contained in the definition of the Convention. As demonstrated above, the Law covers three domestic violence scenarios: violence occurring between family members, between people at a domestic unit (whether or not sharing the same residence), and between people who can be rendered as family members.

\textsuperscript{89} ibid \textsuperscript{90} In Article 1 of the Draft Bill, ‘women, children, engaged couples and individuals whose engagement or marriage union has ended for any reason’ were included into the protection scope. \textsuperscript{91} Article 1 of the 4320 Law (n 39). The term of ‘family member’ was dominant throughout the entire law. Initially, in the law’s preamble, ‘woman’ was stated, instead of ‘culpable partner’, but the law preferred the term ‘partner’ at the end. Even though the ‘partner’ could be presumed to particularly refer to ‘women partners’, it was not worded explicitly in the law. It also should be noted that, before the adoption made to the law in 2007, it was only married partners to be protected: children and the other family members were added later on. This focus on partners, but not on the other family members, was argued to be a violation of equality before the Constitutional Court. The Court dismissed the case. See Karınca (n 47) 12; Eray Karınca, \textit{Sorularla Kadına Yönelik Aile İçi Şiddet} (Ankara Barosu Yayımı, 2011) 72
The Law, however, does not define family and it is not clear what is to be understood as ‘violence occurring at a domestic unit’ or ‘people who can be rendered as family members’. In fact, there has been no clarification on these terms either in the 6284 Law, or in the Guideline with regards to the Implementation of the 6284 Law. It is difficult to comprehend why did the Turkish drafters not prefer to take the simple path of the Convention by simply containing the term of ‘former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim.’ The Law is not clear on whether or not partners who are cohabiting but not officially married are included in the protection scope of the Law. Equally vague is the issue of whether or not couples undergoing an imam marriage, but not an official one, can benefit from the protection. This ambiguity in defining domestic violence, and the way in which it might to be interpreted before the courts, can be illustrative of the tension between secular universalism and cultural relativism discussed in-length before. This is the point that the study addresses in the next section.

a. Universalism and Cultural Relativism vs Women’s Equality: Defining Violence

Imam marriage is a type of religious marriage conducted by an imam (the name of the religious priest in Islam) and is not recognised as a marriage before the law and official bodies in Turkey. However, such marriage is still a common religious ritual in the country. According to the last comprehensive research conducted in this regard, a vast majority of partners conduct both religious and official marriages, while the ones only having an imam marriage are at a far smaller rate. Even though they cover a small portion of the society, they occur in an amount that cannot be underestimated, and it is not clear from the wording whether these partners can benefit from the protection of the 6284 Law. However, there is a consensus in the literature that the Law applies to all partners, regardless of their marital status. Thus it includes couples married solely by an

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92 Banu Bilge Sarhan, ‘Violence Against Women in the Code Numbered 6284’ (2015) 4:8 The Macrottheme Review 40, 43; Akbulut (n 54) 148, 150-1
93 In the explanatory report to the Istanbul Convention, it is stated that the ‘definition of domestic violence that covers acts of physical, sexual, psychological or economic violence between members of the family or domestic unit, irrespective of biological or legal family ties. It is evident here that the drafters did not require any official marriage unity for the Convention to be applicable. See Council of Europe Explanatory Report to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (11 May 2011) CETS 210 para 41.
94 The report of ‘National Research on Domestic Violence against Women in Turkey- 2014’ (n 14) 95 95% of married couples conduct both official and imam marriage. (ibid 77)
96 The partners conducting only imam marriage consist of around 3% of all married couples. (ibid)
imam, those who live together outside marriage, and even ex-partners. In fact, the Justice Commission confirmed this approach in its report that the main purpose of the Law is the protection of women from any type of violence; whether or not the marriage is conducted through official or other ways or, whether or not there is any declared commitment to marriage between partners, women are going to be protected from violence within the borders of the 6284 Law. Confiming that the Law is applicable to such women, however, one needs to be cautious of the reluctance of the drafters from using the words ‘spouses or partners’ in the definition.

During the time the previous 4320 Law was in force, whether women having an imam marriage, women cohabiting with their partners without any form of marriage, or divorced women were entitled to protection from violence had been contentious. The Law did not contain a separate definition of domestic violence and it required women to be officially married in order to be included within the protection scope. Even though in 2007, the Law was amended to broaden the scope of the protection and to remove the requirement that family members had to be living together in order to be protected, the requirement of ‘official marriage’ was nevertheless kept for the victims of violence. In the application of the law, there had been inconsistency as to the protection of such women; while in some cases, protection orders were issued for women cohabiting with their partners without marriage or imam marriage, or divorced women, in some others, the injunction was rejected.

The Parliamentarians, scholars and practitioners were split in two on the question of whether such women should be protected or not. Those who opposed such protection

97 Uğur (n 52) 343; Kırbaş-Canikoğlu (n 58) 363;
98 It was stated in the report that the draft law did not aim to only protect women who are in an officially-recognised marriage unity, but all women regardless of their marital status. See the Report of the General Assembly of the Grand National Assembly of Turkey (24th Term, 2nd Legislative Year 181) 64
99 Kırbaş-Canikoğlu (n 58) 362; Hüsamettin Uğur, ‘Uluslararası Sözleşmeler ve AİHM Kararları İşçğında Ailenin Korunmasına Dair Kanun ve Gayrìresmi Evlilikler Hakkında Yargıtay Kararı’ 155
100 The 4320 Law (n 39) Article 1
101 The 5636 Law (n 49)
102 Article 1 of the 5636 Law (n 49)
103 For contradicting decisions of the Family Court in this regard, see Karnca, ‘Kadına Yönelik Aile İçi Şiddete İlişkin Hukukal Durum ve Uygulama Örnekleri’ (n 47) 44-45
relied on various arguments. For example, one Parliamentarian claimed that to integrate women cohabiting with their partners outside marriage into the scope of the Law would encourage people to pursue such relationships. It could be argued that in this statement there is a strong sense of defence of cultural norms prevalent in the country. In fact, for women to share the same residence with their partners without an official or religious marriage is still a cultural taboo in Turkey and those women are socially labelled as loose, even if they have a consistent and long-term relationship with their partners.

This is not the case in most contemporary European or Western societies. Another argument against ensuring protection for these two groups of women (women only with imam marriages and women cohabiting without any form of marriage) was that it would lead to the legal recognition of those types of relationships, which were not recognised elsewhere within the Turkish legal framework, and this would result in legal inconsistencies. However, even though these relationships were not considered as an official marriage, they already benefited from some other legal entitlements or protections within Turkish Civil Law.

Looking at the international legal framework apart from the Istanbul Convention with regards to the issue, the ECtHR contended in its numerous decisions that the concept of family cannot be limited to the partners having an official marriage under the Article 8 of the ECHR. Rather, the Court declared that partners having a close relationship could be considered as family in the sense of Article 8. In the determination of whether the union should be considered as family, the Court took some points into account, such as

105 Karınca, ‘Kadına Yönelik Aile İçi Şiddete İlişkin Hukuksal Durum ve Uygulama Örnekleri’ (n 47) 48
106 Referring to the National Research on Domestic Violence against Women, Aydin and Baran underline that in Turkey, very big majority of people consider marriage as the only legitimate way to have an intimate relationship and to cohabit. See Okan Aydin and Gülen Baran, ‘Toplumsal Değişme Sürecinde Evlenme Ve Boşanma’ (2010) 21:2 Toplum ve Sosyal Hizmet 117, 120-1
107 Karınca, ‘Kadına Yönelik Aile İçi Şiddete İlişkin Hukuksal Durum ve Uygulama Örnekleri’ (n 47) 48-49
108 ibid
109 ibid
110 For example, in Elsholz v Germany (ECtHR, 13 July 2000), the Court argued that the notion of family under Article 8 was not confined to marriage-based relationships and may encompass other de facto "family" ties. (para 43). Similarly, in Marecks v Belgium App no 6833/74 (ECtHR, 13 June 1979) the Court stated that ‘Article 8 makes no distinction between the “legitimate” and the “illegitimate” family. Such a distinction would not be consonant with the word “everyone”, and this is confirmed by Article 14. (para 31) Furthermore, in Johnston v Ireland App no 9697/82 (ECtHR, 18 December 1986), the Court took into account the fact that the couple in concern were leaving for long time together (i.e., 15 years) in its affirmation of the applicant’s unity with their partner and children as family. (Paras 113-130)
whether or not partners were living together, the length of the relationship or whether a
certain commitment was given in some ways such as having children together.\textsuperscript{111}
Therefore, due to its ‘official marriage’ restriction, the previous 4320 Law had been in
violation with the ECHR, and if the current 6284 Law did not ensure protection for
women in relationships outside official marriages, it would not only breach the Istanbul
Convention, but also its obligations arising out of the ECHR.\textsuperscript{112} Turkey seems to be
taking a big positive step with its adoption of the 6284 Law on this issue, even though it
does not explicitly include the words of ‘former or current spouses or partners,’ unlike
the Istanbul Convention.

As revealed above, the issues of religious imam marriages and the cultural rejection of
partners cohabiting without any type of marriage are issues stemming from the
dynamics of Turkish culture specifically; therefore they do not exist in most of the
Council of Europe member states and the other state parties to the Istanbul
Convention.\textsuperscript{113} In fact, Turkey is in a unique position where the contest and
confrontation between secular and indigenous ethics is observed in a high tension.\textsuperscript{114}
Turkey has more often than not experienced this situation of double bind between its
modernised laws, as well as its obligations evolving out of modern international law on
one hand, and its own traditions and culture that are frequently in tension with those
laws on the other.\textsuperscript{115} Taking into account the specificities of Turkey, it should be asked
whether Turkey should be given a wide margin of appreciation in its implementation of
the Istanbul Convention. For example, whether one can argue for Turkey’s potential
rejection of the protection of women having a relationship outside marriage from
violence, due to its cultural norms? If not, would it lead to the cultural imposition of
Western and European values on Turkey through a universalist view?

The answer to this question inevitable calls for the well-established discussion of
universalism versus cultural relativism within international human rights law. As

\begin{footnotes}
\footnote{\textsuperscript{111} Akbulut (n 54) 151}
\footnote{\textsuperscript{112} This is also in compliance with the Article 1 of CEDAW obliging states to ensure equality to women
regardless of their marital status.}
\footnote{\textsuperscript{113} Karınca, ‘Kadına Yönelik Aile İçi Şiddete İlişkin Hukuksal Durum ve Uygulama Örnekleri’ (n 47)
48-49}
\footnote{\textsuperscript{114} Henri Lefebvre and others, ‘ Review: Ayse Saktanber, Living Islam: Women, Religion and the
Politicization of Culture in Turkey’ (2003) 7:3 Gender, Technology and Development 431, 431}
\footnote{\textsuperscript{115} For an analysis of such a tension within Turkish Laws, see İhsan Yılmaz, ‘Secular Law and the
Emergence of Unofficial Turkish Islamic Law’ (2002) 56:1 Middle East Journal 113}
\end{footnotes}
discussed in depth in the fourth chapter, ‘culture’ is mostly a shell term used to disguise the extents of the political desire to control women’s rights, freedoms and bodies, more than anything else.\textsuperscript{116} This could be same with so-called secular and universalist stance; the state can arguably rely on this position in order to restrict women’s rights and equality when it wants to do so.\textsuperscript{117}

This is well-evident in our issue of the two groups of women who are either having imam marriage without official marriage or women cohabiting with their partners without any type of marriage. In the case of rejection of women having an imam marriage, Turkey would have taken a path towards the secular and modern law approach that the state locates itself neutrally towards all religions and cultures. In this reading, religion would be entirely disregarded in applying law. In the case of rejection of women cohabiting with their partners without marriage, Turkey would have moved in an opposite direction to the previous one; namely regarding cultural norms in implementing law. In fact, it would have regarded the cultural taboo that women sharing a home without marriage do not fit into the chastity norms. In both cases, however, the outcome would be the same; limiting the protection of women, albeit through opposing claims, which are either culturally neutral or cultural-based. This hypothetical scenario is a perfect example strengthening the argument made in the fourth chapter regarding the artificial tension between universalism and cultural relativism. In fact, it was said that both terms can easily be employed so as to address the political aim of the state to restrict women’s equality and rights. Therefore, instead of being trapped with the ambiguous terms of universality or relativism, gender equality must be located as the primary value to test the legitimacy of a law or policy.\textsuperscript{118}

It is evident in the case of \textit{imam} marriage and women cohabiting with their partners outside marriage that when gender equality is put at the centre in a substantial sense, both groups of women would get protection, whilst the adoption of either universalism (in the case of imam married women) and cultural relativism (in the case of cohabiting women outside marriage) would be dangerous. It also should be reminded that culture


\textsuperscript{117} See the discussions in this regard in the section ‘Promoting Changes in the Cultural Patterns: Is the Istanbul Convention Universalist?’ in Chapter 4.

