

BRINGING CRITICAL RACE THEORY TO EUROPE: THE CASE OF IMMIGRANT WOMEN

Fulvia Staiano*

This article moves from the consideration that American critical race feminism (CRF) criticism of laws' pretence of universality as well as of its gender and racial essentialism may be fruitfully applied to the situation of immigrant women in contemporary Europe. Drawing from these criticism, expressed in relation to minority women, it aims to unveil the role of immigration law in creating and reinforcing immigrant women's experiences of exclusion. The article thus analyses selected provisions of supranational and national immigration law, with a special focus on two main aspects: the normative and judicial imposition to immigrant women of unviable requirements modelled on the experiences of citizen women, and the failure of laws to take into account their specific needs. In addition to performing a critical review of the gendered effects of immigration law in contemporary Europe, it will offer evidence of the relevance of critical race feminism beyond the time and geopolitical context in which it was developed.

Keywords: critical race feminism, gender and migration, Europe, United States, human and fundamental rights law.

TABLE OF CONTENTS

I. INTRODUCTION	74
II. CRITICAL RACE FEMINISM AND THE TRANSFORMATIVE POWER OF RIGHTS-BASED DISCOURSES	76
III. FROM THE UNITED STATES TO EUROPE: IMMIGRANT WOMEN AS SUBJECTS OF EXCLUSION	79
IV. FAMILY REUNIFICATION LAW AND THE ONE BREADWINNER MODEL.....	83
V. ENFORCED DEPENDENCE AS A PERVERSE EFFECT OF NORMS APPLICABLE TO IMMIGRANT WOMEN IN EUROPE	89
VI. CONCLUDING REMARKS	94

* Postdoctoral Fellow at the School of Law of University College Cork, Doctor in Laws, European University Institute (Florence). An earlier version of this article was presented at the European Society of International Law 10th Anniversary Conference on *International Law, and... Boundaries of International Law and Bridges to Other Fields and Disciplines*, Vienna, 4th - 6th September 2014.

I. INTRODUCTION

From the late '80s of the twentieth century, a group of scholars in the United States started to express their dissatisfaction with both the doctrinal framing of racial and gender issues in the United States as two separate realms (in feminist legal theory and critical race theory alike) and the American normative framework in force at the time. Their views may be grouped under the umbrella definition of critical race feminism.¹ On the doctrinal level, critical race feminists pointed out the perverse effects of essentialism in critical legal theory.² On the one hand, they criticised feminist legal theory for its reliance on an apparently universal concept of women which was in fact modelled on the experiences of white, upper-class, heterosexual women. On the other hand, critical race feminists also highlighted critical race theory's focus on men of color as the quintessential person of color, while overlooking women of color. Thus, these scholars proposed an alternative method of legal analysis, based on a stronger awareness of the complex experiences of disadvantage and discrimination endured by women of color on the intersecting grounds of sex, race, and class, as well as other categories.

On a more strictly normative level, critical race feminists developed their own critique of law. Two main aspects of their analysis appear particularly interesting. Firstly, some critical race feminists argued against the law's pretence of universality, by showing how the law itself may entrench and reinforce structures of subordination not only between the sexes, but also between ethnic groups and social classes. Secondly, critical race feminists contested the rejection of rights as a tool of empowerment for oppressed groups, advocated by some critical legal scholars both in relation to racial minorities³ and from a feminist perspective.⁴ In response to the view whereby rights are merely an expression of an oppressive system and cannot, thus, bring about effective change, critical race feminists – while admitting that a re-thinking of rights was in order – pointed out the

¹ Not all authors mentioned in this article necessarily identify with this definition. I have, however, chosen to focus on the work of scholars whose legal studies on gender and racial issues are largely in agreement.

² Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' [1989] *University of Chicago Legal Forum* 139, 152 ff; Marlee Kline, 'Race, Racism and Feminist Legal Theory' [1989] *Harvard Women's Law Journal* 115; Angela P Harris, 'Race and Essentialism in Feminist Legal Theory' [1990] *Stanford Law Review* 581.

³ Mark Tushnet, 'An Essay on Rights' [1984] *Texas Law Review* 1363; Alan Freeman, 'Racism, Rights and the Quest for Equality of Opportunity: a Critical Legal Essay' [1988] *Harvard Civil Rights – Civil Liberties Law Review* 295, 328 ff.

⁴ Frances Olsen, 'Statutory Rape: A Feminist Critique of Rights Analysis' [1984] *Texas Law Review* 387; Janet Rifkin, 'Toward a Theory of Law and Patriarchy' [1980] *Harvard Women's Law Journal* 83.

transformative potential of rights-based discourses precisely because they were situated within the system in need of change.⁵

Despite the compelling character of these critiques and notwithstanding the obvious existence of racial and gender issues also in Europe, critical race feminism has had a very limited impact on the European legal space and in European legal scholarship. With the important exception of the concept of intersectional discrimination (which has been well received at institutional⁶ and academic⁷ levels and has started to work its way into jurisprudential analysis⁸), the breakthroughs of critical race feminism have been rarely discussed and applied to this context.⁹

This article aims to mark a step in this direction by exploring an area where the application of critical race feminist thought to the contemporary European context may be particularly fruitful. In particular, it will discuss European and national immigration law by drawing parallels between the current situation of third-country national women in the European legal space and that of women of color between the late '80s and the early '90s of the twentieth century in the United States as analysed by critical race feminists. My analysis will not consist in highlighting the similarities between the issues experienced by these two groups. Rather, the primary aim of this article is to relate the deconstructive and constructive legal analysis carried out in the context of critical race feminism (from now on, CRF) to my own findings on the role of law in reinforcing or curbing the disadvantages and issues currently experienced

⁵ Deborah L. Rhode, 'Feminist Legal Theories' [1990] *Stanford Law Review* 617, 632 ff.

⁶ Joanna Kantola, Kevät Nousiainen, 'Institutionalizing Intersectionality in Europe' [2009] *International Feminist Journal of Politics* 459.

⁷ Mathias Möschel, 'The Relevance of Critical Race Theory to Europe' (PhD thesis, European University Institute 2011), 118 ff.; Dagmar Schiek and Victoria Chege (eds), *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law* (Routledge-Cavendish 2009); Dagmar Schiek and Anna Lawson (eds), *European Union Non-Discrimination Law and Intersectionality: Investigating the Triangle of Racial, Gender and Disability Discrimination* (Ashgate 2011).

⁸ At supranational level, it is possible to recall in particular the landmark judgment of *B.S. v Spain* by the European Court of Human Rights (*B.S. v Spain*, App no 47159/08, ECtHR 24 July 2012). The case concerned a Nigerian woman working in Spain as a prostitute who had been subjected to physical and verbal abuse by police officers on multiple occasions, and who had not obtained redress before domestic courts. In this case, the Court found that the Spanish authorities had breached the applicant's right to be free from inhuman and degrading treatment (art 3 ECHR) in conjunction with her right to equality and non-discrimination pursuant to art 14 ECHR. The racist and sexist character of both the police officers and the judicial authorities' attitude towards the applicant grounded the Court's observation that 'the decisions made by the domestic courts [failed] to take account of the applicant's particular vulnerability inherent in her position as an African woman working as a prostitute' [62].

