ACKNOWLEDGMENTS

The completion of this book was made possible by the award of a Government of Ireland – Irish Research Council Postdoctoral Fellowship. The support of the Council, as well as of the School of Law of University College Cork as host institution, is most gratefully acknowledged.

I would like to express my deep gratitude to Prof. Siobhán Mullally, who acted as a mentor during my fellowship. Her insightful comments, patient guidance and constant encouragement have been truly invaluable.

I also wish to thank Prof. Ruth Rubio Marín, who supervised my doctoral research on migrant women in Europe during my PhD at the European University Institute of Florence, for encouraging me to further pursue this research topic and for her supportive suggestions.

During my time at University College Cork, I was fortunate to share many fruitful conversations with its academic staff. Dr. Claire Murray and Dr. Dug Cubie in particular were kind enough to provide me with useful pointers on adapting my work for the purpose of its publication.

During the preparation of this book, I have benefited enormously from study visits at the Migration Policy Centre of the European University Institute of Florence, the Faculty of Laws of University College London and the Beasley School of Law of Temple University, and from exchanges of ideas with professors and researchers in these contexts. I am particularly grateful to Prof. Philippe De Bruycker, Prof. Anna Triandafyllidou, Prof. Virginia Mantouvalou, and Prof. Jaya Ramji-Nogales for their warm welcome and kind suggestions regarding my research. In addition, I would like to express my appreciation to Prof. Massimo Iovane, Prof. Fulvio Maria Palombino and Dr. Giovanni Carlo Bruno for their encouragement and advice during my study visit at Università degli Studi di Napoli Federico II.

The academic staff of the Faculty of Law of Vrije Universiteit Amsterdam as well as that of the Department of Law of Maynooth University offered me precious feedback on individual aspects of my monograph. I owe a special debt of gratitude to Prof. Evelien Brouwer, Prof. Thomas Spijkerboer and Dr. Clíodhna Murphy.

Any omissions or mistakes are of course solely my own.

LIST OF ABBREVIATIONS

BOE	*Boletín Oficial del Estado*
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CEDAW Committee	UN Committee on the Elimination of Discrimination Against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CJEU	Court of Justice of the European Union
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ESC	European Social Charter
ESC Committee	European Committee on Social Rights
EU	European Union
EU Charter	Charter of Fundamental Rights of the European Union
GU	*Gazzetta Ufficiale*
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
L.O.	*Ley Orgánica*
MWR	Minimum Wage Regulations
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal
R.D.	*Real Decreto*
S	Section
T.U.	*Testo Unico Immigrazione*
TEU	Treaty on European Union
UK	United Kingdom of Great Britain
UN	United Nations
UNTS	United Nations Treaty Series
US	United States of America

INTRODUCTION

Migrant women account for a significant proportion of migration fluxes towards Europe. In 2015, the female share of migrants in Europe was 52,4%.[1] In addition to representing a significant part of the total number of third-country nationals living on the Union territory, migrant women experience specific difficulties and issues in many different aspects of their lives in their host countries, involving both the family and the employment realms. Their socio-economic integration is indeed constrained by a number of factors linked to their sex, ethnic origin, nationality and migrant status.

Migrant women are increasingly migrating alone, becoming primary earners and sending a significant amount of remittances to their families left behind.[2] However, this group still dominates family migration fluxes to Europe.[3] At the time of their first entry, family migrants are likely to be reliant on their sponsoring family member in order to navigate life in their new host country. This dependence is caused by material factors such as language barriers, lack of knowledge of their new host country and its laws, lack of social and possibly family networks, and so forth. In the context of spousal reunification, this may cause serious gender imbalances at the disadvantage of the joining spouse (still predominantly the wife).[4] It al-

---

[1] United Nations International Migration Report 2015, available at <http://www.un.org/en/development/desa/population/migration/index.shtml> accessed 2 July 2016 (hereinafter UN International Migration Report 2015).

[2] Elisabeth Robert 'A Gender Perspective on Migration, Remittances and Development: the UN-INSTRAW Experience' in Tine Davids and others (eds) *Gender, Remittances and Development in the Global South* (Ashgate 2015) (hereinafter Elisabeth Robert 'A Gender Perspective on Migration, Remittances and Development: the UN-INSTRAW Experience').