\textsuperscript{118} See the comprehensive discussion of this point in the section ‘Promoting Changes in the Cultural Patterns: Is the Istanbul Convention universalist?’ in Chapter 4.
and religion do not have certain and stagnant meanings.\textsuperscript{119} Considering that in Turkey, religion as one of the biggest components of culture is politicised more than in many other countries, particularly in relation to women issues,\textsuperscript{120} and even within the same ‘religious women’ umbrella, there are significant differences in the way that these women interpret religion and religious gender norms,\textsuperscript{121} to keep this variety of opinions among women in mind becomes essential.

4. The Holistic (4Ps) Measures in Relation to Domestic Violence: Does Turkish Law Satisfy the Istanbul Convention?

As analysed in depth in the fourth chapter of this study, one of the most unique and promising features of the Istanbul Convention is its handling of the issue of gender-based violence against women as a structural problem, and the imposition of obligations upon state parties by involving various state and non-state actors into a holistic anti-violence framework.\textsuperscript{122} In fact, as argued earlier, when compared to the earlier picture of the international human rights law structure, in which states were asked to take measures to eliminate domestic violence against women in disordered and spontaneous occasions, this feature of the Convention is of the corrective nature. In other words, a holistic map of state measures with regards to the issue had not been developed.\textsuperscript{123} It also demonstrates a shift to an understanding where all types of violence against women are considered as a structural problem, in line with the dominance approach of radical feminist theory.

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\textsuperscript{120} Henri Lefebvre and others (n 114) 432

\textsuperscript{121} Traditionalist right-wing women who support the conservative politicians seeking to curtail the right of women and apolitic Muslim women in Turkey are not necessarily inclusive in their claims or aims that they are pursuing. See, Sarah El-Rashidi, ‘Egyptian Women Campaign for Larger Role in Parliament’ (24 April 2014) <http://www.al-monitor.com/pulse/originals/2014/04/egyptwomen-dostour-parliament-rights.html> accessed 10 February 2016


\textsuperscript{123} As analysed before, the responsibilities imposed upon states to eliminate domestic violence has been mainly through the case-law of the ECtHR, CEDAW Committee, Inter-American Commission Human Rights and through their legally non-binding documents. Furthermore they were either concerned on the special facts of the each case or the recommendations focused on certain aspects of violence. Therefore, Chapter 3 argued that a comprehensive and legally secure framework for legal measures could not be developed prior to the Istanbul Convention. For the detailed discussion made in this regard, see the section ‘Imposition of State Responsibilities in a Fragmented and Dispersed Manner’ in Chapter 3.
It should be analysed whether Turkey achieves to meet the requirement of the Istanbul Convention to adopt holistic measures in its struggle against domestic violence. At this point, it is important to mention Article 10 of the Convention, obliging state parties to establish one or more official bodies to coordinate, implement, monitor and evaluate policies and strategies.  

This part of the Convention is significant, since the body to be established would be the tool to realise and practically implement all the guidance and the policies suggested by the Convention and taken by the states. Turkey established ‘Violence Prevention and Monitoring Centres (VPMCs) within the 6284 Law under the roof of the Turkish Ministry of Family and Social Policies, with the specific aim of complying with the Istanbul Convention. In this context, it is vital to analyse the efficiency of these bodies.

These Centres are established to monitor and evaluate the policies and measures at local level, to run services for the prevention of violence and monitor all prevention and protection orders, to ensure services for victims of violence and for perpetrators, as well as potential perpetrators, in a 7/24 working principle. In fact, according to the 6284 Law, the services of the VPMCs can be classified in three groups: first are general support services, including ensuring that injunction orders are implemented effectively and coordinating the services provided to the victims, such as sheltering, temporary fiscal support, health support and legal aid. The second group comprises services for victims, such as supporting them in employment and assisting them in resolving their psychosocial and economic problems, and the third group provides services for perpetrators, such as training them on anger control, registering them to rehabilitation centres to halt their violent behavioural tendencies or assisting them in employment.

More importantly, these Centres aim to be centralised so that all the complaints in relation to violence against women are directly or indirectly received. It is aimed that

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124 Article 10(1) of the Istanbul Convention states that 'Parties shall designate or establish one or more official bodies responsible for the coordination, implementation, monitoring and evaluation of policies and measures to prevent and combat all forms of violence covered by this Convention.'
125 Article 14 of the 6284 Law (n 6). They are established under the ‘General Directorate on the Status of Women’ which is functioning under the roof of the Ministry of Family and Social Policies.
126 ibid
127 Article 15(1) of the 6284 Law (n 6)
128 Article 15(2) of the 6284 Law (n 6)
129 Article 15(3) of the 6284 Law (n 6)
130 The main purpose of the establishment of these Centers is making women to apply to these institutions straight after when violence occurs. Even if the victims report the violence first to the police stations, it
the totality of services provided to the victim is coordinated, so that women are not traumatised by having to explain what happened many times before different bodies.\textsuperscript{131} One other purpose is to collect a comprehensive data on the prevalence and types of violence, which measures were taken, and which of them have been effective.\textsuperscript{132} The establishment of such centres addressing the issue single-handedly, and collecting a comprehensive data is interpreted by some to mean that the fight against domestic violence has finally been institutionalised in Turkey.\textsuperscript{133}

VPMCs have started to serve in fourteen pilot cities, therefore data in terms of their efficiency, although not comprehensive, is currently available.\textsuperscript{134} However, this data refers to contradictory results. On one hand, many women expressed their satisfaction that, following the injunction orders that they received from the courts the VPMCs provided them with aftercare.\textsuperscript{135} On the other hand, there are worrying implications such as women still mostly go to the police stations first, rather than the Centres, where the self-referral rate is low;\textsuperscript{136} the registered reports on violence and the services are not organised;\textsuperscript{137} insufficient staff in the centres;\textsuperscript{138} the priority is given to the victims of physical violence, while the other types of violence are pushed to the background;\textsuperscript{139} the lack of coordination among the staff,\textsuperscript{140} and the absence of any temporary financial assistance, even though guaranteed in the Law 6284.\textsuperscript{141} GREVIO also expressed its concern that VPMCs had been failing in their purpose to act as centralised ‘one stop stations’ since social services were still running in a fragmented structure and women

\begin{footnotesize}
\begin{enumerate}
\item[131] Altıparmak (n 36) 449
\item[132] Article 15(1)(a) of the 6284 Law (n 6) in line with the Article 10(1) of the Istanbul Convention requiring states to establish bodies to ‘co-ordinate the collection of data as referred to in Article 11, analyse and disseminate its results.’
\item[133] Ceylan (n 48) 50-51; Uğur, ‘‘Kadin Ve Aile Bireylerine Yönelik Şiddete Karşı 6284 Sayılı Kanunun Getirdikleri’ (n 52) 341
\item[134] The report of ‘National Research on Domestic Violence against Women in Turkey- 2014’ (n 14) 38
\item[135] Ibid 217
\item[136] Only 10% of violence applications are lodged at the centres so far, see Altıparmak (n 36) 449. Also, it is reported that some women are still being directed to the police stations as the first point of complaint, see The report of ‘National Research on Domestic Violence against Women in Turkey- 2014’ (n 14) 312. As a result of this, the aim to stop women needing to express what happened many times before different authorities seems failed to be achieved.
\item[137] The report of ‘National Research on Domestic Violence against Women in Turkey- 2014’ (n 14) 312
\item[138] Altıparmak (n 36) 459
\item[139] The report of ‘National Research on Domestic Violence against Women in Turkey- 2014’ (n 14) 268
\item[140] Altıparmak (n 36) 459
\item[141] The report of ‘National Research on Domestic Violence against Women in Turkey- 2014’ (n 14) 261
\end{enumerate}
\end{footnotesize}
were not spared from having to apply to numerous institutions. These problems overshadow the efficiency of Turkey to practice the holistic measures imposed by the Istanbul Convention in a co-ordinated and organised way. This lack of coordination and failure to address the problem under a single roof indicate that although the structural nature of domestic violence is recognised and the measures are meant to be institutionalised in law, they are not realized in practice. In this context, they refer to a failure to meet the radical feminist approach theorising all forms of violence against women as institutional and systematic.

a. A Cultural Uprising: The Threat to Women’s Equality

It is important to analyse one essential provision placed under the prevention pillar (part of 4(P)s structure), which is to promote changes in cultural norms that are threatening women’s equality. The Convention, in its own wording, requires states to promote changes in the social and cultural patterns of behaviour of women and men, in a way that eradicates the customs and traditions leading to the subordination of women.

In the respective article, states are obliged not only to take legal measures to this end, but to also take all measures beyond law that could be effective. This aspect of the Convention is particularly vital considering the unique cultural position of Turkey and its recent gender policies.

Turkey’s attitude on culture and its relation to women’s equality seems more concerning than ever been before, on both legal and political grounds. Particularly in last years, the controversial statements of public officials serving to strengthening the gender roles of women on traditional grounds, and therefore endangering women’s equality, are broadly being reflected in the media. The examples include but are not limited to, the then health minister’s declaration that the only career for women can be the motherhood; the then prime minister Erdoğan’s statement that women are half women if they are not mothers, because of working; one minister’s argument that

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142 GREVIO report on Turkey (n 10) para 142
143 Article 12(1) of the Istanbul Convention.
144 Article 12(2) of the Istanbul Convention.
Turkish women are the accessory of their house and the honour of their husbands, the then deputy prime minister’s claim that women’s laughing loudly in public space is equivalent to unchastity, and so on. This situation was subjected to the criticism of the CEDAW Committee in its last report of Turkey as:

‘[The persistence of deep-rooted discriminatory stereotypes against women] overemphasise the traditional roles and responsibilities of women as mothers and wives, thereby (...) constituting an underlying cause of gender-based violence against women. The Committee also notes with concern that high-level representatives of government have, on several occasions, made discriminatory and demeaning statements about women who do not adhere to traditional roles.’

The same issue was also criticised by GREVIO in its Turkey report which argued that public statements of statesmen and leading public professionals that blamed women victims of violence had amounted to hate speech in some instances, and called these speeches ‘disquieting’ considering the opinion-shaping role of these individuals.

As complementary to this part of the Convention requiring the dismissal of traditions that are harmful to women, the Convention has another subsection requiring states to ensure that culture, custom, religion, tradition or so-called ‘honour’ shall not be considered as justification for any acts of violence. The Convention also asks states to ensure that any of these factors shall not be regarded as justification in criminal proceedings. This is a very crucial part of the Convention since, one of the most prominent types of violence against women in Turkey is custom (töre) murders and honour (namus) killings. In fact, in the cases of women getting married or having a

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150 GREVIO report on Turkey (n 10) para 104
151 Article 12(5) of the Istanbul Convention
152 Article 42(1) of the Istanbul Convention
153 The first official data with regards to the prevalence and risk factors of custom and honor killings in Turkey was collected by a research conducted by the Parliamentary Research Commission and released in 2005. This report revealed that between 2000-2005, 29% percent of all women’s murders were committed to preserve honour. The report also showed that these forms of violence are still prevalent in Turkey and being experienced in every region, albeit at different rates (the largest portion being Marmara Region hosting 19% of all honour and custom killings). The report also underlined that much of the deaths which were reported as ‘suicide’ are likely to result from the pressure on women on the basis of honour and
romantic relationship without permission of their family, losing their virginity in extra-marital relationships, being raped and so on, women are being murdered by males in their families, such as their brothers, fathers, husbands or ex-husbands.\textsuperscript{154} In some circumstances, women are murdered on the basis of honour, due to their wearing styles, talking to foreign men, or wanting to divorce their partners.\textsuperscript{155} Looking at the Turkish legal framework in this regard, while according to the previous Turkish Criminal Law, \textit{namus} (honour) and \textit{töre} (custom) were considered as a reason for the application of unjust provocation, and therefore the perpetrators were issued a reduced sentence,\textsuperscript{156} the current Criminal Law states that \textit{töre} (custom) cannot be deemed as a reason for unjust provocation and in that case, the perpetrator is even to be issued an increased sentence.\textsuperscript{157}

Although, this amendment made in 2005 is a positive development in accordance with the respective provisions of the Istanbul Convention, it needs to be highlighted that the new Law does not refer to \textit{namus} (honour) as a forbidden ground for unjust provocation. It only refers to \textit{töre cinayetleri} (custom murders).\textsuperscript{158} It is important to underline that custom and honour killings in the Turkish context hold differences. \textit{Töre cinayeti} (custom murder) refers to the case in which a family council decides on the killing of the woman who arguably dishonoured the family due to her inappropriate sexual or non-sexual behaviours, and one male member of the family is selected to execute the murder. This tradition is particularly unique to the eastern part of the country.\textsuperscript{159} \textit{Namus cinayetleri} (honour-killings) are, however, the murders of women due to the personal interpretation of honour of the males and does not require the involvement of a family council or anything as such. In other words, these murders are being prosecuted on a wider spectrum of honour-related reasons and they are murders

\textsuperscript{154} Karunca, ‘Sorularla Kadın a Yönelik Aile İçi Şiddet’ (n 91) 40
\textsuperscript{155} ibid
\textsuperscript{156} 765 Numbered Turkish Criminal Law (abrogated) (adopted, 1 March 1926, entered into force 13 March 1926) Article 445
\textsuperscript{157} 5234 Numbered Turkish Criminal Law (adopted 17 September 2004, entered into force 21 September 2004) Article 82(j)(k)
\textsuperscript{158} ibid
\textsuperscript{159} In fact, the Courts require the presence of a decision to murder from a family council in order to classify it as a custom murder. See Ankara Barosu Kadın Hakları Merkezi, ‘İnsanlığın Namus Lekesi: Töre Cinayetleri’ (2008) 66:4 Ankara Barosu Dergisi 17, 19
having an individual character.\textsuperscript{160} Considering that honour killings are one of the most prominent types of domestic violence against women,\textsuperscript{161} the failure of the Turkish law to include honour as a forbidden ground for the unjust provocation is concerning in terms of Turkey’s compliance with the Istanbul Convention.\textsuperscript{162} What is more concerning is that, as noted by GREVIO, the unjust provocation is still being considered as applicable to honour killings before Turkish courts.\textsuperscript{163} In this regard, ‘honour’ arises as another loophole that the government, law enforcers and judiciary can fill by grounding it on cultural factors, in line with their own political desire to suppress women.