⁹ A rare example in this sense is provided by Adrien K Wing and Monica Smith, 'Critical Race Feminism Lifts the Veil? Muslim Women, France, and the Headscarf Ban' [2005] *UC Davis Law Review* 743.

by third-country national immigrant women in Europe, and to the role and potential of human and fundamental rights law in this realm.

The first part of this article will be devoted to a critical survey and analysis of the views expressed by CRF scholars in relation to the pretence of universality and impartiality of law and to the possible role of rights in exposing and remedying the subordination experienced by oppressed groups of women. Among the wide array of theoretical stances expressed by critical race feminists, special attention will be devoted to those areas which I believe are more likely to be fruitfully applied to immigrant women in contemporary Europe.

The second part of the article will then lay out my own position on the issues detected by critical race feminists in the United States, making reference to the different question of immigrant women in Europe. More specifically, through an analysis of significant single examples of rulings I will tackle two main issues. On the one hand, I will explore the extent to which legal norms applicable to immigrant women in Europe may constitute yet another example of how the law, by being oblivious of difference, creates and reinforces the instances of inequality experienced by this group. On the other hand, I will explore the transformative potential of human and fundamental rights law in revealing and correcting the shortcomings entrenched in law, which prevent the effective protection of immigrant women's rights in the European legal space.

II. CRITICAL RACE FEMINISM AND THE TRANSFORMATIVE POWER OF RIGHTS-BASED DISCOURSES

In 1989, Kimberlé Crenshaw wrote a compelling article¹⁰ in which she illustrated the problematic consequences of the legal consideration of race and gender as mutually exclusive categories. Taking Black women¹¹ as her reference group, she illustrated the law's failure to effectively grasp their experience of discrimination and subordination on the intersecting grounds of race and gender, and its consequent role in the perpetuation of the *status quo*. In order to illustrate her point, Crenshaw focused in particular on anti-discrimination law, *per se* and on its judicial enforcement. She argued that the anti-discrimination framework in the United States encouraged a focus on sex- and class-privileged Black individuals¹² in race discrimination cases, and on race- and class-privileged women in sex discrimination cases. Subsequently, Crenshaw further developed her theoretical stance by observing that structures of domination and subordination of certain groups of women on the intersecting grounds of sex, race, class and so forth, could be significantly aggravated by laws,

¹⁰ Crenshaw (n 2).

¹¹ In conformity with critical race feminists' use of the term, in this article I will use the term 'Black' to refer to persons of African descent in the United States.

¹² Kimberlé Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color' [1991] *Stanford Law Review* 1241, 1249.

which failed to consider these specificities. She argued that intersectional subordination was 'frequently the consequence of the imposition of one [normative] burden that interacts with pre-existing vulnerabilities to create yet another dimension of disempowerment.'¹³ In the same period, Minow and Spelman stressed the importance of a contextual analysis of law 'in order to expose how apparently neutral and universal rules in effect burden or exclude anyone who does not share the characteristics of privileged, white, Christian, able-bodied, heterosexual, adult men for whom those rules were actually written.'¹⁴

While CRF identified law as a flawed and biased system overlooking the specific issues and situation of minority women, and of Black women in particular, many CRF scholars argued in support of rights-based approaches as a strategy to remedy this shortcoming. This view was initially developed in response to critical legal scholars who rejected rights-based discourses because they believed that – while conveying a false sense of fairness – rights ultimately legitimised the *status quo*, and, thus, the oppression of certain groups.¹⁵

CRFs, on the other hand, firmly believed in the transformative power of rights. They pointed out that access to rights had been a significant achievement for these groups, for instance by recalling the importance of the civil rights movement for Black Americans.¹⁶ CRFs agreed that the legal system of rights protection was not immune to criticism, and that in fact a re-thinking of rights was in order, before the needs of disempowered groups could effectively be taken into account by law. Nonetheless, many were convinced that the language of rights could be re-appropriated by these groups and effectively used as a strategic tool of societal change – precisely because this language constituted the dominant discourse and could be used to push their demands into the spotlight.

This stance was also expressed with specific reference to women experiencing disadvantage on the grounds of sex and race. Mari Matsuda, for instance, referred to legalism and to the very notion of rights as 'a tool of necessity' for 'outsiders, including feminists and people of color.'¹⁷ She proposed the adoption of a multiple consciousness as a jurisprudential

¹³ *ibid.*

¹⁴ Martha Minow and Elizabeth V Spelman, 'In Context' [1990] *Southern California Law Review* 1597, 1601.

¹⁵ Nn 3 and 4.

¹⁶ See for instance Kimberlé Crenshaw, 'Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law' [1988] *Harvard Law Review* 1331, 1349 ff, and Patricia Williams, 'Alchemical Notes: Reconstructing Ideals from Deconstructed Rights' [1987] *Harvard Civil Rights – Civil Liberties Law Review* 401. On the same note, see also Robert A Williams, 'Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for Peoples of Color' [1988] *Law and Inequality* 103.

¹⁷ Mari Matsuda, 'When the First Quail Calls: Multiple Consciousness as Jurisprudential Method' [1989] *Women's Rights Law Reporter* 7, 8.

method, not merely in the sense of a strategic shifting of points of view but as a contextual interpretation of law, i.e., as an 'opportunity to operate both within the abstractions of standard jurisprudential discourse, *and* within the details of our own special knowledge.'¹⁸ This approach, she argued, could be fruitfully applied to constitutional rights as well, in order to make them more responsive to the needs of outsiders. Referring to her own perspective as a Japanese-American woman, Matsuda noted that the American Constitution was not written for her, but she could make it her own, 'using [her] own consciousness as a woman and person of color to give substance to those tantalizing words "equality" and "liberty".'¹⁹

Despite its strong links with the U.S. context, the CRF discourse on rights did not remain confined to that domestic order. Indeed, several scholars started to pay greater attention to international law, and to the increasingly relevant source of law constituted by international human rights law. Thus, the CRF debate on the transformative role of rights shifted its focus from a national to a transnational dimension.

Berta Esperanza Hernández-Truyol, in particular, considered CRF a key tool for the reconstruction of human rights norms on sex-based violence in the light of a stronger sensitivity to the intersections of race, sex, ethnicity and so forth.²⁰ She observed that human rights had the potential to play an important role in ensuring the enjoyment of full personhood for the most disenfranchised and disadvantaged individuals on the grounds of sex, sexuality, class, and nationality.²¹ For this purpose, however, it was equally important to ensure that human rights themselves would not reinforce the hegemonic legal view, which also contributes to these individuals' othering. In this respect, Hernández-Truyol highlighted the potentially central role that critical movements could play in this field.²² Along the same lines, Penelope Andrews²³ and Hope Lewis²⁴ called for a CRF analysis of human rights law for the benefit and progress of all women, not simply white Western ones, in an effort to connect local issues with the global and transnational arena of international human rights law.

¹⁸ *ibid*, 9.

¹⁹ *ibid*, 10.