[3] Eurostat, *First permits by reason, age, sex and citizenship* (most recent data from 2014), <http://ec.europa.eu/eurostat/web/asylum-and-managed-migration/data/database> accessed 2 July 2016. In addition to family reunification – which consists of bringing to the host country immediate family members such as spouses or children – "family reasons" may also refer to other types of family migration such as family formation, namely the immigration of a partner for marriage purposes – IOM *World Migration 2008: Managing Labour Mobility in the Evolving Global Economy* (2008) 155, <https://publications.iom.int/system/files/pdf/wmr_1.pdf> accessed 18 July 2016.

[4] Elisabeth Strasser and others 'Doing Family', (2009) 14 The History of Family 165, 174.

so generates vulnerability to domestic violence, and hampers migrant women's capability to react to it.[5]

The described difficulties often intertwine with hurdles related to labour market integration. In the European Union, third-country nationals in general are much more likely to be unemployed than EU citizens. For migrant women, the employment gap with EU citizens is more than double that of their male counterparts (15% and 7% respectively).[6] When they do access the European labour market, migrant women are driven by employers' demand towards jobs traditionally associated with gender roles. They therefore disproportionally concentrate in sectors such as domestic work (including childcare and elderly care), services such as hotel cleaning and waitressing, and entertainment.[7] These professions are often characterised by long working hours, bad working conditions, heavy physical demands and low prospects of career advancement. The usually low wages paid for these professions contribute to the significant pay gap experienced by women migrant workers both as women and as migrants.[8] Furthermore, for migrant women, entering these professions often entails a significant de-skilling. The over-qualification rates of third-country national women in Europe are striking if compared to those of third-country national men and of EU citizen women – particularly in Southern European countries, where such rates are often higher than 80%.[9]

International soft law sources have in part acknowledged these multiple causes of disadvantage. The UN Committee on the Elimination of Discrimination Against Women (CEDAW Committee)[10] and the Committee on the Protection of the

---

[5] Parliamentary Assembly of the Council of Europe, Resolution 1697(2009) on *Migrant Women: at Particular Risk of Domestic Violence*, adopted on 20 November. The Resolution stresses how "confronted with the language barrier and family pressure, [migrant women] often end up isolated and unable to express their views and have only limited access to any facilities that exist to protect the victims of domestic violence" (para 1).

[6] OECD and European Commission, *Indicators of Immigrant Integration 2015* (2 July 2015), 306, <http://www.oecd.org/publications/indicators-of-immigrant-integration-2015-settling-in-9789264234024-en.htm> accessed 3 July 2016 (hereinafter *Indicators of Immigrant Integration 2015*).

[7] European Network of Migrant Women and European Women's Lobby, *Migrant Women's Integration in the Labour Market in Six European Cities: a Comparative Approach*, March 2012, <http://www.epim.info/wp-content/uploads/2011/02/ENoMW-and-EWL-Research-Study-Migrant-Womens-Access-to-Labour-Market-March-2012.pdf> accessed 3 July 2016; Eleanor Morris 'Family Reunification and Integration Policy in the EU: Where are the Women?' (2015) International Migration and Integration 16, 642 (hereinafter: Eleanor Morris 'Family Reunification and Integration Policy in the EU: Where are the Women?').

[8] Eleanor Morris 'Family Reunification and Integration Policy in the EU: Where are the Women?' 642; Elisabeth Robert 'A Gender Perspective on Migration, Remittances and Development: The UN-INSTRAW Experience' in Ton van Naerssen and others (eds) *Women, Gender, Remittances and Development in the Global South* (Routledge 2016).

[9] *Indicators of Immigrant Integration 2015* 316.