Besides controversial political statements and judicial interpretations, chastity, religion and traditions also formed ground for some controversial attempts of legal reform such as prohibiting abortion\textsuperscript{164} and re-criminalising adultery.\textsuperscript{165} The recent law authorising imams to legally validate the marriage is another example.\textsuperscript{166} These legal steps are in contradiction with the earlier era, when progressive legal reforms took place to annul some laws having discriminatory effects on women, as a result of strong women lobbying and feminist movements. For example, in the 1990s, the provision binding women’s work to the permission of their husband was abolished by the Constitutional

\textsuperscript{160} Karınca, ‘Sorularla Kadına Yönelik Aile İçi Şiddet’ (n 91) 40-41. It should be noted that there is not a clear legal definition of honour killings in Turkey, and some scholars define it so as to involve a decision of family council, in a similar vein to custom killings. See Ece Göztepe, “‘Namus Cinayetlerinin” Hukuki Boyutu: Yeni Türk Ceza Kanunu’nun Bir Değerlendirmesi’ (2005) 59 Türkiye Barolar Birliği Dergisi 29, 29-30

\textsuperscript{161} Honour-killings are more of an interest to this research which is focusing on violence of male partners against women. In fact, in custom murders, there is a intra-generational violence where the males of the family from different generations, such as fathers and even sons sometimes are involving in violence.

\textsuperscript{162} Akbulut (n 54) 157-8


\textsuperscript{164} Then-prime minister Erdoğan declared that his political party (AKP) was working on a law draft which was criminalising abortion in 30 May 2012. Such a law has never been adopted. Yet it should be underlined that, abortion in Turkey is practically prohibited in last years, since the state hospitals are often rejecting to practice abortion. Also, fathers of single women who are going through abortion are being informed, without their permission, under a health policy recently introduced. For Erdoğan’s statement, see <http://www.hurriyet.com.tr/gundem/kurtaj-yasasi-cikartacagiz-20654033> accessed 4 November 2017.

\textsuperscript{165} During the reform of Criminal Law in 2004, then-prime minister Erdoğan has declared many times that adultery will be included in the new law as a crime. As a result of the reaction and protests from womens’ rights advocates and feminists, this has not happened. This proposal has been heavily criticised by the EU. Erdoğan, recently declared that adultery should be re-negotiated and be recriminalized as it is in contradiction with Turkish societal values. See, ‘AKP 2004’te Suç Haline Getiremediği Zinayi Yeniden Gündemine Aldı’ (22 February 2018) <https://m.bianet.org/bianet/insan-haklari/194571-akp-2004-te-suc-haline-getiremediigi-zinayi-yeniden-gundemine-aldi> accessed 6 November 2017

\textsuperscript{166} With the amendment to the 5490 Numbered Law on the Civil Registration Services. The amendment was adopted 18 October 2017 and entered into force 3 November 2017.
By 1997, women were allowed to officially use their maiden name and the husband’s surname together,\textsuperscript{168} and by 1998, the adultery of women was decriminalised.\textsuperscript{169} Yet, the most essential and holistic change among these was the mass of amendments to both Criminal and Civil Law by the beginning of the 2000s,\textsuperscript{170} so as to abolish the inequality between women and men in family structures, and to perceive the sexuality of women as a part of their personal integrity, rather than a component of morality and family order.\textsuperscript{171}

Taking all of these together, although Turkey took effective steps to implement the Istanbul Convention, such as the adoption of the 6284 Law, there are two major problems coming to the fore: first of all, Turkey seems to fail to establish the link between the elimination of domestic violence and strengthening women’s equality. This is a great worrying point in terms of the effective implementation of the Istanbul Convention, and an important indicator of a potential problem which would arise in the application of a radical feminist instrument in a domestic setting. As explained throughout the study, the concept of violence and women’s inequality are conceptualised as two sides of the same coin in the radical dominance theory of MacKinnon.\textsuperscript{172} All forms of violence are considered as a manifestation of women’s subordination and, on this ground, the right to equality guarantees is invoked. It was seen that the Istanbul Convention employed the same reading of equality (as subordination) and constructed all of its measures on the confirmation of an organic link between women’s inequality and all forms of violence against women.\textsuperscript{173} Looking at the Turkish legal framework, it becomes visible that on one hand, the government enacts a

\footnotesize{\textsuperscript{167} Article 159 of the old 743 Numbered Turkish Civil Law was abolished by the Constitutional Court in 29 November 1990. See Altınay and Arat (n 13) 27
\textsuperscript{168} ibid
\textsuperscript{169} ibid
\textsuperscript{170} In fact, as a result of these reforms, the old 765 Numbered Turkish Criminal Law (n 156) was considerably changed by the new and current 5234 Numbered Turkish Criminal Law (n 157) in 2004. Similarly, the old 743 Numbered Turkish Civil Law (adopted 4 May 1988, entered into force 12 May 1988) was amended by the new and current 4721 Numbered Turkish Civil Law ( adopted 22 November 2001, entered into force 8 December 2001).
\textsuperscript{171} Altınay and Arat (n 13) 29
\textsuperscript{173} See the section ‘The Convention as a Gender Equality Convention: Taking a Dominance Approach?’ in Chapter 4.}
very new law specifically devoted to tackling violence against women (the 6284 Law) through promising features, and on the other, it takes legal and political steps endangering women’s both *de facto* and *de jure* equality. As confirmed in both radical feminism and the Istanbul Convention, without empowering women from all aspects, including legal, the elimination of violence is an impossible project. Turkey’s concerning moves towards equality bring into doubt its sincerity in its political commitment to address gender-based domestic violence. Considering this conservative approach positioning women to a secondary and subordinate position in society, it would not be wrong to expect a rise in all types of gender-based violence against women, including domestic violence, in Turkey in the forthcoming years. As one author stated, Turkey has already turned into a *laboratory of violence* requiring more research and comprehensive policies towards gender equality.\footnote{Boyacıoğlu (n 4) 141}

Secondly, cultural, traditional and religious norms seem to form the main ground for all the steps imperilling women’s equality. As revealed above, this has been confirmed by the CEDAW Committee in its recent country report.\footnote{The CEDAW Committee 2016 Report to Turkey (n 5) para 28} It is worthy to remember at this point the discussions made in the context of cultural relativism earlier in this chapter (and the fourth chapter). It was repeatedly stated that culture can be instrumentalised in different meanings to serve the real political will of the states.\footnote{The United Nations Special Rapporteur expressed that ‘the greatest challenge to women’s rights and the elimination of discriminatory laws and harmful practices comes from the doctrine of cultural relativism’. See Amnesty International, ‘It is in Our Hands: Stop Violence against Women’ (Report) (2004) AI-Index AMR 77/001/2004 32} Furthermore, as the fourth chapter argued, culture is mostly used to detriment the rights and freedoms of women, but not otherwise.\footnote{See the comprehensive discussion of the point in the section “Promoting Changes in the Cultural Patterns: Is the Istanbul Convention universalist?” in the 4th chapter.} Looking at the political statements of the officials and the justifications for legal attempts in Turkey, the previous argument of the research proves that culture and religion is invoked to threaten women’s social and economic equality, bodily integrity and freedom, without any exception.

In this context, the suggestion of this research to situate women’s equality at the centre of concerns, but not through artificial terms of culture, cultural relativism or universalism proves to be efficient with regards to the current stance of the government towards women. It is evident in the aforementioned political statements that, once
ambiguous terms such as culture and religion are employed, there is always a leeway for those terms to be interpreted broadly so as to harm women. However, when equality is put to the centre, this would not be the case. Even in a restricted formal equality understanding, legal attempts such as re-criminalising adultery or prohibiting abortion would be seen as a direct discrimination against women and would therefore be outlawed. This again demonstrates that equality must be the key criterion in elaborating laws and policies affecting women.

5. Does Turkish Law Strike a Fair Balance between Criminal and Special Civil Law Measures in the Struggle to Tackle Domestic Violence?

As aforementioned in Chapter 3, the Istanbul Convention requires state parties to strike a fair balance between their criminal and special civil law measures while addressing domestic violence. In fact, it obliges state parties to criminalise all acts of physical, sexual and psychological violence, and this implies that when these forms of violence fit within the definition provided for domestic violence, namely when these acts occur within the family or domestic unit, or between former or current spouses or partners, they form a type of domestic violence and they must be criminalised. On the other hand, the Convention explicitly imposes the obligation to ensure special civil law measures including emergency barring orders, and restriction and protection orders. In the face of this, the questions to be posed next are whether Turkey strives to strike a fair balance between these two lines of measures in its approach to domestic violence, and what are the existing problematic points that need to be corrected in each of those lines.

a. Criminal Measures

In Turkish Law, the acts leading to domestic violence against women are treated under various laws. One of the most prominent of these laws is the Criminal Law.

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178 For example, in the case of Whelan v. Ireland (12 June 2017), Com No 2425/2014, UN Doc No CCPR/C/119/D/2425/2014 the UN Human Rights Committee argued that Ireland’s prohibition of abortion led to the discrimination of the applicant on the basis of her sex breaching Article 26 (equality before the law) of the International Covenant on Civil and Political Rights. Similarly, the Indian Supreme Court decriminalised adultery on the basis that it is a breach of equality before law in 27 September 2018.

179 Article 35 and 36 of the Istanbul Convention

180 Article 3(b) of the Istanbul Convention

181 Article 52 of the Istanbul Convention

182 Article 53 of the Istanbul Convention

183 The Constitution of Turkish Republic (n 7); The 4721 Numbered Turkish Civil Law (n 164); The 5393 Numbered Law on Municipalities (n 42); The 4787 Numbered Law on the Establishment, Duties and Jurisdiction Procedure of the Family Courts (n 42)
should be briefly underlined here that the 6284 Law does not have any reference to the Criminal Law, as it mostly consists of regulations on special civil law measures such as restraining orders and protection orders. In Turkish Criminal Law, like many other jurisdictions, there is not a specific crime of domestic violence against women, rather the acts which could be considered as incidents of domestic violence are handled under numerous crimes. It must be reminded that even though the Istanbul Convention defines domestic violence so as to include physical, psychological, sexual and economic violence, it only obliges states to criminalise the first three forms of violence.

In Turkish Criminal Law, there are crimes that can encompass different types of physical violence such as felonious homicide, felonious injury, torment, physical compulsion, deprivation of liberty, and cruelty to the person sharing the same dwelling, and the last three of these crimes can be relevant for both physical and psychological violence. The crimes of sexual abuse and sexual harassment constitute grounds for handling the sexual types of domestic violence. However, it is crucial to state that these crimes are drawn in a gender-neutral manner and neither of them have a specific reference to domestic violence.