²⁰ Berta Esperanza Hernández-Truyol, 'Breaking Cycles of Inequality: Critical Theory, Human Rights, and Family In/justice' in Francisco Valdes, Jerome McCristal Culp and Angela P Harris (eds), *Crossroads, Directions and a New Critical Race Theory* (Temple University Press 2002), 349.

²¹ *ibid*, 351.

²² *ibid*.

²³ Penelope Andrews, 'Globalization, Human Rights and Critical Race Feminism: Voices from the Margins' [2000] *Journal of Gender, Race and Justice* 373.

²⁴ Hope Lewis, 'Embracing Complexity: Human Rights in Critical Race Feminist Perspective' [2003] *Columbia Journal of Gender and Law* 510.

III. FROM THE UNITED STATES TO EUROPE: IMMIGRANT WOMEN AS SUBJECTS OF EXCLUSION

The adoption of the described transnational dimension by CRFs encouraged increased attention to the situation of women from countries other than the United States, and in particular from politically non-Western countries ('the Global South').²⁵ However, it appears that immigrant women were considered in this context mostly in so far as they were also women of color, rather than as a separate and broader group with their own specific needs and difficulties. As a consequence, in these analyses the discrimination and inequality suffered by immigrant women on the grounds of migrant status was often overshadowed by race and sex discrimination. Crenshaw had already referred to the case of immigrant women as an example of how the law fails to address the specific needs of women of color, and of how norms designed on the basis of the experiences of women from certain ethnic groups or classes will be unable to offer effective protection and redress to other women who already face specific issues due to their ethnic origin and/or class.²⁶ The same may be said for Lewis,²⁷ who discussed the transformative potential of international human rights law for Jamaican immigrant women in the United States.

The points raised in the context of CRF, however, are in my view applicable to immigrant women in a much broader sense than was actually explored by the above-mentioned scholars. Indeed, I believe that immigrant women taken as a group and not 'simply' as immigrant women of color constitute an important reference for a contemporary re-thinking of CRF thought.

²⁵ *ibid.* See also Hope Lewis, 'Lionheart Gals Facing the Dragon: The Human Rights of Inter/national Black Women in the United States' [1997] *Oregon Law Review* 567; Hope Lewis, 'Universal Mother: Transnational Migration and the Human Rights of Black Women in the Americas' [2001] *Journal of Gender Race & Justice* 197, where the author discussed migrant status as an intersecting ground of discrimination with race and sex more at length, but always in the perspective of how to ensure the effective implementation of Black women's human rights.

²⁶ Crenshaw, 'Mapping the Margins' (n 12), 1246. In particular, Crenshaw discussed the marriage fraud provisions envisaged by s 216 of the U.S. Immigration and Nationality Act 1957. She highlighted that s 216 required immigrants who had entered the country in order to marry a U.S. citizen or a permanent resident to remain married for two years before being able to apply for permanent residence status. Crenshaw rightly argued that this provision disproportionately and negatively impacted women, and women victims of domestic violence in particular, because it forced them to choose between enduring the abuse and risking deportation. As a result, this norm aggravated their vulnerability to domestic violence caused by the inevitable dependence of immigrant women on their husbands when first arriving in the U.S. due to language barriers, lack of information, and so forth.

²⁷ Hope Lewis, 'Lionheart Gals' (n 25). See in particular p 614, where Lewis asks in relation to CEDAW: 'can an instrument intended to protect against discrimination against women on the basis of sex adequately address discrimination on the basis of both race and gender?'

In this respect, I would argue that the main breakthrough of CRF was that it shed light on the barriers experienced by women from particularly disadvantaged groups in accessing legal protections formally recognised to them by the law – as well as its reasoning on fundamental rights as a possible gateway of empowerment. The reason I find these ideas particularly attractive lies in their universal character, i.e., in their potential to transcend the geographical and historical context in which they were conceived and developed, and to be applied fruitfully to other disadvantaged groups of women.

The discussed theories offer an interesting frame for the analysis of the current status of immigrant women in the European legal space. In the next sections, I will, therefore, explore the false neutrality of the laws applicable to immigrant women in the European legal space and the potential of human and fundamental rights to overcome this shortcoming. In particular, I will discuss how apparently neutral laws negatively and disproportionately affect this category from the point of view of access to rights and entitlements on an equal footing. Furthermore, I will analyse relevant examples of interaction between biased norms on the one hand and human and fundamental rights on the other, and I will reflect on the possible role of the latter in correcting the disparate impact of the former on immigrant women specifically.

This two-step inquiry will be carried out with reference to two examples of disparate impact generated by law on immigrant women specifically. The first example concerns the legal enforcement of unviable models for immigrant women (with a specific focus on the one-breadwinner model), which produce disproportionate and negative effects on their possibility to access rights in the host countries on an equal footing with immigrant men. The second example concerns the perverse effects generated by norms, which create a high level of dependence of migrants on family members or employers, negatively affecting their enjoyment of equality within the family, or their possibility to obtain protection and redress against domestic violence and labour exploitation.

Arguably, this type of analysis owes a great debt to the work of the above-mentioned scholars. However, my own methodology differs from CRF reasoning in at least two respects. Firstly, the main aim of CRF analysis was ultimately political. The legal discourse, including the language of rights, was mainly considered as a tool to be used strategically in order to generate societal change for women belonging to minorities. Conversely, my own approach to the matter of the transformative potential of rights is more juridical than political. My ultimate aim is to verify the effects of human and fundamental rights on biased norms applicable to immigrant women rather than to devise the most effective jurisprudential methods in relation to their social impact. Consistently with this choice, I will not speak in terms of oppression or subordination, but rather of disparate impact and indirect discrimination.

A second aspect of differentiation between my own approach and that of CRF concerns the specific grounds of discrimination on which to focus. As I have briefly outlined above, CRFs did not overlook immigrant women. However, because their main focus was the intersections of race and gender, and thus on immigrant women of color, the fact that this group was also negatively and disproportionately affected by law on the grounds of being migrants remained in the background of their analysis. I believe that in order to effectively capture the experiences of exclusion of immigrant women in the European legal space, it is necessary to focus on the disparate impact of applicable laws on the intersection of the gender and migrant status. In some instances, such disparate impact is clearly produced on immigrant women of certain ethnic groups.²⁸

However, in the vast majority of the cases that I will be considering, immigrant women more widely emerge as negatively affected as migrants as well as women. While the discrimination grounds of race/ethnic origin and migrant status can certainly overlap, it is equally important to acknowledge that immigrants in general, hence including immigrant women, may also be discriminated due to their being migrants, which qualifies them as foreigners and outsiders even when they do not belong to ethnic minorities in the host country.