[10] Committee on the Elimination of Discrimination against Women, *General recommendation No.*

Rights of all Migrant Workers and Members of Their Families (Migrant Workers Committee) [11] also concerned migrant domestic workers have addressed common issues that affect women migrant workers, with a special focus on the domestic work sector. At Council of Europe level, the Parliamentary Assembly has issued Resolutions and Recommendations devoted to migrant women on multiple occasions. These sources have covered several areas, ranging from integration, [12] to domestic violence [13] and employment. [14]

However, the contribution of law to migrant women's vulnerability has been only tangentially mentioned in these contexts. This book, on the other hand, unveils the existence of a gender bias in European norms – at both EU and at domestic level – regulating migrant women's family life and employment. For this purpose, it specifically focuses on third-country national women who enter and reside on the territory of the European Union on the grounds of regular residence permits for family reasons or work purposes. This book starts from the premise that norms of immigration law can significantly aggravate factual disadvantages implied in women's migration processes. These observations relate both to EU secondary legislation and to domestic laws applicable to migrant women. There is no univocal cause for this phenomenon. In some cases, this may occur because of the normative enforcement of gender stereotypes concerning migrant women's role within the family and society. In others, apparently neutral norms can indirectly discriminate against migrant women by failing to take into account their specific difficulties and burdens. Lastly, in some cases immigration law directly generates vulnerability for migrant women by forcing them into prolonged situations of dependence from others (spouses or employers).

Against this background, a crucial question concerns the potential and the limitations of human and fundamental rights law in remedying such complex forms of discrimination. A plethora of human rights treaties apply on the European Union territory. All EU Member States have ratified UN treaties such as the 1966 Inter-

---

26 on women migrant workers, 5 December 2008, CEDAW/C/2009/WP.1/R CEDAW (hereinafter CEDAW General Recommendation no. 26).

[11] UN Committee on Migrant Workers, *General Comment No. 1 on Migrant Domestic Workers*, 23 February 2011, CMW/C/GC/1 (hereinafter Committee General Comment no. 1).

[12] Parliamentary Assembly of the Council of Europe, Resolution 1478 (2006) – (hereinafter Resolution 1478(2006)) – and Recommendation 1732(2006) on the Integration of Immigrant Women in Europe, adopted on 24 January 2006.

[13] Parliamentary Assembly of the Council of Europe, Resolution 1697(2009) – (hereinafter Resolution 1697(2009) – and Recommendation 1891(2009) on Migrant Women: at Particular Risk of Domestic Violence, adopted on 20 November 2009.

[14] Parliamentary Assembly of the Council of Europe, Resolution 1811 (2011) and Recommendation 1970(2011) on Protecting Migrant Women in the Labour Market, adopted on 15 April 2011 – (hereinafter Resolution 1811 (2011)) –.

national Covenants on Civil and Political Rights (ICCPR)[15] and on Economic, Social and Cultural Rights (ICESCR),[16] the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),[17] and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[18] The same can be said for the key human rights treaty of the Council of Europe, namely the European Convention on Human Rights (ECHR).[19] The commitment of the European Union to the protection of human rights on its territory is also conveyed by the adoption of the Charter of Fundamental Rights of the European Union (EU Charter).[20] At domestic level, EU Member States' constitutional systems recognise basic fundamental rights to citizens and non-citizens alike, albeit in varying degrees.

Nevertheless, the entity and quality of the impact of this rich system of human rights protection on the everyday circumstances of migrant women is yet to be analysed. This book aims to fill this gap. It does so through a critical review of human and fundamental rights jurisprudence at supranational and domestic level, identifying effective judicial interpretations to ensure migrant women's equal enjoyment of their rights and entitlements in the fields of family life and employment. This book devotes a special attention to sources of human rights law created within the Council of Europe system (primarily the ECHR) and to domestic systems of protection of fundamental rights law. When relevant, EU primary and secondary law sources recognising fundamental rights and freedoms, as interpreted by the Court of Justice of the European Union (CJEU), are also discussed.

Since the mid-1980s, sociologists and social scientists have advocated the inclusion of a gender perspective in migration studies.[21] They contrasted the assump-

---

[15] International Covenant on Civil and Political Rights, adopted on 16 December 1966 and entered into force on 23 March 1976, UNTS 999, 171.

[16] International Covenant on Economic, Social and Cultural Rights, adopted on 16 December 1966 and entered into force on 3 January 1976, UNTS 993, 3.

[17] International Convention on the Elimination of All Forms of Racial Discrimination, adopted on 21 December 1965 and entered into force on 7 March 1966 and entered into force on 4 January 1969, UNTS 660, 195.