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184 5234 Numbered Turkish Criminal Law (n 157)
185 This issue was highlighted by the CEDAW Committe in its 7th Turkey report as 'It notes with concern, however, that the law does not criminalize domestic violence as such, and includes no provision relating to the prosecution or punishment of perpetrators.' The CEDAW Committee 2016 Report to Turkey (n 5) para 32
186 The Istanbul Convention allows state parties to to provide for non-criminal sanctions, instead of criminal sanctions, for the behaviours referred to in Article 33 (psychological violence) and Article 34 (stalking). It also allows states to enter reservation to impose criminal sanctions for only minor offences of physical violence (Article 35) in Article 78(2).
187 Article 82 of Criminal Law (n 157)
188 Article 86 of Criminal Law (n 157)
189 Article 96 of Criminal Law (n 157)
190 Article 108 of Criminal Law (n 157)
191 Article 109 of Criminal Law (n 157)
192 Article 232 of Criminal Law (n 157)
193 Emel Baydur and Burcu Ertem, 'Kadına Yönelik Evlilik İçi Şiddetin Hukuki Boyutları: Ceza Kanunu, Medeni Kanun ve Ailenin Korunmasına Dair Kanun Kapsamında Bir İnceleme' (2006) 65 Türkiye Barolar Birliği Dergisi 89, 97. It should be noted here that many types of violence or harms including physical, sexual, psychological or economic can be involving in many crimes together. It is difficult to draw a strict line in between them.
194 Article 102 of Criminal Law (n 157)
195 Article 105 of Criminal Law (n 157)
196 The Criminal Law (n 157) can also address psychological domestic violence within the gender-neutral crimes, including assisting or encouraging suicide (Article 84), breach of obligations conferred upon by family law (Article 233), defamation (Article 125), threat (Article 106), prevention of communication (Article 124) and as such.
Turkish criminal legislation seems to have a wide-range of crimes which would address different types of domestic violence, including physical and sexual ones, in line with the requirements of the Istanbul Convention. However, the adoption of the legislations does not mean much, unless they are implemented in an efficient way taking into account the particularities and the nature of domestic violence cases.\textsuperscript{197} The statistics on criminal prosecutions in Turkey are collected by a department of the Ministry of Justice in order to reveal the number of cases seen under each provision of the Criminal Law and the way in which they were ruled.\textsuperscript{198} Unfortunately, the data does not reveal how many of the cases that relied on the above-mentioned articles consisted of domestic violence incidents, therefore, it is currently not clear to what extent these criminal provisions were applied when domestic violence was at stake, and to what extent were the perpetrators punished.\textsuperscript{199} This lack of judicial data was considered by GREVIO as a cause of a great concern in its Turkey report.\textsuperscript{200}

The first problem arises in the context of Turkey’s regulations of aggravating circumstances. As analysed before, the Istanbul Convention ensures a provision containing detailed circumstances which should be considered as aggravating circumstances when determining the sentence.\textsuperscript{201} The provision incorporates nine different circumstances, most of which specifically relevant to domestic violence. For example, ‘[when] the offence was committed against a former or current spouse or partner as recognised by internal law, by a member of the family, a person cohabiting with the victim or a person having abused her or his authority’, the Convention requires states to increase the sentence of the perpetrator.\textsuperscript{202} Beyond this, whether the offence was committed repeatedly;\textsuperscript{203} a person was made vulnerable due to the offence;\textsuperscript{204} the offence was committed in the presence of a child;\textsuperscript{205} the offence was committed

\textsuperscript{197} In fact, Article 45(1) of the Istanbul Convention requires states ‘take the necessary legislative or other measures to ensure that the offences established in accordance with this Convention are punishable by effective, proportionate and dissuasive sanctions, taking into account their seriousness.’
\textsuperscript{198} See the collected data of the ‘Intelligence Agency of the Ministry of Justice General Directorate of Criminal Register’ <http://www.adlisicil.adalet.gov.tr/adliarsiv.html> accessed 4 September 2018
\textsuperscript{199} WAVE, ‘Violence against Women Comparative Report: Italy, Spain and Turkey’ (n 43) 31 ve 32
\textsuperscript{200} GREVIO report on Turkey (n 10) para 78(d) and (f); para 199
\textsuperscript{201} Article 46 of the Istanbul Convention
\textsuperscript{202} Article 46(a) of the Istanbul Convention
\textsuperscript{203} Article 46(b) of the Istanbul Convention
\textsuperscript{204} Article 46(c) of the Istanbul Convention
\textsuperscript{205} Article 46(d) of the Istanbul Convention
jointly;\(^\text{206}\) an extreme level of violence was preceded or accompanied;\(^\text{207}\) the use or threat to use a weapon accompanied the offence;\(^\text{208}\) the victim had severe physical or psychological harm as a result of offence;\(^\text{209}\) and the perpetrator had previously been convicted of offences of a similar nature\(^\text{210}\) are enumerated as the other aggravating circumstances.

Looking at the Turkish Criminal Law in a comparative fashion with the Convention, it is seen that there are considerable flaws in this regard,\(^\text{211}\) which can be classified under three categories. First of all, only in certain crimes, are the offences being committed against the partner considered as an aggravating circumstance. For example, if a murder,\(^\text{212}\) injury,\(^\text{213}\) torment,\(^\text{214}\) and deprivation if liberty\(^\text{215}\) is committed against the partner, the Criminal Law requires the sentence to be increased. However, the crime being committed against the partner is not considered as an aggravating circumstance in physical compulsion, sexual harassment and many other relevant crimes.\(^\text{216}\) Secondly, in Turkish Criminal Law, partners outside the marriage are never included into the term ‘partners’, therefore, the violent acts against women who are co-habiting with their partners without an official marriage or with a religious marriage (\textit{imam nikahı}), ex-partners and engaged partners cannot be considered as a case where the sentence of the perpetrator should be increased.\(^\text{217}\) Thirdly, existing crimes within the Turkish Law do not contain almost any of the other aggravating factors provided by the Convention, such as the offence being committed in the presence of a child, or in a repetitive manner.\(^\text{218}\)

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\(^{206}\) Article 46(c) of the Istanbul Convention

\(^{207}\) Article 46(f) of the Istanbul Convention

\(^{208}\) Article 46(g) of the Istanbul Convention

\(^{209}\) Article 46(h) of the Istanbul Convention

\(^{210}\) Article 46(i) of the Istanbul Convention

\(^{211}\) Akbulut (n 54) 175; ‘Bianet (Independent Communication Network) Shadow Report about Turkey to GREVIO’ (3 July 2017) 13

\(^{212}\) Article 82(d) of Criminal Law (n 157)

\(^{213}\) Article 86(3)(a) of Criminal Law (n 157)

\(^{214}\) Article 96(2)(b) of Criminal Law (n 157)

\(^{215}\) Article 109(3)(e) of Criminal Law (n 157)

\(^{216}\) Article 108 of Criminal Law (n 151); Article 105 of Criminal Law (n 157)

\(^{217}\) Bianet Shadow Report about Turkey to GREVIO (n 211) 24-25; Akbulut (n 54) 160; ‘Istanbul Sözleşmesi İç Hukukta Nasıl Uygulanıyor?’ (Bianet, 16 June 2017) <https://m.bianet.org/bianet/toplumsal-cinsiyet/187286-istanbul-sozlesmesi-ic-hukukta-nasil-uygulaniyor> accessed 5 May 2018

\(^{218}\) Akbulut (n 54) 174
In the light of the above findings, it is evident that the Turkish Criminal Law satisfies the obligation to criminalise the types of violence that the Istanbul Convention asks states to do, yet the aggravating circumstances still need to be amended in accordance with the Convention.\footnote{ibid 175} Considering that the Turkish Criminal Law is a 2004 dated law which was adopted far before the Convention, it is expected that its measures would fall short to meet the requirements that the Convention brings.\footnote{ibid 170} What is disappointing is that Turkey did not make any amendments to its criminal law after ratifying the Convention and confined itself to adopt the 6284 Law, which does not have any reference to the criminalisation measures in relation to domestic violence.\footnote{This issue was highlighted by the CEDAW Committe in its 7th Turkey report as ‘It notes with concern, however, that the law does not criminalize domestic violence as such, and includes no provision relating to the prosecution or punishment of perpetrators.’ The CEDAW Committee 2016 Report to Turkey (n 5) para 32}

Furthermore, the problems arising during the implementation phase, such as the police reluctance to response to domestic violence,\footnote{According to the 2014 data on domestic violence, the couples have been reconciled by the police officers in 29% of the complaints, whilst in 41% has been referred to other institutions and in 13% no response has been given. In only 23% cases women were granted protection orders and injunctions. See, Ayşe Alican-Şen, ‘Türkiye’de Kadına Yönelik Şiddette Mücadelede Kurumlar Arası İşbirliği Süreci Ve 6284 Sayılı Yasanan Uygulanabilirliği’ (2018) 22:11 Motif Akademi Halk Bilimi Dergisi 141, 148} need to be corrected through systematic, comprehensive and integrated measures. These include training all law enforcers\footnote{Article 15 of the Istanbul Convention} and agencies operating within the criminal justice system on gender-based domestic violence, to empower women in order to enable them to report the offence, and to maintain a life standard they that deserve in a post-violence era.

As stated briefly in the third chapter, to broaden the scope of the aggravating circumstances should be considered as a way to enable the gender-neutral criminal framework to address the gendered nature of domestic violence more efficiently.\footnote{See the sub-section ‘Criminal Law’ under the section ‘Criminal and Civil Dimensions: Striking a Balance in the Fight against Domestic Violence’ in Chapter 4.} In other words, the Istanbul Convention does not oblige state parties to adopt a specific domestic violence crime, yet through aggravating circumstances, it requires states to establish a criminal mechanism where the unique and gendered features of the problem can be addressed. By failing to adopt aggravating circumstances within its gender-neutral criminal law so as to include the unique components of domestic violence, such as its repetitive nature, children witnessing the crime, use of a weapon and so on,
Turkey misses the chance to make its framework more efficient in responding to the particularities of the issue arising out of its gendered nature.

Confirming how the aggravating circumstances can promote a more gender-based response towards domestic violence incidents, it is controversial whether they could really achieve to meet the gendered core of the problem. In fact, when there is not a specific domestic violence crime and the problem is left to be handled under fundamentally gender-neutral crimes, aggravating circumstances would fail to address the real nature of violence over a gender-neutral legal surface. For example, in the case of an injury claim of a woman victim of domestic violence, even if the recidivism of the acts is regulated as an aggravating circumstance, this would still fall short to meet the nature of violence. As a matter of fact, the abuse would be equated with physical assault and a ‘calculus of harms’ i.e. the more injury or trauma, the more serious the abuse would be applied to assess the severity. However, the harm resulting from violence is not the harm that would arise in an ordinary physical assault; domestic violence leads to women being deprived of feelings of autonomy, liberty and security over a long term. Therefore, the concept of harm underlining a generic injury crime (or any other relevant crime) is not capable of meeting the harm evolving out of domestic abuse. This could reflect a liberal conceptualisation of violence in which the unique harm that domestic violence creates on women is not addressed, and is only responded to by reference to the harm arising out of other acts of repeated violence.

At this point, another question comes to fore, that of whether the adoption of a specific domestic violence crime would be more capable of addressing the gendered nature and particularities of domestic violence, even though the Istanbul Convention does not impose such an obligation on state parties. In Turkey, there has not been much debate

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225 For example, Heather Douglas, in her research on the Australian criminal law, pointed out the necessity of adopting a new domestic violence offence, since the current legal framework considering ‘gender’ of the victim and the ‘relationship’ between partners as aggravating circumstances is not sufficient to respond to the gendered nature of domestic violence. She referred to the arguments that ‘current provisions do not reflect the ongoing and controlling and coercive nature of domestic violence and that such an offence could assist in educating the public about the serious nature of domestic violence’. See, Heather Douglas, ‘Do We Need A Specific Domestic Violence Offence?’ (2015) 39 Melbourne University Law Review 434, 465

226 ibid

227 Evan Stark, ‘Rethinking Coercive Control’ (2009) 15:12 Violence against Women 1509, 1510

228 ibid

229 ibid 1511

on the issue so far, except for a few scholars contending that domestic violence should be regulated as a specific crime in the Turkish Criminal Law, in the light of its own nature.\textsuperscript{231} It is argued that this approach would constitute an important step in promoting changes in society towards a rejection of gender-based domestic violence.\textsuperscript{232} This lack of interest resembles the analysis of Burke in the context of the US, that there has been no consideration on the substance of criminal law and its relation to domestic violence.\textsuperscript{233} Rather the efforts have mostly focused on enhancing procedural aspects such as adopting mandatory arrest or \textit{ex parte} proceedings forcing police and prosecutors to enforce the laws already on book, instead of adopting a new crime that would more appropriately address domestic violence.\textsuperscript{234}

The question turns to be how would the adoption of a specific domestic violence crime address the problem better than the relevant gender-neutral crimes. One feature of domestic violence distinguishing it from other acts of violence is its ongoing and controlling nature, as stated by Evan Stark in his coercive control theory.\textsuperscript{235} In fact, as argued constantly before, MacKinnon, whose dominance theory is taken as a guideline in this study, thinks in a parallel line that domestic violence is a tool by which men construct a power control on women so as to subordinate them.\textsuperscript{236} Even if there might be periods of non-violence in a violent intimate relationship, it still does not break the controlling cycle.\textsuperscript{237}

In this context, it would not be right to presume that traditional gender-neutral crimes would effectively address domestic violence, as they treat domestic violence as an incident-based crime.\textsuperscript{238} In other words, in the application of those gender-neutral


\textsuperscript{233} Burke (n 230) 554

\textsuperscript{234} ibid 559


\textsuperscript{236} Mackinnon, \textit{Feminism Unmodified} (n 172) 40-41

\textsuperscript{237} Douglas (n 225) 440

\textsuperscript{238} ibid 437; Stark, ‘Rethinking Coercive Control’ (n 227) 1509, 1515
crimes, the ongoing and controlling nature of the issue is not taken into account.\textsuperscript{239} This leads to ignoring the motivation underlying the act, which is controlling and subordinating women. It is striking that GREVIO in its Turkey report, by explicitly referring to the ‘coercive control’ theory, underlined a similar concern. In analysing the criminal offences applicable to psychological violence cases in Turkish criminal law, it stated that these offences were designed to sanction single isolated acts and failed to capture the ongoing and prolonged abuse, by reminding that many of such acts may also fall short to meet the threshold of criminalisation.\textsuperscript{240}

Returning to the example of the calculation of injury, when a special crime of domestic violence is adopted taking into account the coercive and ongoing nature of domestic violence, the injury would not be calculated in accordance with the harm arising out of any other repeating violence incidents. Rather, the crime itself would directly recognise the unique harm of domestic violence in its own terms, without any further comparison. In fact, in this case, the dramatic effects of violence on women, such as the deprivation of autonomy and liberty would be addressed. This point directly refers to the MacKinnon’s claim to move the law away from gender-neutral looking male standards, and position it towards an understanding where the harms to women are evaluated as harms themselves.\textsuperscript{241} In this regard, even though the Istanbul Convention does not explicitly impose such an obligation, a radical reading of violence would require Turkey to enact a specific domestic violence crime, where the gendered nature of violence, i.e. its controlling and ongoing character, is taken into account.