While carrying out this analysis, I am aware that by discussing immigrant women as a broad category I may incur criticism of essentialism and oversimplification myself. There is no doubt that third-country national immigrant women in Europe constitute an extremely diverse and heterogeneous group, and that its members may experience different issues depending on culture, religion, nationality, class, marital status, and even personal circumstances. Nonetheless, in addition to recalling that every legal analysis inevitably entails a certain degree of abstraction, I shall also clarify that I do not aim to make claims which are universally valid and applicable to all immigrant women in Europe. In the following sections I will discuss significant examples of the negative impact that certain norms are likely to produce on immigrant women – regardless of their personal

²⁸ See for instance *Abdulaziz, Cabales and Balkandali v the United Kingdom* (1985) Series A no 94. Here, the applicants – immigrant women who had subsequently obtained British citizenship or become naturalised as British citizens – argued that they had been discriminated against not only on the grounds of sex, but also on the grounds of race due to the stricter conditions imposed by the 1980 Statement of Changes in Immigration Rules to male immigrants pursuing reunification with settled spouses or fiancés, in comparison to those required to female immigrants pursuing reunification in the United Kingdom. The applicants, in particular, recalled that these restrictions did not apply if the resident spouse or fiancé was a British citizen born or having a parent born in the United Kingdom and that this differential treatment *de facto* benefited persons of a specific ethnic origin. Although the Court dismissed the race discrimination claim, merely justifying this conclusion by stating that 'the 1980 Rules made no distinction on the grounds of race and were therefore not discriminatory on that account' [85], it is nonetheless interesting to recall that a minority of the Commission had noted that 'the main effect of the rules was to prevent immigration from the New Commonwealth and Pakistan' and that 'by their effect and purpose, the rules were indirectly racist and there had thus been a violation of Article 14' [84].

situation, attitudes and aspirations but simply by virtue of their being migrants and women – and explore the possible role of human and fundamental rights in this respect.

With CRFs' 'multiple consciousness' in mind, I argue that an effective analysis of the perverse effects of legal norms on immigrant women's rights and entitlements is not possible unless a re-definition of notions of 'right to family life' and 'right to employment' is performed. Thus, in this article I propose an understanding of family life and employment as clusters of rights and entitlements. In this sense, family life should be understood as including key rights such as the right to spousal equality, the right to access family reunification and to enjoy family unity in conditions of equality, the right to live free of domestic violence as well as the right to protection during pregnancy. Similarly, I have chosen to understand the employment domain as encompassing the right to access the host country's labour market in conditions of equality and non-discrimination, the right to non-discrimination in the workplace and in relation to dismissal, freedom from exploitation and abuse by employers, as well as access to justice in relation to employment matters.

While this construction does not necessarily reflect the current understanding of the rights to family life and to employment in international human rights law, as these rights may not be interpreted as encompassing all of the aspects mentioned, I believe that this approach has two merits. Firstly, it effectively reflects the complex experiences and issues of immigrant women in the European legal space. By considering these legal norms against the threshold of the rights included in these clusters, I will, thus, be able to gain a better understanding of how certain legal provisions produce a disparate impact on immigrant women specifically. Secondly, the interpretation of family life and employment as heterogeneous domains allows me to consider the perverse effects that do not stem from individual norms, but rather from the interaction of norms. In particular, this construction reveals how a disparate impact on immigrant women may derive from the combination of norms traditionally assigned to separate legal domains (e.g., family reunification law, labour migration law, but also criminal law, labour law, family law and so forth).

Having clarified this, I shall observe that third-country national women who enter and reside legally in the European Union may be disproportionately and negatively affected by norms applicable to them for many different reasons. In the later sections, I will discuss two significant examples of the gender-related shortcomings of apparently neutral legal provisions, namely the normative imposition of the one-breadwinner model in European and domestic family reunification law, and the enforced dependence from family members and employers respectively observable within EU family reunification law and domestic visa schemes for artistes. While doing so, I will explore the ways in which human and

fundamental rights law has interacted with them and assess the latter's potential to correct said shortcomings.

IV. FAMILY REUNIFICATION LAW AND THE ONE BREADWINNER MODEL

A shortcoming, which is identifiable in family reunification law in particular concerns the imposition of unviable and gendered models on immigrant women exclusively. Because these models may be more easily complied with by immigrant men or by citizen women, immigrant women experience disproportionate difficulties in satisfying the related legal requirements and, thus, in accessing rights and entitlements which are formally recognised to them by the law. Thus, these norms produce a disparate impact on immigrant women's access to the right to family life and limit their possibility to access family reunification in conditions of equality with their male counterparts.

A telling example of this phenomenon is, in my view, identifiable in European family reunification law, which appears to strongly adhere to a one breadwinner model. In particular, its heavy reliance on economic thresholds as the only gate to access family reunification suggests a normative view of the ideal and trustworthy sponsor as one devoted to productive work. On the one hand, these requirements pursue the legitimate objective to ensure that, once admitted to the territory of the Union, family members will not weigh on Members States' social assistance systems and will, therefore, not constitute a burden for their host countries. On the other hand, however, it must not be overlooked that this exclusive focus on financial prerequisites disproportionately and negatively affects immigrant women's possibilities to sponsor family reunification. Due to inequalities and discrimination on the intersecting grounds of sex, immigrant status and ethnic origin, immigrant women in Europe experience less favourable employment opportunities and receive lower salaries in comparison to both male immigrants and citizen women.²⁹ In addition to this, immigrant women are more likely to be faced with heavy care burdens which make it more difficult for them to reach a satisfactory work/family balance, or to participate in the labour market at

²⁹ European Union Agency for Fundamental Rights, *Migrants, Minorities and Employment: Exclusion and Discrimination in the 27 Member States of the European Union, Update 2003- 2008*, Publication Office of the European Union, 2010, p 74; Albert Kraler, *Civic Stratification, Gender and Family Migration Policies in Europe: Final Report*, International Centre for Migration Policy Development, Vienna, May 2010; Eleonore Kofman, 'Gendered Migrations, Livelihoods and Entitlements in European Welfare Regime' in Nicola Piper (ed), *New Perspectives on Gender and Migration: Livelihoods, Rights and Entitlements* (Routledge 2008), 77; Eleonore Kofman, Judith Roosblad and Saskia Keuzenkamp, 'Migrant and Minority Women, Inequalities and Discrimination in the Labour Market' in Karen Kraal, Judith Roosblad, and Judith Wrench (eds), *Equal Opportunities and Ethnic Inequalities in European Labour Markets: Discrimination, Gender and Politics of Diversity* (Amsterdam University Press 2009), 56 ff.

all.³⁰ The possible absence of a kin network in the host country and the low accessibility of childcare services (or lack thereof) in the host country are among the factors that contribute to this phenomenon.

Against this background, Directive 2003/86/EC³¹ on the right to family reunification – aimed at third-country nationals regularly residing in the territory of the Union – allows Member States to require that the sponsor provide evidence of having accommodation 'regarded as normal for a comparable family in the same region',³² sickness insurance for himself or herself and his/her family members, as well as 'stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned.'³³ Similarly, a renewal of the residence permit for the purpose of family reunification may be rejected by the Member States if the sponsor can no longer count on sufficient financial resources.³⁴ It should be noted that the gender bias implied in these norms stems not only from their strong – if not exclusive – focus on economic requirements (*vis-à-vis* the lower income disproportionately experienced by immigrant women in Europe), but also from the fact that they require the sponsor to be able to financially support his or her family members all by himself or herself, and not only at the time of their first entry, but apparently for as long as they hold a residence permit for family reunification. This constitutes an extremely high economic threshold, all the more so for immigrant women.