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

[19] Convention for the Protection of Human Rights and Fundamental Freedoms, adopted on 4 November 1950 and entered into force on 3 September 1953, ETS no. 005.

[20] Charter of Fundamental Rights of the European Union, OJ C 326 of 26 October 2012.

[21] Mirjana Morokvasic 'Birds of Passage are also Women…' (1984) 18 The International Migration Review 886; Gregory A. Kelson and Debra L. DeLaet (eds) *Gender and Immigration* (Macmillan Press 1999); Floya Anthias and Gabriella Lazaridis (eds) *Gender and Migration in Southern Europe: Women on the Move* (Bloomsbury Academic 2000); Rhacel Salazar Parreñas *Servants of Globalization: Women, Migration and Domestic Work* (Stanford University Press 2001); Eleonore Kofman and others, *Gender and International Migration in Europe: Employment, Welfare and Politics* (Routledge 2005); Helma Lutz (ed) *Migration and Domestic Work: a European Perspective on a Global Theme* (Ashgate 2008).

tion that the migration process is a gender-neutral experience, and highlighted that men and women face different issues in their countries of destination. In order to gain an accurate and complete understanding of phenomena linked to international migration, the specific aspirations, difficulties and motivations of migrant women must be taken into consideration.

Despite their significance, these well-consolidated theoretical stances have not entirely been embraced by legal thought. In fact, legal scholars have rarely adopted a gender perspective in their analyses of the international and domestic regulation of migration fluxes. The few notable exceptions in this context have focused on specific aspects of migrant women's lives in the host country, or on specific domestic jurisdictions.[22] The lack of comprehensive legal studies on the human rights of migrant women in Europe, and on the contribution of law to their vulnerability both in the realm of family life and in that of employment, is regrettable. This matter, indeed, raises broader theoretical questions concerning the universality and effectiveness of international human rights law.

The tension between universality and relativity of international human rights law has been explored by legal scholars from several points of view.[23] In particular, some have pointed out international human rights law's failure to acknowledge women's specificities.[24] The frequent marginalisation of women's rights as subcategories of human rights and the adoption of victimisation discourses in international human rights law have been at the core of this criticism. Other scholars have argued against an essentialist view of women as a unitary category within interna-

---

[22] See for instance Siobhán Mullally 'Migration, Gender, and the Limits of Rights' in Ruth Rubio Marín (ed) *Human Rights and Immigration* (OUP 2014) (hereinafter Siobhán Mullally 'Migration, Gender, and the Limits of Rights'); Judy Fudge and Kendra Strauss 'Migrants, Unfree Labour, and the Legal Construction of Domestic Servitude: Migrant Domestic Workers in the UK' in Cathryn Costello and Mark Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (OUP 2014) (hereinafter Judy Fudge and Kendra Strauss 'Migrants, Unfree Labour, and the Legal Construction of Domestic Servitude: Migrant Domestic Workers in the UK'); Saskia Bonjour and Betty de Hart, 'A Proper Wife, a Proper Marriage: Constructions of "Us" and "Them" in Dutch Family Migration Policy' (2013) European Journal of Women's Studies 61; Sarah Van Walsum and Thomas Spijkerboer (eds), *Women and Migration law: New Variations on Classical Feminist Themes* (Routledge-Cavendish 2007).

[23] For a broad and thorough analysis of this tension, see Jack Donnelly *Universal Human Rights in Theory and Practice* (Cornell University Press 2013). See also David Kennedy 'The International Human Rights Movement: Part of the Problem?' (2002) 15 Harvard Human Rights Journal 101, 110.

[24] Rebecca J Cook 'Women's International Human Rights Law: The Way Forward' in Rebecca J Cook (ed) *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press 2011); Nicola Lacey 'Feminist Legal Theory and the Rights of Women' in Karen Knop (ed) *Gender and Human Rights* (OUP 2004); Diane Otto 'Women's Rights' in Daniel Moeckli and others (eds) *International Human Rights Law* (OUP 2010); Diane Otto 'International Human Rights Law: Towards Rethinking Sex/Gender Dualism' in Vanessa E Munro *The Ashgate Research Companion to Feminist Legal Theory* (Ashgate 2013).

tional human rights law. They have highlighted that this construction obliterates the experience of non-citizen women, as well as of women from ethnic and religious minorities. [25]

It is important to stress that these criticisms never departed from human rights altogether. Rather, they urged a reconsideration of international human rights norms in the light of cultural, religious, ethnic and sexual difference.