Moreover, adopting a specific domestic violence crime would promote ‘fair labelling’. In their article examining the concept of fair labelling, Chalmers and Leverick enumerate the reasons why fair labelling in criminal law matter.\textsuperscript{242} In the special context of domestic violence, two of them come into prominence: firstly, the names of offences have a symbolic and declaratory function,\textsuperscript{243} that it can symbolise the degree of condemnation that should be attributed to the offender, and signals to society how that

\textsuperscript{239} Douglas (n 225) 437, 442, 447
\textsuperscript{240} GREVIO report on Turkey (n 10) para 215
\textsuperscript{241} Mackinnon, Feminism Unmodified (n 172) 70-71
\textsuperscript{243} Chalmers and Leverick (n 242) 266
particular offender should be regarded. \(^{244}\) Secondly, fair labelling is important for its potential effects on the agencies working within the criminal justice system that adopting a new crime of domestic violence might be one way of communicating to criminal justice professionals that such incidents should be taken seriously. \(^{245}\) Beyond these, a specific crime would lead to higher penalties than gender-neutral generic crimes which do not lead to much punishment, particularly in the case of non-extreme cases of physical, psychological or sexual violence. \(^{246}\)

b. Special Civil Measures

Following the analysis on the criminal legal framework, the scope of the special civil measures provided for domestic violence victims in Turkish law needs to be analysed as well. Therefore, the analysis must refer to the 6284 Law, which is the law that deals specifically with violence against women and is focused on the prevention and protection orders for violence victims. \(^{247}\) In fact, the 6284 Law is predominantly devoted to the regulation of these orders and authorises family courts and administrative chiefs \(^{248}\) to issue such orders, when women are subjected to violence or under the risk of being subjected to violence. \(^{249}\) These orders have been categorised under two different titles, as prevention orders and protection orders, \(^{250}\) but not under the terms of restraining and protection orders of the Istanbul Convention. \(^{251}\) The drafters of the Convention confirmed the fact that these orders exist under various names in different jurisdictions and they highlighted that as long as they serve the purpose of preventing the commission of violence and protection of victims, states would be free to choose the

\(^{244}\) ibid 216  
\(^{245}\) ibid 229  
\(^{247}\) The 6284 Law (n 6)  
\(^{248}\) Article 3, 4 and 5 of the 6284 Law (n 6). In the Law, the term ‘administrative chief’ is used which refers to local authorities including mayor, district governor, governor and mukhtar. In the law, there are provisions in relation to the Violence Prevention and Monitoring Service, (Articles 14-15) education and co-ordination between institutions (Article 16) and so on. However a great majority of the law is devoted to the orders.  
\(^{249}\) As it has been mentioned earlier before in this chapter, the 6284 Law does not only aim to protect women; children, family members and victims of stalking are also protected subjects. However, since mostly women are using/are going to use the law and the focus of this study is domestic violence against women, these protection and prevention orders are analysed in the context of women victims.  
\(^{250}\) Protection orders are regulated in two different groups as the ones to be issued by administrative chiefs (Article 3) and by the judges of family court. (Article 4). Prevention orders however can only be issued by judges and regulated in Article 5 of the 6284 Law (n 6).  
\(^{251}\) Article 53 of the Istanbul Convention
term in their own jurisdictions. In this context, Turkey’s choice of the terms does not seem problematic in its compliance with the Convention, yet the scope of the orders needs to be analysed.

In accordance with the Convention, the 6284 Law provides a wide-array of preventive and protective orders to be ensured by family court judges and administrative chiefs upon the request of victim or on the application of the Ministry of Family and Social Policy, law enforcement officers or the prosecutors. The protection orders include providing suitable accommodation for victims and their children, provisional financial assistance, guidance and counselling on psychological, occupational and legal matters, changing the victim’s workplace, locating a separate settlement than the family settlement, if the victim is married to or cohabiting with the abuser, and changing the identity documents of the victim when necessary. The prevention orders, on the other hand, include the prevention of the perpetrator to humiliate and insult victim in words or behaviour, immediate removal of the perpetrator from the settlement of the victim, prohibiting the perpetrator to approach the settlement, school or workplace of the victim, restriction on the relationship between children and perpetrator, prohibiting the perpetrator to disturb victim through communication instruments, treatment for perpetrator if he is an alcohol or drug addict in a health centre and so on.

Since these orders contain the measures to be taken to prevent violence before it occurs and to protect victims after she is subject to violence, they are both retrospective and prospective in nature, in accordance with the Convention. The Law makes a distinction between protection and prevention orders that, while both judges and administrative

252 Explanatory Report (n 93) para 268
253 Article 8 of the 6284 Law (n 6)
254 Article 3(1)(a)
255 Article 3(1)(b)
256 Article 3(1)(c)
257 Article 4(a)
258 Article 4(b)
259 Article 4(d)
260 Article 5(1)a
261 Article 5(1)b
262 Article 5(1)c
263 Article 5(1)c
264 Article 5(1)f
265 Article 5(1)h and i
chiefs can issue protection orders, only judges can ensure prevention orders. Due to the severely restrictive nature of the preventive orders on the freedom of perpetrators, the law requires those orders to be issued following a more official and diligently considered process than protection orders. Moreover, the Law authorises law enforcement bodies to issue some of these orders in severe situations in order to impede the loss of time in cases having an immediate risk against the victim. All orders can be provided for maximum six months, however this period can be extended or a different suitable order can be issued when necessary. Again, in accordance with the Convention requiring state parties to ensure that breaches of these orders are subject to effective, proportionate and dissuasive criminal or other legal sanctions, the Law 6284 contends that when the perpetrator violates the order, they shall be imprisoned for three to ten days. This imprisonment period would be prolonged in each repetition of the violation, provided that the total period of imprisonment does not exceed six months.

The current Turkish law seems to provide a comprehensive array of prevention and protection orders. It is important that GREVIO expressed its appreciation in this regard. It is also worthy to underline that the 6284 Law seems far more progressive and promising in comparison to the previous 4320 Law in the context of these special civil measures. First of all, the 4320 Law did not contain any protection orders, rather it only made some prevention orders available for the victims. Therefore, it would not be wrong to argue that it was less victim-centred and lacked positive obligations imposed on the state to empower and protect women after the violence had occurred. Secondly, according to the 4320 Law, only judges were authorised to take decisions on the orders, but not chief administrators or law enforcement officers, and this hindered

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266 While protection orders are regulated in Article 3 (to be issued by administrative chief) and Article 4 (to be issued by judge), prevention orders are regulated in only one article (Article 5) authorising only judges.
267 Article 3(2)
268 Article 8(2)
269 Article 53(3) of the Istanbul Convention
270 The Guideline to the 6284 Law (18 January 2013) Article 38(5)
271 ibid Article 38(6)
272 Article 8(3) of the 6284 Law
273 GREVIO report on Turkey (n 10) para 296
274 Seven protection orders were ensured in the Article 1 of the 4320 Law (n 39).
275 Uğur, ‘Kadin ve Aile Bireylerine Yönelik Şiddete Karşı 6284 Sayılı Kanunun Getirdikleri’ (n 52) 335
the state to take an immediate step in undelayable cases. Thirdly, the prevention orders were to be issued for maximum six months but without an option to prolong this period, unlike the current 6284 Law. Considering that many violence cases occur after the orders expire, the extension possibility provided by the 6284 Law is an essential step to make the orders effective.

c. The Balance Fails: Steps to be Taken in Criminal Measures

In the light of the foregoing, it could be argued that following its ratification of the Istanbul Convention, Turkey concentrated its attention on its special civil measures through preventive and protective orders, instead of reforming its criminal law in the fight against domestic violence against women. In fact, as stated above, the law which was specifically adopted for enforcing the Convention, i.e. the 6284 Law, does not have any reference to criminal measures in relation to violence against women, but is predominantly concerned with prevention and protection measures. Furthermore, Turkey has not made any amendments to its existing criminal law provisions which are relevant to domestic violence against women after its ratification of the Convention. Also, it is evident that the Turkish criminal legal framework fails to ensure aggravating circumstances, as required by the Convention. This being the case, the Turkish law is presently failing to strike a fair balance between civil and criminal measures, by putting more weight on the former.

In its report to Turkey, GREVIO made the same evaluation by arguing that civil prevention and protection orders seemed replacing criminal measures in Turkey. Although it recognised the importance of civil measures, it stated that prosecution within criminal meanings is essential as a signal from the state that violence against women is inimical to its values. By substituting criminal measures to civil measures, it argued that Turkey lessened its opportunity to protect its citizens and failed to signal its abhorrence of violence against women.

In the face of this picture, Turkey seems to have two options: the first one is to amend its aggravating circumstances in the light of its responsibilities arising out of the

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276 Özbilen and Soygüt-Arslan (n 54) 382-3
277 Baydur and Ertem (n 193) 117
278 Özbilen and Soygüt-Arslan (n 54) 384
279 Akbulut (n 54)
280 GREVIO report on Turkey (n 10) para 198. Also see page 9, para 283 and 286.
Istanbul Convention. This would ensure Turkey’s compliance with the Convention. However, as stated above, Turkey’s expanding the aggravating circumstances, but still addressing domestic violence under existing gender-neutral crimes would not be a sufficient approach. Although women might get more protection within the scope of these circumstances, the real gendered nature of the problem would not be addressed. Even if the recurrent nature of violence and severe physical or psychological harm resulting from violence would be taken into account, as the definition of harm to be used is taken from the gender-neutral criminal law principles, it would fall short to address the unique harms such as the loss of autonomy, self-esteem and liberty arising from domestic violence.\(^\text{281}\) This approach would lean towards a liberal way of handling the problem.

The second option would be to adopt a specific domestic violence crime taking into account the gendered nature of the problem. When violence and harm is defined in line with the ongoing, coercive and controlling nature of violence, the harm specific to domestic violence would get to be addressed without any comparison with other similar factors taking place in a gender-neutral criminal framework. This would be a more radical approach in the same line with MacKinnon’s statement to challenge the male standard of law constructed under a gender-neutral look, and to recognise the wrongs to women in their own nature.\(^\text{282}\) Unfortunately, this option has not been discussed to a sufficient extent in Turkey yet. Considering that Turkey is currently failing to adopt even the aggravating circumstances, this option does not seem to come true soon. Turkey should start considering this option and it should be ensured that the new law does not mimic the other crimes, only adding the element of intimate relationship to its scope. Rather, it should be designated to contain the unique and unaddressed characteristics of domestic violence.\(^\text{283}\)

6. Conclusion

At the beginning of this chapter, it was stated that the study aimed to question the extent to which Turkey has been implementing the Istanbul Convention effectively. It was hoped that this analysis would also indicate what problems might arise in the

\(^{281}\) Stark, ‘Rethinking Coercive Control’ (n 227) 1509-1510

\(^{282}\) Mackinnon, Feminism Unmodified (n 172) 70-71

\(^{283}\) Stark, ‘Rethinking Coercive Control’ (n 227) 1516; Burke (n 230) 561
implementation of such a radical feminist instrument as the Istanbul Convention. This study showed that the Istanbul Convention has constituted a strong guideline for Turkey in terms of adopting its legislation and policies in relation to domestic violence, and in the light of this guidance Turkey has taken numerous positive steps. Through the new 6284 Law which was adopted following the ratification of the Convention, Turkey brought up a more women-focused violence law, included more women into the legal protection scope, established the Violence Prevention and Monitoring Centres (VPMCs) in order to organise all measures holistically, and provided more comprehensive prevention and protection orders than the previous Turkish law. This demonstrates that the impact of the Istanbul Convention has been wide, on taking all these measures in such a short time. In this context, the Istanbul Convention undoubtedly has had an impact more than being only a rhetorical human rights law instrument.