Similarly, problematic norms are observable at the domestic level. An interesting example in this respect is provided by art. 3.73 of the 2000 Dutch Aliens Decree (*Vreemdelingenbesluit*), whereby individuals aiming to sponsor family reunification must have sufficient, lasting and independent resources, i.e., resources acquired through paid employment, or contributory social welfare benefits or consisting in personal assets. Interestingly, legal reforms in Dutch law concerning income requirements have been adopted amidst discussions concerning their effects on women's possibilities to sponsor family reunification. In 1998, when the Dutch government's 2000 Aliens Act established an increase in income requirements, arguments both in favour and against this measure concerned female sponsors.³⁵ On the one hand, the government maintained that the increase would encourage immigrant women to improve their labour market situation, and thus their emancipation. On

³⁰ Elisabeth Strasser, Albert Kraler, Saskia Bonjour and Veronica Bilger, 'Doing Family' [2009] *The History of Family* 165.

³¹ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] O.J. L 251/12.

³² Art 7(1)(a) of Directive 2003/86.

³³ Art 7(1)(c) of Directive 2003/86.

³⁴ Art 16(1)(a) of Directive 2003/86.

³⁵ Betty De Hart, Tineke Strik and Henrike Pankratz, *Family Reunification: a Barrier or a Facilitator of Integration? Country Report of the Netherlands*, 25 ff, available at <http://research.icmpd.org/2012.html?&F=> (accessed 8 May 2015).

the other hand, the Green Left submitted data showing that stricter income requirements simply meant that immigrant women were disproportionately affected in their possibilities to sponsor family reunification (with a decrease of sponsors from 48% to 32% since the new thresholds had been established).³⁶

With respect to these issues, human and fundamental rights law does not offer any cure-all solutions. To clarify this point, I will now turn to discuss an instance where human rights actually grounded the reinforcement of a breadwinner model, and two national examples where on the other hand fundamental rights produced the opposite effect and contributed to the disestablishment of this model.

As to the first example, in 2005 the European Court of Human Rights faced the question of whether the refusal of the Dutch authorities to grant family reunification to a mother who failed to satisfy the income requirements envisaged by art. 3.73 of the 2000 Dutch Aliens Decree constituted a breach of her and her children's right to family life under article 8 of the European Convention on Human Rights (from now on, ECHR). In this case – *Haydarie v. the Netherlands*³⁷ – the applicant mother was a widower who had been recognised refugee status in the Netherlands, where she had established her residence together with one of her four children and her disabled sister. Subsequently, she had applied for family reunification with her other children. The Dutch authorities, however, rejected her application on the grounds that she did not have any other income besides general welfare benefits and that it was not possible to find 'special circumstances on the grounds of which it should be held that the aim served by the income requirement under the immigration rules entailed disproportionate consequences for the first applicant.'³⁸ In particular, the Minister of Foreign Affairs observed that a balance had to be reached between Ms. Haydarie's interest to enjoy family life in the Netherlands and the general interests pursued by Dutch immigration policy. The Minister 'was only prepared to accept the existence of a positive obligation under article 8 when, despite serious efforts made by the first applicant, there were no real prospects for her to obtain lasting, sufficient and independent means of subsistence and, given the circumstances in which she found herself, it would be unreasonable to maintain the income requirement.'³⁹ Ms. Haydarie, on the other hand, submitted that 'she had to care for her wheelchair-bound sister who refused aid from strangers and that she did not wish to leave her sister alone in the house fearing that she might cause a fire.'⁴⁰

³⁶ *ibid*, 26.

³⁷ *Haydarie v the Netherlands* App no 8876/04 (ECtHR, 20 October 2005).

³⁸ *ibid*.

³⁹ *ibid*.

⁴⁰ *ibid*.

A stark contrast between an abstract legal model and the reality of the applicant's situation is identifiable in this case. The legal prerequisites imposed by the Dutch authorities were clearly based on a breadwinner model – not simply because the 2000 Aliens Decree required prospective sponsors to comply with financial requirements and did not include welfare benefits in the definition of income for this purpose. Most importantly, although in certain circumstances the national authorities accepted that imposing income requirements would be unreasonable, these circumstances did not imply the consideration of other models besides that of breadwinner. Indeed, the 'serious efforts' required by the Minister involved:

an active attitude on her part, implying actively looking for and accepting work even where a job would not correspond to her education or professional experience, registering at an employment office ... and interim employment agencies indicating to be willing to accept any kind of work, reacting to vacancy announcements, intensive writing of (un)solicited job applications, and undertaking labour-market oriented studies.⁴¹

Thus, even when the national family reunification policy admitted an exception to its financial prerequisites, the breadwinner model was still enforced. Unsurprisingly, the care burdens of Ms. Haydarie were qualified as her 'own choice' by the national authorities because 'she could appeal to aid-providing bodies.'⁴²

Against this background, I argue that the European Court of Human Rights could have identified a disparate impact on Ms. Haydarie's right to family life through a contextual analysis of article 8 ECHR. A consideration of her situation in context would have revealed that as an immigrant widow with heavy care burdens, and no family network to share them with, she could hardly have pursued paid employment at all. This approach would also have made clear that, as an immigrant and a woman, Ms. Haydarie would have encountered disproportionate difficulties in accessing sufficiently paid employment to singularly support herself, her four children and pay for aid-providing agencies to entrust with her sister's care. In this sense, the *Haydarie* case epitomises very well the potentially beneficial effects of the contextual interpretation of rights proposed by Matsuda⁴³ as well as Minow and Spelman.⁴⁴

Regrettably, the *Haydarie* judgment illustrates instead how a gender-insensitive interpretation of human rights law may reinforce gendered models imposed by immigration law. Here, indeed, the Court merely endorsed the Dutch authorities' view whereby the unpaid care work

⁴¹ *ibid.*

⁴² *ibid.*

⁴³ Matsuda (n 17).

⁴⁴ Minow and Spelman (n 14).

performed by Ms. Haydarie was a choice to stay inactive and not to perform 'actual work', stating that 'she preferred to care for her wheelchair-bound sister at home'⁴⁵ and that 'it [had] not been demonstrated that it would have been impossible for the first applicant to call in and entrust the care for her sister to an agency providing care for handicapped persons.'⁴⁶

Positive examples of the contextual interpretation of fundamental rights in cases concerning immigrant women's access to family reunification have, on the other hand, been provided at domestic level, and in particular in the Italian order. I shall refer to two meaningful cases of judicial recognition of the possibility to sponsor family reunification for third-country national women devoted to unpaid care work within the household, despite the fact that they did not comply with legally-established income requirements for this purpose.