The situation of migrant women in contemporary Europe recalls these theories. Their complex experiences of exclusion and discrimination are due to a combination of factors, including sex, class, ethnic origin, citizenship and migrant status. EU and domestic norms regulating their life in the host country can significantly foster these issues. The question of whether international, European and domestic human rights law can expose and correct these legal shortcomings arguably involves an assessment of the capability of these sources to effectively ensure equality for all.

Such a question, however, poses the further problem to determine the meaning of equality. Different concepts of equality have been elaborated in legal scholarship, and each has a specific significance for the status of migrant women in the European Union. This book adopts a multifaceted concept of equality as an analytical lens. To do so, it draws from different theoretical insights that share the ultimate goal of fulfilling substantive equality for all women – regardless of their ethnic origin, migrant status, class, religion, and so forth.

First, equality must be understood as freedom from a legal enforcement of stereotypes. Compliance with a certain normative or judicial view based on stereotypical expectations on the grounds of sex or migrant status should not be an additional requirement implicitly imposed to migrant women for enjoying certain rights. If similar instances occur, legislators and courts themselves generate indirect discrimination towards them. The rejection of stereotypes as a possible justification for differential treatment has been performed by the ECtHR ever since the beginning of its judicial activity. In fact, it is possible to affirm that the interpretation of the right to equality and non-discrimination established by Art. 14 ECHR as an anti-stereotyping norm took its first steps precisely in relation to gender discrimination – and most notably to stereotypes concerning women's role within the family. In the early case of *Marckx v. Belgium*, [26] for instance, the ECtHR held that

---

[25] Karen Engle 'Female Subjects of Public International Law: Human Rights and the Exotic Other Female' (2006) 26 New England Law Review 50; Ratna Kapur 'Cross-Border Movements and the Law: Renegotiating the Boundaries of Difference' in Kamala Kempadoo (ed) *Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex Work and Human Rights* (Routledge 2013); Ratna Kapur 'Revisioning the Role of Law in Women's Human Rights Struggles' in Saladin Meckled-García and Basak Çali (eds) *The Legalization of Human Rights: Multidisciplinary Perspectives on Human Rights and Human Rights Law* (Routledge 2006).

[26] *Marckx v. Belgium* (ECtHR) App no 6833/74 (27 April 1979) (hereinafter *Marckx v. Belgium*).

the view whereby unmarried mothers are less inclined than married ones to recognise their child does not constitute an objective and reasonable justification for excluding them from the automatic recognition of a legal bond with their children.

From its *Konstantin Markin v. Russia*[27] judgment, the ECtHR started to openly use the term "stereotype" in relation to sex discrimination. Here, it clarified that "gender stereotypes, such as the perception of women as primary child-carers and men as primary breadwinners cannot, by themselves, be considered to amount to sufficient justification for a difference in treatment".[28] More recently, this principle has been applied to displaced women in the judgment of *Vrontou v. Cyprus*.[29] Here, the ECtHR identified a breach of the principle of non-discrimination in the Cypriot aid regime, whereby children of displaced persons could obtain housing assistance by registering on the refugee card of their father (but not of their mother). Indeed, the male breadwinner model on which such a regime was based suggested a stereotypical and thus discriminatory justification for this difference in treatment.

Beyond the specific perspective of gender stereotypes, the increasingly frequent interpretation of equality as an anti-stereotyping norm in the ECtHR has been commended within European legal scholarship.[30] It is believed that this approach will lead the ECtHR to move beyond traditional understandings of formal equality and equality of opportunity, and towards addressing structural disadvantage and social exclusion as the root causes of inequality and discrimination. Gender stereotypes are both the cause and the effect of discrimination against women, and that when they infiltrate law they negatively affect women's rights, including human rights.[31]

The gradual affirmation of an anti-stereotyping concept of equality in the ECtHR's jurisprudence is arguably a remarkable development, especially considering that this understanding of equality has been developed in the context of US anti-

---

[27] *Konstantin Markin v. Russia* (ECtHR) App no 30078/06 (22 March 2012) (hereinafter *Konstantin Markin v. Russia*).