On the other hand, the study has revealed the many points in which Turkey falls behind the Istanbul Convention. The first and the most prominent failure of Turkey is that it does not establish the link between domestic violence and inequality of women. The study pointed out the political statements and legal reform attempts jeopardising *de facto* and *de jure* equality of women throughout the last decade. This situation refers to a big clash between two ends: On one hand, Turkey adopted a new law (the 6284 Law) right after the ratification of the Istanbul Convention, which is specifically devoted to violence against women through promising measures. On the other hand, Turkey encounters a legal and political mainstream where women are being positioned to a secondary status. This is in entire contrast with the radical feminist reading conceptualising all forms of violence simply as a manifestation of the subordination of women. This is also in contradiction with the Istanbul Convention, which employs a radical reading of equality (as a matter of subordination) and draws all its measures on its confirmation of the organic link between equality and violence. In this regard, Turkey has currently been failing to meet the most essential part of the Istanbul Convention. This also indicates that the state’s lack of a genuine will to empower women within and outside law might be the biggest impediment in implementing a radical feminist conceptualisation of domestic violence, although the state might seem

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as having taken positive steps in the special context of the elimination of domestic violence.

The research demonstrated that culture, religion and traditional norms have been used as the main ground for anti-equality approaches. This situation proves that the approach of the Istanbul Convention putting gender equality at the centre, and not giving any credits to the cultural justifications in the case of violence against women, is efficient in practice. Moreover, it is seen that cultural norms can be interpreted in various ways that could produce different meanings, and states can take restrictive measures on women at times on the ground of culture, and at other times, on the ground of universal/culture-neutral norms. This case study on Turkey confirmed the previous suggestion of the research that in resolving gendered issues involving culture (which is the situation in most cases), instead of choosing one of universalist or cultural relativist approaches, the approach serving gender equality best must be preferred. In other words, gender equality must be positioned superior to any type of so-called universalist or cultural relativist claims when domestic violence against women is at stake.

Finally, the study pointed out that Turkey is currently failing to strike a fair balance between its criminal and special civil law measures in addressing domestic violence by giving more weight on the latter. In resolving this issue, Turkey seems to have two options: the first is to amend the aggravating circumstances in line with the measures of the Istanbul Convention. This would help Turkey to address some gendered aspects of domestic violence within its entirely gender-neutral criminal framework. However, this option does not seem to sufficiently respond to the gendered core of the problem. In fact, even if some factors such as the recurring nature of violence and the severity of the harm would be taken into account, as the definition of harm and violence would be still taken from the gender-neutrally drawn criminal law principles, it would not address the unique harm that women go through after the violence occurs. This option would still serve to a liberal conceptualisation of violence where the harm is still addressed on a gender-neutral surface. The second option would be the adoption of a special domestic violence crime where the coercive, ongoing and controlling nature of violence is taken into account. In this way, the harms resulting from domestic violence specifically, such as the women’s deprivation of autonomy, self-respect and liberty over the long term, can be addressed. This approach would meet the radical conceptualisation of violence as
it would serve the aim of Mackinnon, which is to challenge the law serving to male standards through a gender-neutral look, and to recognise the wrongs to women in their own terms.\textsuperscript{285}

\textsuperscript{285} Mackinnon, Feminism Unmodified (n 172) 70-71
CHAPTER 7

CONCLUSION

1. The Istanbul Convention: A Radical Feminist Instrument

This thesis began by asking the question of whether the Istanbul Convention could be seen as a radical feminist instrument in addressing domestic violence within an international human rights law treaty. While laying out the premises and the way in which radical feminism addresses domestic violence against women through the dominance model developed by MacKinnon, it became clear that this approach challenges the liberal philosophy ingrained in law more strongly than the other feminist approaches. In this regard, the research demonstrated that there is a strong clash between liberal and radical conceptualisations of domestic violence. The question of whether the Istanbul Convention is a radical feminist instrument then evolved into the question of the extent to which a radical concept of domestic violence is employed in the Istanbul Convention, so as to challenge the liberal conceptualisation of the phenomenon which has been so inherent in most of international human rights law instruments.

Analysing the tension between liberal and radical conceptualisations, the second chapter has underlined three points. First of all, while in liberal philosophy, the reading of equality is formal and based on sameness (to men), within the dominance theory, it is a matter of power distribution leading to the subordination of women/dominance of men. For MacKinnon, the act of domestic violence itself is a reflection of the subordination of women, and therefore is a form of sex discrimination. On the other hand, in the liberal construction of equality, as domestic violence is drawn in a gender-neutral manner, the act itself is not considered a matter of inequality in the first instance.

1 See the explanations under the ‘Radical Feminism’ title overall in Chapter 2. Denise Schaeffer, ‘Feminism and Liberalism Reconsidered: The Case of Catharine MacKinnon’ (2001) 95:3 American Political Science Review 699, 699-70; Carol Smart, Feminism and the Power of Law (Routledge 1989) 72.
3 Catherine A Mackinnon, Feminism Unmodified: Discourses on Life And Law (Harvard University Press 1989) 32-3
Applying such a liberal approach to the international legal perspective means that for a discrimination claim to be successful in a domestic violence case, the applicant would have to prove certain points, most of which would be viewed in a comparative position to men, such as statistics revealing that there are more women victims than male victims, or the state’s intentionally treating women and male victims in different ways. Secondly, through the confirmation of violence as an explicit form of subordination of women, without any further requirements on the basis of how men or others are treated before the law, the radical conception recognises the harm occurring to women in women’s terms, and not in comparison with the male standard of harm, as in liberal philosophy. This strongly challenges the male standard and deconstructs the male subject of law.  

Thirdly, as domestic violence is considered as a group-based and systematic problem in the radical conceptualisation, unlike the individualistic perspective of liberal philosophy, a law taking the radical approach would open the doors to structural and holistic legal measures being taken by states to address the problem.

In the light of the aforementioned points, the third chapter has analysed the human rights law framework and the way in which it addressed domestic violence up until the adoption of the Istanbul Convention. It has been seen that the liberal conceptualisation of violence was prevalent. First of all, domestic violence was not confirmed as an explicit form of discrimination through a dominance reading of equality and on a legally-binding basis, except under the Convention of Belem do Para. It has been revealed that a broad consensus was reached that domestic violence violates the right to equality of women among the UN, OAS and the CoE bodies. However, this either occurred on a non-legally-binding basis, or through the application of formal equality imposed by liberal philosophy. In fact, it has been seen that within the UN, the CEDAW Committee and the DEVAW affirmed the natural discriminatory element of all types of violence against women by pointing out the historical power inequality between women.

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5 For a comprehensive analysis of this point, see the ‘Radical Feminism’ section in Chapter 2 and the ‘Domestic Violence and the Lack of an Independent Human Rights Violation’ section in Chapter 3.  
6 Harris (n 4) 187  
7 In the preamble of the Convention of Belem do Para, it is stated that ‘violence against women …[is] a manifestation of historically unequal power relations between women and men.’  
8 See the section titled ‘Domestic Violence as Discrimination: Problematic Aspects of the Equality Reading Developed by Human Rights Bodies in Chapter 3.'
and men, in line with the dominance theory. Yet DEVAW and the CEDAW Committee’s General Recommendations and jurisprudence on individual complaints were merely soft-law instruments, with no legal enforceability. A similar reading of equality could be observed in the jurisprudence of the Inter-American Commission on Human Rights. At the other end of the spectrum, the ECtHR, whose case-law was legally binding on the state parties, could not develop a consistent approach towards domestic violence and applied a liberal reading of equality even in some of the most recent cases. Although in Opuz, it confirmed that there was no need to prove the state’s intention to discriminate in order to find a violation of the right to non-discrimination in domestic violence cases, the approach was not consistent. In some of the subsequent cases, the Court either failed to examine the discrimination claim at all, or required proof of state intention to discriminate, or statistics proving the discriminatory treatment of women in the implementation of laws, in order to find a violation of Article 14. This approach within the fundamentally liberal construction of the ECHR was far from an affirmation that the violence itself was discriminatory in nature, as suggested by the dominance theory. This reading still reflected a formal equality reading, which according to radical feminists, needed to be deconstructed.

At the other end of the spectrum, the fourth chapter has revealed that the whole structure of the Istanbul Convention is established on the organic link between the historical subordination of women and all forms of violence against women, including domestic violence. On the basis of this understanding, the Istanbul Convention declares domestic violence as a form of discrimination against women without any requirement to be proven for declaring the discriminatory nature of the violence. For the Convention, the

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12 Opuz v Turkey App no 33401/02 (ECtHR, 9 June 2009) para 191

13 Civek v Turkey App no 55354/11 (ECtHR, 23 February 2016)

14 A v Croatia App no 55164/08 (ECtHR, 14 October 2010) para 101

15 ibid paras 95-97

16 Article 3(a)
violence itself is fundamentally discriminatory, manifesting the historical power inequality between women and men, as suggested by MacKinnon in her dominance theory. This discriminatory nature of violence is so deeply affirmed within the Convention that being an anti-violence convention, it also imposes a separate state obligation to ensure *de facto* and *de jure* equality for women. Comparing the Istanbul Convention with the previous developments mentioned above, the Convention’s strength becomes evident. In fact, while the CEDAW Committee adopted a similar reading of equality for the context of domestic violence, it did this through soft law instruments such as General Recommendations and decisions on individual complaints. The Istanbul Convention, however, employs a dominance model of equality as a legally-binding treaty, and therefore moves the CEDAW approach to a legally secure ground in the European context. In fact, as stated above, this had been achieved by the Convention of Belem do Para outside Europe before. It goes without saying that the substance of the approach to equality employed by the Istanbul Convention contradicts the liberal formal equality approach that the ECtHR has applied in recent cases.

Furthermore, the research has demonstrated that before the adoption of the Istanbul Convention, domestic violence against women had not been recognised as an independent human rights violation in a legally-binding instrument in Europe (and in the world with the exception of the Convention of Belem do Para). In fact, the CEDAW Committee, as a women’s equality body, strived to integrate the issue into its scope of CEDAW through the discrimination route. Similarly, the Inter-American Commission found violations of equality and some other rights such as the right to fair trial, judicial protection and so on in domestic violence cases. Looking at the ECtHR, domestic violence had mainly been dealt with under the right to life, prohibition of torture, right to privacy and family and finally the right to non-discrimination. As none of the instruments that these bodies supervised had a specific space or provision devoted

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17 Preamble of the Istanbul Convention; MacKinnon, *Feminism Unmodified* (n 3) 32-3
18 The ‘practical realisation’ phase in Article 4(2) of the Istanbul Convention refers to *de facto* equality as suggested in Chapter 4.
19 In a similar vein to the CEDAW Committee, the Inter-American Commission on Human Rights handled domestic violence on its case law which is only binding on the party states to the cases, and on its reports which are soft-law instruments. See the section ‘Imposition of State Responsibilities in a Fragmented and Dispersed Manner’ in Chapter 3.
20 Preamble and Article 3 of the Convention of Belem do Para.
21 In the cases of *Maria de Penha v Brazil* and *Lenahan v United States* (n 10)
to gender-based domestic violence against women in their original structure, they could only invoke state responsibility mostly on the ground of gender-neutrally drawn rights and guarantees. This failure to recognise domestic violence as an individual human rights violation says much about the clash between liberal and radical feminist conceptualisation of violence. Domestic violence being addressed under different rights, sometimes inconsistently, demonstrates that the unique harm and wrong that it imposes on women is disregarded, and that a legal response is provided on the basis of liberal gender-neutral rights, which have originally been designed to address male problems.

This is in stark contrast with MacKinnon’s claim that the law should move away from the male standard, where women’s problems are addressed in proximity with the harms and violations against men. Rather a legal framework should be ensured where wrongs to women are recognised in their own terms. This is achieved by the Istanbul Convention, where all forms of violence against women, including domestic violence, are declared as a human rights violation, besides being discriminatory against women on a legally-binding basis. In fact, in spite of the long-lasting discussions and the attempts of certain countries to elaborate domestic violence as only impairing the enjoyment of other rights of women in the drafting process, the Istanbul Convention finally took this stance by confirming that domestic violence not only bars the enjoyment of other rights, but is an independent human rights violation itself. This demonstrates a step towards a radical conceptualisation of violence, rejecting any other standards (mainly male standards) to which the wrongness of domestic violence against women is measured. It is argued that this is a strong blow to the male object of human rights.

Moreover, this study has demonstrated that before the adoption of the Istanbul Convention, the human rights bodies from the UN, OAS and CoE had imposed some positive obligations on states after finding violations of rights in domestic violence cases. However, these obligations were articulated in a fragmented and insufficient manner, and by using legally non-binding tools. In fact, particularly the CEDAW

\[22\] In fact, the rights contained in the ECHR are gender-neutrally drawn rights. This is also the fact for the rights ensured in the American Declaration and the American Convention that are monitored by the Inter-American Commission on Human rights. See chapter 3.

\[23\] See the section ‘Why a New Convention? - Important Highlights from the Drafting Process’ in Chapter 4.

\[24\] See the section ‘Imposition of State Responsibilities in a Fragmented and Dispersed Manner’ in Chapter 3.
Committee in its decisions on individual complaints issued comprehensive general recommendations for states on their legal structures, and suggested particular steps to be taken for the victims. Yet these measures were imposed unsystematically and insufficiently. The CEDAW Committee could not provide a structure of measures revealing which steps to be taken by which governmental bodies and for what purpose in sufficient detail to address every angle of the problem. This is similar to the jurisprudence of the Inter-American Commission of Human Rights, where due to the lack of a specific provision on domestic violence in the instruments, the measures suggested could not require different state actors to work in co-operation with each other. The ECtHR was even more limited, owing to its fundamentally negative understanding of rights. In fact, the Court’s analysis was predominantly focused on the question of whether there had been a violation of any rights in the case concerned, and even if so, the Court’s judgement was rather declarative of the violation, instead of imposing detailed positive state measures on states to eradicate the problem.