This recognition occurred through an interpretation of national norms on family reunification on the joint grounds of articles 29 and 30 of the Italian Constitution – which respectively envisage a State obligation to recognise the rights of the family and the right, as well as the duty, of parents to support and educate their children – and of article 35, which establishes a State obligation to protect work in all its forms. Thus, in a case concerning a Brazilian mother whose application for family reunification had been rejected on the grounds that she was not a worker but rather a homemaker, the Italian Constitutional Court held that this exclusion had been carried out on the grounds of a wrongful interpretation of the law.⁴⁷ The applicant should have been considered a worker to all effects, because unpaid care work within the household, 'due to its socio-economic value, can be included, despite its peculiarities, within the scope of the protection ensured by art. 35 of the Constitution to work "in all its forms"',⁴⁸ as it is:

a type of working activity that has been recognised on multiple occasions due to its social and also economic relevance, also because of the undeniable advantages that it brings to society as a whole and, at the same time, because of the burdens and responsibilities that are implied in it and that weigh to this day

⁴⁵ *Haydarie* (n 37).

⁴⁶ *ibid.*

⁴⁷ *Corte Costituzionale, sentenza* no. 28 of 12 January 1995. The case stemmed from an issue of constitutionality raised with respect to art 4(1) of law no. 943 of 30 December 1986 (*Gazzetta Ufficiale* no. 8 of 12 January 1987), which was subsequently repealed by art 47(1)(b) of *Decreto Legislativo* no. 286 of 25 July 1998, (*Gazzetta Ufficiale* no. 191 of 18 August 1998, S.O. no. 139). The provision at issue established that third-country national workers regularly residing in Italy and employed had the right to family reunification with their spouse and their dependent and unmarried minor children, provided that they were able to ensure them 'normal life conditions'.

⁴⁸ *Corte Costituzionale, sentenza* no. 28/1995, *cit.*, Legal Grounds, [4].

almost exclusively on women (also due to widespread unemployment).⁴⁹

In another instance, when the so-called *Testo Unico Immigrazione*⁵⁰ was already in force in the Italian order, the Court of Bologna annulled the rejection of a mother's application for family reunification justified by the fact that she had no income.⁵¹ In support of this conclusion, the Court also recalled that denying the mother family reunification simply because she contributed within her own family through unpaid care work constituted an excessively restrictive interpretation in breach of articles 29, 30 and 35 of the Constitution. Moreover, it deemed 'constitutionally illegitimate to allow family reunification with children for foreign women who work outside of the home and deny it to foreign women who carry out their homemaker activity, with the logistic and material support of entire families.'⁵²

In these examples, it is interesting to observe how the competent courts discussed the unpaid care work performed by the prospective sponsors of family reunification not as an isolated activity, but rather with reference to the context in which this activity took place. By doing so, they were able to reveal how, despite the fact that the immigrant women involved did not have an income resulting from productive work, they contributed to the well-being and functioning of their families through their unpaid work. This, in turn, encouraged a judicial interpretation of the constitutional value of protection of the family and the constitutional obligation of the State to protect work as also including the homemaker's right to family reunification within its scope.

Arguably, the result of this disestablishment of a strict breadwinner model was a more gender-sensitive understanding of family reunification norms and, therefore, a stronger protection of immigrant women's right to equality and non-discrimination in the field of family life. Immigrants performing unpaid care work within the household – to this day disproportionately women – were indeed allowed to enjoy family life with their children in conditions of equality with male sponsors, provided that the need to ensure that the latter would not weigh on the state finances could be satisfied by referring to the whole income of the family rather than just that of the sponsor.

⁴⁹ *ibid.*

⁵⁰ *Decreto Legislativo* no. 286 of 25 July 1998, *Gazzetta Ufficiale* no. 191 of 18 August 1998, *Supplemento Ordinario* no. 139.

⁵¹ *Tribunale di Bologna, ordinanza* of 14 November 2002.

⁵² *ibid* (translation by the author).

V. ENFORCED DEPENDENCE AS A PERVERSE EFFECT OF NORMS APPLICABLE TO IMMIGRANT WOMEN IN EUROPE

Another issue which is commonly observed in norms applicable to immigrant women in Europe concerns the enforced dependence to which this group is pushed by gender insensitive norms. This shortcoming runs along the lines of the public/private distinction criticised by feminist legal theory as specifically harmful for women.⁵³ By overlooking factual difficulties experienced by immigrant women in private realms such as the family or certain types of employment relationships, the regulation of the public realm of residence permits or visa regimes may generate deeply gendered effects by further aggravating such difficulties.

When norms concerning residence permits create a strong dependence on other individuals for residence rights, migrants in general will experience power imbalances to their disadvantage. This disadvantage may, however, be particularly serious for immigrant women, because migrant status may combine with gender issues in generating serious violations of their rights in the fields of family life and employment (for instance with respect to their right to equality within the family, or to their right to be free from labour exploitation). This section will discuss two instances of the described shortcoming, respectively concerning EU family reunification law and national labour migration schemes for artists. In both of these very different realms, it is indeed possible to identify norms which indirectly generate dependence and subordination to the disadvantage of immigrant women specifically.

With regard to the family domain, a good illustration of these points is once again offered by the EU family reunification regime. Directive 2003/86, in particular, establishes a high level of dependence between sponsors and family members, which is particularly likely to generate violations of the latter's right to equality within the family if applied to the case of reunification with spouses. This source envisages very low standards with respect to the possibility for family members to access independent permits, allowing Member States to withhold the granting of said permits for up to five years of residence.⁵⁴ In the event of interruption of the relationship justifying the granting of a residence permit for family reunification, Member States are left with the discretionary power to grant independent permits in case of divorce, separation or widowhood.⁵⁵ In the event of 'particularly difficult circumstances', which also include domestic violence, Member States are instead obliged to grant independent permits.⁵⁶ Besides these hypotheses, Member States are allowed to withdraw residence permits or refuse their renewal due to events which

⁵³ Nicola Lacey, 'Feminist Legal Theory and the Rights of Women' in Karen Knop (ed), *Gender and Human Rights* (OUP 2004), 21-22.

⁵⁴ Arts 15(1) and 15(4) of Directive 2003/86.

⁵⁵ Art 15(3) of Directive 2003/86.

⁵⁶ Art 15(3) of Directive 2003/86.

may be well beyond the control of the sponsor: when the sponsor and the family member 'no longer live in a real marital... relationship',⁵⁷ when the sponsor engages in a long-term relationship with another person⁵⁸ and when the sponsor's residence comes to an end.⁵⁹ One may argue that the enforced dependence of family members is gender neutral, since immigrant men may also enter the Union for the purpose of family reunification with their spouses. However, it is crucial to consider that family reunification sponsors are still predominantly male, and that women constitute at present the majority of family migration fluxes.⁶⁰ Therefore, in addition to the inevitable factual dependence on sponsors implied in family migration,⁶¹ immigrant women are currently the category most affected by the legal dependence imposed by family reunification regimes.

In the field of employment, another significant example of enforced dependence as a perverse effect of an apparently neutral immigration regime is provided by special visa regimes for artistes. Because this profession is often carried out in private environments such as nightclubs, a high level of dependence between migrant workers and employers may expose the former to an increased risk of labour and sexual exploitation, abuse and trafficking. The correlation between special temporary permits

⁵⁷ Art 16(1)(b) of Directive 2003/86.

⁵⁸ Art 16(1)(c) of Directive 2003/86.

⁵⁹ Art 16(3) of Directive 2003/86.

⁶⁰ Eurostat, *First permits by reason, age, sex and citizenship* (most recent data from 2012), available at

<http://epp.eurostat.ec.europa.eu/portal/page/portal/population/data/database> (last accessed on 12 June 2014). In addition to family reunification – which consists of bringing into the host country immediate family members such as spouses or children – these family reasons may also refer to other types of family migration (Eleonore Kofman, Veena Metoo, 'Family Migration' in International Organization for Migration, *World Migration Report*, 2008, 155. See also Nicola Piper, *Gender and Migration*, Paper Prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration, 2005, 22.). For instance, family migration also can occur through family formation or marriage migration, whereby second or subsequent generations of children of immigrant origin bring in a spouse from their parents' or grandparents' country of origin, or whereby a settled immigrant or a citizen bring in a spouse from abroad. Other types of family migration consist in the migration of the entire family or sponsored family emigration of not immediate family members.

⁶¹ The factual dependence experienced by family migrants is already significant, since at the time of their first entry they are more likely to need to rely on sponsors in order to navigate life in the new host country. Language barriers, lack of understanding of the host countries' laws, possible lack of social and kin networks all contribute to this factual vulnerability. Arguably, if referred to spousal relationships, this factual dependence may generate serious inequality within the family (Strasser, Kraler, Bonjour, Bilger, 'Doing Family' (n 30), 174; Jordi Roca i Girona, Montserrat Soronellas Masdeu, Yolanda Bodoque Puerta, 'Migraciones Por Amor: Diversidad y Complejidad de las Migraciones de Mujeres' [2012] *Papers: Revista de Sociologia* 285, 703.

for artistes and an increased risk of trafficking and exploitation has been discussed with reference to the Belgian regime in force during the 90s.⁶²

More recently, the Italian and Cypriot rules on the matter have been subjected to criticism precisely because of the strong links with employers implied by them. The Italian regime was chastised by a 2011 Shadow Report on the implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),⁶³ which highlighted how 'entry to Italy with a residence permit for artistes (the limited duration of which is linked to the willingness of the employer to maintain the contract) creates a situation of dependence on club managers which is often conducive to exploitation.'⁶⁴ Art. 27(2) of the *Testo Unico* provides that holders of artistes' permits cannot be employed in a different sector, nor hired with a different qualification. Pursuant to article 40(14) of the implementing regulation of the *Testo Unico*,⁶⁵ artistes may not change employers even at the time of renewal of their residence and work permits.

Similarly, the Cypriot immigration policy was under scrutiny in the past⁶⁶ because it allowed the owners of cabarets and nightclubs to apply for residence and work permits on behalf of employees. In addition to this, the Cypriot policy appeared questionable because employers were required to deposit a sum as a guarantee to cover possible repatriation expenses, and artistes were prevented from leaving the premises of the establishment where they were employed from 9 p.m. to 3 a.m. Furthermore, cabaret and club managers were burdened with the responsibility to report absences from work and breaches of contract to the authorities. The penalty for a breach of this obligation, however, also involved the employee who would have had to face repatriation.

With respect to the enforced dependence generated by apparently neutral norms applicable to immigrant women, I would argue that human and fundamental rights – and in particular the right to equality and non-discrimination – have the potential to contrast this perverse effect if

⁶² Federico Lenzerini, 'International Legal Instruments on Human Trafficking and a Victim-Oriented Approach: Which Gaps Are to Be Filled?' [2009] *Intercultural Human Rights Law Review* 205, 233 ff.

⁶³ Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

⁶⁴ Italian Platform *Lavori in Corsa: 30 Anni CEDAW, Rapporto Ombra in Merito allo Stato di Attuazione da parte dell'Italia della Convenzione ONU per l'Eliminazione di Ogni Forma di Discriminazione nei Confronti della Donna (CEDAW) in Riferimento al VI Rapporto Presentato dal Governo Italiano nel 2009*, June 2011, 43 (translation mine).

⁶⁵ *Decreto del Presidente della Repubblica* no. 394 of 31 August 1999, *Gazzetta Ufficiale* no. 258 of 3 November 1999, *Supplemento Ordinario* no. 190.

⁶⁶ Entry procedures for artistes were regulated by guidelines issued by the Ministry of the Interior as well as by immigration officers. For an account of the situation of artistes in Cyprus, see *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR, 7 January 2010) [80]. The judgment extensively cites reports from the Cypriot Ombudsman, the Council of Europe Commissioner for Human Rights and the U.S. State Department.

interpreted through an anti-subordination lens. In order to clarify this point, I will now move on to discuss two examples of this understanding in court judgments which have produced positive results in this field.

My first example concerns the supranational level, and in particular the European Court of Human Rights' judgment in *Rantsev v. Cyprus and Russia*.⁶⁷ This case was initiated by the application of the father of a young Russian woman (Ms. Rantsev) who had travelled to Cyprus holding a so-called 'artiste visa' and a work permit for the purpose of being employed in a cabaret (under the above-mentioned Cypriot immigration policy), and who had died under unclear circumstances which suggested that she had been trafficked and sexually exploited. Thus, the father applied before the Court, against both Cyprus and Russia, in order to obtain the recognition of a violation of his daughter's right to life, to be free from slavery, servitude and forced labour, and to liberty and security, among other claims.

With reference to the claim of violation of the right to be free from slavery, servitude and forced labour pursuant article 4 ECHR against Cyprus, it is extremely interesting that for the purpose of assessing a possible violation of positive and negative State obligations under these provisions, the Court did not merely analyse domestic criminal law, but also the national immigration regime. Thus, after considering several reports on the situation of holders of artiste visas in Cyprus, the Court significantly criticised the high level of dependence of artistes on employers permitted by domestic immigration policy. The existence of 'measures [encouraging] cabaret owners and managers to track down missing artistes or in some other way to take personal responsibility for the conduct of artistes'⁶⁸ was deemed by the Court as 'unacceptable in the broader context of trafficking concerns regarding artistes in Cyprus.'⁶⁹ Similarly, the Court chastised the 'practice of requiring cabaret owners and managers to lodge a bank guarantee to cover potential future costs associated with artistes which they have employed' as 'particularly troubling'.⁷⁰ These features prompted the Court to conclude that Cyprus had failed to offer 'Ms. Rantsev a practical and effective protection against trafficking and exploitation',⁷¹ therefore incurring a violation of article 4 ECHR.

A second meaningful example of the potential of fundamental rights to reverse the subordination effects of immigration law is provided by an Italian lower court. In particular, in 2010 the Court of Novara⁷² assessed the case of a Russian woman whose application for a long-term residence

⁶⁷ *Rantsev* (n 66).

⁶⁸ *ibid*, [292].

⁶⁹ *ibid*.

⁷⁰ *ibid*.

⁷¹ *ibid*, [293].