25 For an example, see AT v Hungary (CEDAW Committee, 26 January 2005) Com No 2/2003, UN Doc A/60/38 (2005) I (Concerning the author of the communication) and II for the general measures.

26 The CEDAW Committee has also adopted various General Recommendations elaborating the scope of state responsibilities in the context of gender-based violence against women in particular contexts. See General Recommendation 26 on Women Migrant Workers (5 December 2008) CEDAW/C/2009/WP1/R para 26(i); General Recommendation 27 on Older Women and Protection of Their Human Rights (16 December 2010) CEDAW/C/GC/27 para 37; General Recommendation 30 on Women in Conflict Prevention, Conflict And Post-Conflict Situations (18 October 2013) CEDAW/C/GC/30; Joint General Recommendation 31 of the CEDAW Committee and General Comment 18 of the Committee on the Rights of the Child on Harmful Practices (14 November 2014) CEDAW/C/GC/31–CRC/C/GC/18; General Recommendation 32 on the Gender-Related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women (14 November 2014) CEDAW/C/GC/32; General Recommendation 34 on the rights of rural women (7 March 2016) CEDAW/C/GC/34; General recommendation 35 on Gender-based Violence against Women, Updating General Recommendation No 19 (14 July 2017) CEDAW/C/GC/35. It should be reminded that these are soft-law instruments and on legal terms, they cannot go further than bringing suggestions or creating a political pressure on states. Furthermore, many of them are concerning specific aspects of violence, therefore not bringing a structure of comprehensive measures to eliminate domestic violence overall.

27 Inter-American Commission also issued reports which are either dealing with the certain aspects of violence against women or in terms of specific countries, but not in a holistic way. See, Inter-American Commission on Human Rights, ‘The Situation of The Rights of Women in Ciudad Juárez, Mexico: The Right To Be Free From Violence And Discrimination’ (7 March 2003) 44 OEA/SerL/V/II.117; Legal Standards Related to Gender Equality and Women’s Rights in the Inter-American Human Rights System: Development and Application ‘ (3 November 2011) 60 OEA/SerL/V/II.143; Access to Information, Violence against Women, and the Administration of Justice in the Americas ‘ (27 March 2015) 19 OAS/SerL/V/II.154.

With this way of addressing domestic violence, the gendered and systematic nature of the problem fades away and is not considered much different than any other forms of gender-neutral forms of violence. In other words, in this framework, domestic violence is addressed as if it is an individual matter not requiring holistic and systematic state measures to be defeated. At the other end of the spectrum, the Istanbul Convention has brought the most detailed state responsibilities globally and more importantly, it has achieved this as a legally-binding treaty. In fact, through its 4(P)s framework, comprehensive measures are ensured under each of the (P) pillars (for (p)revention of violence, (p)rotection of victims, (p)rosecution of perpetrators and the adoption of gender-based (p)olicies). The Convention introduced comprehensive state responsibilities under different articles by requiring states to construct necessary institutions to make them operate in co-operation with each other, under a holistic policy. This is a significant development considering that even the Convention of Belem do Para enumerated state duties in only two articles.

As this thesis has demonstrated, the dominance theory conceptualises violence against women, including domestic violence, as a systematic group-based problem through its equality formulation as a power inequality between women and men. This is in contrast to both liberal and post-modern feminisms, where the shared experience of subordination of women is not integrated into a method to be used in the legal sphere, and therefore all violence incidents tend to be handled individually. Through its 4(P)s framework, the Istanbul Convention addresses the systematic nature of the problem by confirming that violence is a structural problem, to be addressed in a structural way, through a holistic and co-ordinated legal framework and policies. This approach is in contrast to the one taken by other bodies, where state measures are suggested in a fragmented manner. In this regard, the Istanbul Convention employs an approach recognising the systematic nature of violence far more firmly than other regional and international human rights institutions.

In the light of all these points mentioned above, it can be seen that the Istanbul Convention constitutes a shift from a liberal to a radical feminist conceptualisation of Assembly Resolution 1853 (2011) on Protection Orders for Victims of Domestic Violence (Adopted 25 November 2011).

29 Article 7(1) and Article 10 of the Istanbul Convention
30 Article 7 and 8 of the Convention of Belem do Para
31 See the section ‘Postmodern Feminism and Essentialism Critiques’ in Chapter 2.
domestic violence within the structure of international human rights law. It succeeds in
doing this by employing a dominance model of equality in the context of domestic
violence, challenging the male standard of rights by recognising domestic violence
against women as an independent human rights violation, and addressing the systematic
nature of the problem through its 4(P)s policy.

Achieving all these points, this thesis has argued in the fifth chapter that the Istanbul
Convention challenges the public/private dichotomy and the individualistic nature of
rights to a greater extent than it has been done in the past. Firstly, by declaring domestic
violence as a human rights violation on the ground of its legally-binding nature for the
first time in Europe, it politicises the issue in the strongest terms, by making the issue
open to state interference. This is a greater challenge to the so-called private nature of
domestic violence, compared to soft-law instruments recognising the problem as a
human rights violation. In fact, the states would not be sanctioned once they fail to fulfil
their responsibilities arising from those tools. To put it simply, it is not legally
controversial in Europe that domestic violence is now a political problem. Secondly, by
ensuring the most detailed guidelines on state responsibilities on a wide-spectrum, from
the adoption of education curriculum to the reform of the whole criminal legal
framework,\textsuperscript{32} the Convention considerably restricts states’ freedom to decide on how to
address the problem. In the light of such a strong imposition of responsibilities upon
states, the Convention embraces the idea that there is no distinction between gendered
problems happening in the public and private spheres in terms of positive state
responsibilities.

Similarly, it takes the challenge against the individualistic nature of rights to a greater
extent than had previously been the case within the structure of human rights. It is true
that CEDAW has recognised the collective interest of women to be free from
discrimination, and has therefore challenged the hyper individualism originating from
liberal philosophy.\textsuperscript{33} However, the Istanbul Convention takes this challenge a step
further by focusing on a more specific issue affecting women, compared to the broader
aim of CEDAW, which is promoting substantive equality between women and men.
The Istanbul Convention confirms that women in Europe and from all over the world

\textsuperscript{32} The Prevention and Protection measures are regulated in Articles 12-28. The state responsibilities with
regards to prosecution are regulated in Articles 49-58.
\textsuperscript{33} See the section ‘Shift from an Individual Rights to a Collective Rights Approach’ in Chapter 5.
can share a more specific collective interest to be free from a socially constructed problem, which is violence. This is a firmer embrace of the collective interests of women, compared to the CEDAW’s approach, which had originally failed to refer to violence against women under its broader anti-discrimination structure. Furthermore, by allowing state parties far less space to make reservations than CEDAW, the Istanbul Convention recognises a more inclusive understanding of the collective interest of all women, which cannot be sacrificed in the interests of any cultural or religious claims.

This thesis has argued that the Istanbul Convention’s strong challenge against these two components of rights (the public/private dichotomy and the individualistic nature of rights) that are well-ingrained in the establishment of the whole human rights law framework (stemming from the liberal philosophy) contributes to its radical feminist character. The study has argued in the second chapter that although the critiques against the public/private dichotomy and the individualistic nature of rights cannot be attributed exclusively to radical feminists or MacKinnon, the dominance theory has brought the most comprehensive formula of equality and violence, which challenges these two points most strongly within the legal context. It has been argued that by ensuring a monolithic reading of violence as a manifestation of women subordination, dominance theory can be used to politicise the problem. Furthermore, it establishes a ground for stronger calls for legal reforms in respect to issues which have traditionally been considered to belong to the private sphere. At the same time, by perceiving violence as a group-based problem of all women in a totalising manner, MacKinnon has firmly advocated for legal solutions taking into account the collective nature of the gendered problems of women. Considering that the Istanbul Convention achieves to deliver the strongest blow to the public/private dichotomy through its designation of the most detailed legally binding state responsibilities, and also through its recognition of the collective interest of women to be free from violence with a more specific focus than CEDAW, the thesis has argued that the Istanbul Convention is successful in addressing the concerns of radical feminism, and can therefore be called as a radical feminist instrument.

In this regard, it is argued that the Istanbul Convention constitutes a shift from a liberal to a radical feminist conceptualisation of violence within human rights law. It is true

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34 Article 78 of the Istanbul Convention
that the Convention of Belem do Para, which is an older instrument, meets some aspects of the radical feminist reading of domestic violence (i.e. by adopting a dominance model of equality and recognising violence against women as an independent human rights violation) on a legally-binding basis. However, the state responsibilities are articulated in a far more-detailed and holistic way in the Istanbul Convention than the Convention of Belem do Para, through its 4(P)s principle so as to address the structural nature of violence, as suggested by radical feminists. In this context, the Istanbul Convention further expands the radical nature of the Convention of Belem do Para, and finally provides a radical feminist reading of domestic violence as a legally-binding instrument in the context of Europe.

2. Limitations

Despite the fact that the Istanbul Convention reflects a strong radical feminist voice, it is clear that it is not immune from potential problems in relation to its monitoring system. This thesis has demonstrated that the construction of its supervisory body, the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) resembles those of the other human rights instruments, particularly the UN treaty bodies. In this context, the problems which have been experienced by the CEDAW Committee in the implementation phase are likely to be also experienced by GREVIO. In fact, it has been seen that GREVIO mainly conducts its supervisory function through a state reporting procedure and is also able to adopt General Recommendations and initiate an inquiry procedure, just like the CEDAW Committee. Considering that the effective implementation of CEDAW is severely hindered by the late, insufficient or non-reporting by states, such problems could occasionally appear before GREVIO. In this regard, the study has considered a key problem inherent to the implementation of all international human rights law instruments, which is the lack of official ways in which effective sanctions could be issued in the case of a violation. To put it differently, owing to the notion of state sovereignty, international human rights bodies are fairly limited in their sanctioning power once state parties fail to comply with international standards. The sanctions mostly cannot go beyond a naming and shaming approach, and financial

35 Article 69 of the Istanbul Convention
36 Article 68 (14) of the Istanbul Convention
37 CEDAW entitles the Committee to make general recommendations in its introduction. Para 2 of the Optional Protocol to CEDAW (adopted 6 October 1999, entered into force 22 December 2000) UNTS 2131 83 authorises the Committee to conduct a special inquiry procedure.
fines (mostly) or imprisonment cannot be imposed on the violating state. This is the case for GREVIO, which is not granted a judicial power to order fines for state parties, unlike the ECtHR.

One more substantial difference between GREVIO’s monitoring tasks and those of the CEDAW Committee is that GREVIO is not equipped with an individual complaints mechanism. It might have been thought that as domestic violence is a primarily hidden or unreported problem, and since the number of domestic violence claims being lodged at human rights bodies is fairly small, this would not lessen the effectiveness of GREVIO’s monitoring. However this thesis has argued that the question to be posed should rather be what would have been lost in authorising GREVIO to receive individual complaints, instead of focusing on the hypothetical inefficiency of granting such a procedure to GREVIO. This research has demonstrated that the case-law of the CEDAW Committee and the Inter-American Commission has made a significant contribution to the interpretation of the abstract terms of key instruments, and the content of General Recommendations in relation to cases of domestic violence, in a practical sense. If GREVIO was entitled to receive such complaints, it would firstly constitute a platform where a broader explanation could be provided in relation to the articles of the Convention, besides the General Recommendations. Secondly, it would provide an additional layer to the supervisory function of GREVIO, which would promote the state parties to be more diligent in the steps to be taken. In this regard, it remains to be seen whether GREVIO will develop more innovative ways to supervise state parties’ compliance in time and whether the Council of Europe will introduce an individual complaint mechanism through a new Protocol, as in the case of CEDAW.

Besides the concerns about its monitoring mechanism, this study has underlined that the Istanbul Convention’s efficiency in addressing domestic violence through a radical feminist voice may be negatively affected by the cultural justifications provided by states for their non-complying practices. It should be underlined that this concern does not arise out of the Istanbul Convention itself; rather it is a general problem that has been invoked particularly in the context of women’s rights within human rights law. As Europe is far from homogenous in its cultural patterns, and the Istanbul Convention is

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open to accession from all countries around the world, the Convention is an instrument applicable to a wide-spectrum of cultures and traditions. The Istanbul Convention takes a firm stance against potential claims justifying any forms of violence covered in its scope on the basis of culture, religion, tradition or so-called honour. It also gives a far more limited space for reservations relying on these factors compared to CEDAW.