⁷² *Tribunale di Novara*, judgment of 1 March 2010.

permit on the grounds of her marriage to an Italian citizen was rejected due to an alleged lack of cohabitation between the spouses.⁷³ In fact, the couple did not live together because the husband had been incarcerated as a precautionary measure after the applicant had reported him to the authorities for committing physical abuse and sexual violence against her. The applicant, however, declared that, despite the domestic violence suffered, she did not intend to leave her husband, and that she had reported him to the authorities under the false belief that he would be checked into a rehabilitation facility to cure his drug addiction. In this case, the Court of Novara grounded its decision on a wide range of international human rights law and European fundamental rights law sources protecting the right to private and family life, including article 8 ECHR, article 7 of the European Charter of Fundamental Rights and Freedoms⁷⁴, article 12 of the Universal Declaration of Human Rights⁷⁵, article 16 of the European Social Charter⁷⁶ and article 17 of the International Covenant on Civil and Political Rights.⁷⁷ The Court also referred to article 29(2) of the Italian Constitution, which established a fundamental right to moral and legal equality of spouses within marriage.

On these grounds, the Court interestingly identified a bias against immigrant women implied in the combined effects of the Italian criminal system of protection from domestic violence and Italian immigration law. In particular, it observed that while Italian citizens enjoyed effective protection against domestic violence because national law allows them to immediately obtain court orders imposing precautionary measures to protect them, the same was not true for migrant women. For Italian women, it could be affirmed that 'the fact that precautionary measures involve putting an end to cohabitation – ranging from removal from the conjugal home to precautionary detention – does not negatively impact victims, who can still freely determine their marital situation.'⁷⁸ On the other hand, the discussed interpretation prevented immigrant women from effectively enjoying the same protection. Indeed, the Italian authorities' interpretation, whereby a lack of cohabitation between spouses could automatically cancel the right of residence of the applicant:

creates a clear discrimination between third-country national women and Italian women, and puts the former in the

⁷³ The requirement of cohabitation had been inferred by the Italian police authorities on the grounds of art 19(2)(c) of the *Testo Unico*, which prohibits the expulsion of third-country nationals cohabiting with their Italian spouse.

⁷⁴ Charter of Fundamental Rights of the European Union, O.J. C 364 of 18 December 2000 and then O.J. C 83/389 of 30 March 2010.

⁷⁵ Universal Declaration of Human Rights (adopted 10 December 1948), UNGA Res. 217 A (III).

⁷⁶ European Social Charter [revised] (adopted 18 October 1961, entered into force 26 February 1965) CETS No. 35.

⁷⁷ International Covenant on Civil and Political Right (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

⁷⁸ *Tribunale di Novara*, cit. (translation by the author).

inacceptable condition of having to choose between suffering family abuse by the spouse without reacting and to risk, after reporting her situation, to be expelled from the State where she has built, as in the case at issue, her entire network of emotional, employment and economic relationships.⁷⁹

Therefore, the Court concluded that this lesser protection was not compatible with immigrant women's right to equality within the family as protected by international and European law as well as by Italian constitutional law. Instead, a different interpretation should have been adopted 'whereby the possibility to react to family abuse with the means set forth by the State is guaranteed without any difference to any person present on the national territory, preventing the status of Italian citizen or third-country national woman married to an Italian citizen, or legal resident on other grounds, from being able to affect her negatively⁸⁰ as well as her 'freedom of self-determination in relation to her ethical and moral sphere.⁸¹

In the above-mentioned judgments, human and fundamental rights played an important role in unveiling and contrasting the disparate impact of national immigration norms on immigrant women. In the *Rantsev* judgment, the indirectly discriminatory effects of the Cypriot artiste visa regime were evident. While this aspect was not openly discussed by the Court, from the reports considered in the judgment, it emerged clearly that this regime produced the perverse effects of exposing immigrant women specifically to trafficking as well as sexual and labour exploitation. It was on these grounds that the Court interpreted the prohibition of slavery, servitude and forced labour enshrined in article 4 ECHR as preventing the adoption of immigration policies which foster situations of dependence of permit holders (in this case, disproportionately immigrant women) from employers. A similar interpretation of a fundamental right as an anti-subordination clause was performed in the Italian case with reference to immigrant women's right to family life – understood, coherently with my own construction, as also encompassing the right to live free of domestic violence and the right to marital equality.

VI. CONCLUDING REMARKS

In this brief inquiry, I have discussed how apparently neutral norms may in fact produce a disparate impact on immigrant women, negatively affecting the enjoyment of their rights to family life and employment in conditions of equality with both their male counterparts and women citizens. I have also examined some significant examples of the interaction between biased norms on the one hand, and human and fundamental rights law on the

⁷⁹ *ibid.*

⁸⁰ *ibid.*

⁸¹ *ibid.*

other, in order to understand what type of impact the former have produced on the latter.

The results of this review suggest that CRFs' observations not only effectively mirror the current legal treatment of immigrant women in the European legal space, but also that many of their intuitions may be used to push for stronger protection of immigrant women's right to equality and non-discrimination in the fields of family life and employment. Firstly, as CRFs have rightly emphasised, it is important to increase awareness in legal studies and practice regarding the fact that apparently neutral norms may produce perverse effects on groups already experiencing factual difficulties. In the case of immigrant women, this occurred, for example, through the legal enforcement of abstract models, which were clearly not designed with their specific situations in mind, or in the overlooking of factual triggers of dependence by certain norms and their consequent reinforcement of inequality and subordination within the family and in employment relationships.

At the same time, another important CRF teaching, which in my view was confirmed to be true also in the European space, concerns the fact that rights are indeed a powerful discourse, and should therefore not be forgone, but rather re-thought so as to properly address gendered shortcomings inherent in legal norms. The judicial examples discussed have shown how human and fundamental rights – as established by both supranational and national law – may alternatively serve to reinforce the perverse effects of biased norms on immigrant women or actually unveil and contrast the resulting violations of their right to equality and non-discrimination.

In this respect, a gender-sensitive interpretation of human and fundamental rights has proven to be key. As I have shown, the most effective results in this sense were obtained when the competent courts implemented these rights by paying attention to the broader context of disadvantage in which the immigrant women involved were situated – e.g., their families in need of their care work, a national situation of trafficking and exploitation of female artistes, an interaction between criminal laws and immigration laws which undermined legal protection from domestic violence. In these cases, a contextual interpretation of the human and fundamental rights of the women involved produced the disestablishment of gendered and unviable legal models, or unveiled how the law itself sanctioned inequalities by crossing the public/private divide underlying certain norms. As a result, immigrant women's rights obtained stronger judicial protection.

In sum, the example of immigrant women in contemporary Europe shows that certain groups continue to experience obstacles to a full enjoyment of their rights which are strongly reminiscent of CRFs' observations and may, therefore, strongly benefit from legal analysis carried out from this

perspective. The judicial examples analysed in this article are both proof of the ongoing relevance of CRF beyond geographical and historical boundaries, and a crucial reminder of the need for a continuous re-thinking of human and fundamental rights law so as to make them actually accessible for all. To paraphrase Matsuda,⁸² these rights were not written for immigrant women, but they can and they should be made their own.

⁸² Matsuda (n 17).