This thesis has argued that this position of the Istanbul Convention should not be labelled as absolute universalism. Neither should it be blamed for imposing Western values on Non-Western countries. In fact, as an instrument of European-origin, the Istanbul Convention becomes open to such critiques as observed by the cultural relativist arguments made against the previous human rights law instruments. In this regard, the thesis has strongly contended that the Istanbul Convention should be considered as a treaty locating women’s equality as a priority value over any culture-based claims, instead of being positioned in a spectrum between the artificial poles of universalism or cultural relativism. In fact, both so-called universalist and cultural relativist arguments can be utilised so as to work against women’s interests. However when women’s equality is taken as a priority, the states would not have the space to instrumentalise universalism or cultural relativism in accordance with their political will to restrict women’s rights and freedoms. Furthermore, under such an approach, a human rights instrument could not be blamed for cultural imposition, rather it would be simply considered as an instrument positioning women’s equality as the supreme value. In the analysis of Turkey as a case study, this way of approaching the Convention has proven convincing, as will be pointed out below while giving suggestions for the country’s effective implementation of the Istanbul Convention.

3. **Recommendations to Turkey**

Examining the steps taken by Turkey following its ratification of the Istanbul Convention, it is clear that the Convention has provided a strong guideline for numerous legal regulations aiming to address domestic violence against women, in a more efficient way. The adoption of the 6284 Law immediately after the ratification of the Convention, which provided a women-focused anti-violence framework, the establishment of the Violence Prevention and Monitoring Centres (VPMCs), in order to

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facilitate the measures in an organised and holistic manner, and the provision of comprehensive special civil measures (i.e. prevention and protection orders) all indicate Turkey’s commitment to implement the Convention effectively in its own context.

At the same time, the research brought some problems to light in the context of Turkey’s handling of domestic violence which are concerning and overshadow the declared commitment of Turkey to eliminate violence. These negative aspects that the research uncovered are illustrative of the types of problems that may arise in the implementation of such a radical feminist instrument as the Istanbul Convention. The points that Turkey should consider and act upon immediately can be summarised as below:

- First and foremost, Turkey should complement its anti-violence laws with policies ensuring women’s equality.

While Turkey seems to be taking important legal steps such as adopting the anti-violence 6284 Law, it has also taken legal and political steps that endanger women’s equality. This has been done by positioning women in a secondary status through a patriarchal lens, particularly over the course of the last decade. In fact, the statements of public officials emphasising the maternal role of women, honour and chastity strengthen the traditional gender roles of women, therefore jeopardising women’s equality. Turkey has also attempted to bring forward various legal initiatives having a discriminatory effect on women, such as the prohibition of abortion and re-criminalisation of adultery. These steps not only lead Turkey to a failure in complying with the Istanbul Convention, they also indicate a failure in satisfying a radical feminist reading of domestic violence. In fact, both the Convention and the dominance model of MacKinnon perceive violence against women and women’s inequality as two sides of the same coin. They confirm that all forms of violence against women are a matter of historical power inequality between women and men, and therefore state measures should be used to serve women’s empowerment while aiming to eliminate violence. In this regard, Turkey’s anti-violence efforts should be simultaneously pursued alongside more egalitarian laws and policies towards women.

- Turkey should position women’s equality at the centre of interpreting its laws, instead of the so-called universalism or cultural relativism that can be used in a flexible manner against women’s interests.
This thesis has demonstrated that Turkish public officials mainly rely on culture in their discriminatory statements against women. This is in contrast to the Istanbul Convention, which firmly prohibits state parties from justifying their laws on the grounds of culture, religion, tradition and so-called honour. In this context, Turkey should remove *namus* (honour), which can still be invoked as a ground for unjust provocation, from its Criminal Code.\(^4^0\) This thesis has argued in the sixth chapter that although culture has been used as a basis to restrict women’s equality and freedom, the so-called secular universalism can be equally dangerous for women as well. To illustrate how this is possible, the study referred to the definition of domestic violence provided by the 6284 Law, which does not explicitly refer to ‘partners’, therefore is unclear in its potential scope of application.\(^4^1\) In this regard, it is not obvious whether women who are married through an *imam* (religious) marriage, i.e. not officially married, and women who are cohabiting with their partners outside marriage, are included into the scope of the law. On one hand, if a secular universalist approach is taken, women who have *imam* marriage would be excluded from the protection of the law. On the other hand, once a cultural relativist approach is applied, women who are cohabiting with their partners without marriage would be excluded, since such a partnership is still a cultural taboo and not respected in Turkish society. In this context, Turkey should locate women’s equality at the centre while interpreting ambiguous terms in its laws, instead of using universalism or cultural relativism, both of which could be utilised to restrict women’s rights and protections.

- The 6284 Law should be amended so as to include the term ‘gender-based violence’, as well as a definition of ‘gender’.

Looking at the 6284 Law, it has been seen that in contrast to the Istanbul Convention, no definition of ‘gender-based violence against women’ is provided. Rather it is incorporated into the definition of ‘violence against women’. Furthermore, the 6284 Law does not provide a definition of ‘gender’, although the Istanbul Convention does define the term. This reluctance to refer to ‘gender’ suggests that although women victims have been put at the centre in the 6284 Law, Turkey does not seem fully committed to affirming the structural nature of violence stemming from the gendered roles subscribed to women. The failure to identify the problem as gender-based is an

\(^{40}\) 5234 Numbered Turkish Criminal Law (adopted 17 September 2004, entered into force 21 September 2004) Article 82(j)(k)

\(^{41}\) Article 2(b) of the 6284 Law (n 39)
indications of Turkey’s failure to establish the link between structural inequality of women and violence. In this regard, the 6284 Law should be adapted to incorporate gender into its context, and the gendered nature of the problem should always be kept at the centre of concern in relation to its implementation. This is crucial for addressing the structural and group-based nature of the problem, as underlined by MacKinnon and radical feminists.

- Turkey should reform its criminal law in accordance with its responsibilities arising out of the Istanbul Convention so as to address the gendered nature of domestic violence.

This thesis argued that after the ratification of the Istanbul Convention, Turkey has focused its efforts on special civil law measures, such as protection and prevention orders, yet equal weight is not given to its criminal law structures. As discussed in the sixth chapter, it is clear that the Turkish Criminal Code currently falls short in meeting the aggravating circumstances standards imposed by the Convention, many of which aim to address the gendered nature of domestic violence against women. In this regard, Turkey seems to have two options: one is to expand the scope of the aggravating circumstances so as to meet the requirements of the Istanbul Convention, such as recognising the offence’s being committed in a repetitive manner as an aggravating circumstance in the relevant crimes. The second option, requiring a more radical approach, is to adopt a specific domestic violence crime where the gendered nature of the problem is taken into account in the construction of the offence.

The first option can be identified as a liberal approach where domestic violence is still being evaluated according to the parameters of gender-neutrally drawn crimes, and the said circumstances are to be applied only exceptionally. For example, even when the repetitive nature of the violence is recognised as an aggravating circumstance, the harm would be calculated on the extent of the injury or trauma that occurred, as would be the case in a gender-neutral physical violence incident. At the same time, when domestic violence is designated as a special crime, it would take into account the ongoing and controlling nature of the violence, and therefore could recognise the unique harms of repeating violence on women, such as the deprivation of self-esteem, liberty and autonomy. In this context, the second option, where harms to women are recognised in their own terms, but not in proximity with the gender-neutral looking standards which
are actually serving men, would satisfy MacKinnon’s approach. In fact, in this approach the criminal law would be reconstructed to address women’s issues explicitly, and therefore the male standard would be challenged. This being the case, although the Istanbul Convention does not impose an obligation on state parties to adopt a specific domestic violence crime, it seems as the most radical solution and Turkey should seriously consider this option in the following times.

4. Concluding Remarks

Arguing that the Istanbul Convention is a promising radical feminist tool to be utilised in the efforts to eliminate gender-based domestic violence, this thesis does not lose sight on the fact that the potential of the Convention is not absolute in any sense, and depends on how state parties implement the Convention. As the Turkish case study suggests, even when states take positive steps following the ratification of the Convention, they can still find ways to evade their obligations arising from the radical nature of the Convention. Conforming this, however, it has come to light in this thesis that the Istanbul Convention achieves two significant points. Firstly, by employing a dominance model of equality and relating it to violence against women, the Convention achieves to politicise the problem as a group-based issue for women, which stems from the historical power inequality between women and men. In this context, domestic violence is finally confirmed as structural, and therefore a political problem of women, on a legally secure ground in the European human rights law framework.

Secondly, beyond its conceptualisation of domestic violence in this way, the Istanbul Convention itself should be seen as a political commitment, as well as a legal development. In fact, particularly through the rise of second wave feminism (to which radical feminism belongs to), feminists have been trying to reconceptualise violence and address the needs of women victims within the human rights law framework since the 1970s.42 The Istanbul Convention is the latest point reached following these endeavours. Above all, it indicates a broad agreement within the European context that domestic violence is not an issue to be left to be handled under existing generic human rights law instruments. Rather, the Convention reflects a mutual commitment among European states to address the gendered and structural nature of the problem under a

comprehensive legal framework. This inevitably provides more room for the inclusion of domestic violence into the global agenda to be addressed more vigorously from legal, political and social perspectives. It is striking that, Acar, the president of GREVIO, noted in the interview that she was positively surprised when the Committee of Ministers of the Council of Europe established the drafting Committee for a new instrument which specifically addressed the issue of violence against women and domestic violence. Now there is a clear commitment from Europe to confirm the gendered nature of the problem, and to pursue legal solutions through this confirmation.

Considering that GREVIO is currently at the initial steps of its monitoring tasks, it remains to be seen to what extent this political promise to eliminate gender-based violence will be achieved in practical terms at domestic levels. At this point, it is worth recalling one of the most prominent critiques of third-wave feminists (handled under postmodern feminism in this study) against the group-based understanding of violence suggested by radical feminists, including MacKinnon. The radical approach is argued to homogenise women in an artificial woman category by confirming a female essence on one hand, and by ignoring the intersecting forms of discriminations against women that arise from multiple aspects of their identity, such as race, sexuality, class and so on, on the other. This thesis underlined the distinction between two. While the former refers to anti-essentialism which, in most cases, led to the rejection of woman category altogether, the latter one is the intersectional theory which does not reject social categories, but in contrast, uses them strategically in order to address subordination that women are subject to due to their unique forms of experiences. In this context, it is argued that without a woman category, feminism would be left without a subject and that MacKinnon’s approach is fully compatible with Crenshaw’s intersectionality theory, due to their similar challenge against the sameness / difference paradox in antidiscrimination law.

In analysing the Istanbul Convention in the context of intersectionality, this study concluded that the lack of any reference to intersectionality or intersectional discrimination is highly disappointing considering that other jurisdictions and bodies

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43 Interview with Feride Acar, President of Group of Experts on Action against Violence against Women and Domestic Violence and the Retired Professor of the Faculty of Economic and Administrative Sciences in METU (Ankara, Turkey, 18 January 2017)
had made explicit references to intersectionality earlier,\textsuperscript{44} such as 2010-dated General Recommendation 28 of the CEDAW Committee. On the other hand, the overview of the GREVIO’s first evaluation reports suggested that GREVIO has paid a more significant consideration towards intersectional forms of discrimination against women victims of violence than the text of the Istanbul Convention suggests, although not in a consistent way. Considering that, except for the first two country evaluation of reports, GREVIO has increasingly referred to intersectionality together with a comprehensive analysis of the structural issues leading to such cases of intersectional discrimination against certain individuals, it would not be far-fetched to expect a progressive trajectory in its future work. At this point, it is highly essential to recall the recommendations of this research for an efficient application of intersectionality that it is hoped GREVIO will take on. First of all, GREVIO should avoid connecting women’s experiences of intersectionality predominantly to embodied and biological notions since this approach could cause essentialism in its simplest form. Secondly, GREVIO should be less concerned with who are the vulnerable women, such as women with disabilities, migrant women, Black women etc., and instead should aim to develop a consistent analytical method in evaluating the power relations causing intersectional forms of discrimination in each specific case. Otherwise, GREVIO may fall into the trap of adding up infinitive subgroups by stereotyping them as vulnerable without question. Furthermore, only such an approach can really address the root causes and structural nature of the intersectional forms of discrimination, in a parallel line to MacKinnon’s feminism that utilises law to address hidden yet prevalent forms of power inequalities.

\textsuperscript{44} It is noted by many that the international human rights law bodies have been developing their interpretations of rights in incorporating intersectionality over the last three decades. See Sandra Fredman, \textit{Intersectional Discrimination in EU Gender Equality and Non-Discrimination Law} (European Commission 2016) 27; Emma Buxton-Namisnyk, ‘Does an Intersectional Understanding of International Human Rights Law Represent the Way Forward in the Prevention and Redress of Domestic Violence against Indigenous Women in Australia?’ (2014) 18:1 Australian Indigenous Law Review 119, 126
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