[28] Ibid 142.

[29] *Vrountou v. Cyprus* (ECtHR) App no 33631/06 (13 October 2015) (hereinafter *Vrountou v. Cyprus*).

[30] Alexandra Timmer 'Toward an Anti-Stereotyping Approach for the European Court of Human Rights' (2011) 11 Human Rights Law Review 707 (hereinafter Alexandra Timmer 'Toward an Anti-Stereotyping Approach for the European Court of Human Rights'); Oddný Mjöll Arnadóttir 'The Differences that Make a Difference: Recent Developments on the Discrimination Grounds and the Margin of Appreciation under Article 14 of the European Convention on Human Rights' (2014) 14 Human Rights Law Review 647.

[31] Alexandra Timmer 'Toward an Anti-Stereotyping Approach for the European Court of Human Rights'. For a broader analysis of states' argumentations based on gender stereotypes in judicial contexts, see Rebecca J. Cook and Simone Cusack *Gender Stereotyping: Transnational Legal Perspectives* (University of Pennsylvania Press 2011), 123 ff.

discrimination doctrine and is relatively foreign to European legal culture.[32] Feminist legal scholarship in the U.S. has strongly supported such judicial interpretations of equality, arguing in favour of their transformative potential with respect to the broader structures of subordination and disadvantage that negatively affect women's enjoyment of their rights. This idea gained momentum from the 1970s onwards, primarily thanks to the academic and judicial work of Ruth Bader Ginsburg, who first theorised an understanding of the constitutional principle of equality as barring a legal enforcement of traditional conceptions of gender roles, to the detriment of women's but also men's equal opportunities. Such a conception highlighted the negative effects of state enforcement of stereotypical representations of women, and unveiled the self-fulfilling prophecy enshrined in this enforcement, whereby pushing women to conform to stereotypical gender roles would inevitably make it harder for them to actually challenge and re-think such roles, leaving them unmodified.[33]

For migrant women, the anti-stereotyping approach holds some promise. They experience gender, ethnic and migration-related stereotypes in all areas of their lives. In some cases, such stereotypes also permeate law enforcement by the host country's authorities and courts, undermining migrant women's equal enjoyment of rights and entitlements formally recognised to them. In the field of family life, for instance, the general intrusiveness of legal assessments concerning the quality of migrants' parenting can assume stereotypical undertones. Migrant mothers in particular deal with such stereotypes when pursuing derivative residence rights in the host country in order to enjoy family life with their resident children, or when applying to sponsor family reunification. With respect to employment, labour market demands in European host countries are often driven by stereotypical expectations on the intersecting grounds of sex, ethnic origin and in some cases religion. Such demands push migrant women into unregulated and unprotected sectors traditionally associated with care and personal services, but also influence employers' demands within the same sectors.[34]

This book will carry out a more in-depth analysis of each of the mentioned as-

---

[32] Ruth Rubio Marín 'A New European Parity-Democracy Sex Equality Model and why it won't fly in the United States' (2012) 60 American Journal of Comparative Law 99, 123 ff. (hereinafter Ruth Rubio Marín 'A New European Parity-Democracy Sex Equality Model and why it won't fly in the United States'); Julie Suk 'From Antidiscrimination to Equality: Stereotypes and the Life Cycle in the United States and Europe' (2012) 60 American Journal of Comparative Law 75.

[33] Ruth Bader Ginsburg 'Gender and the Constitution' (1975) 44 University of Cincinnati Law Review 1; Cari Franklin 'The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law' (2010) 85 New York University Law Review 83.

[34] This is particularly evident in the area of domestic work. Among the first studies to highlight this phenomenon, see Bridget Anderson *Doing the Dirty Work? The Global Politics of Domestic Labour* (Palgrave Macmillan 2000) 152 ff.

pects. On a general level, it can be observed that an anti-stereotyping approach is one of the necessary angles to adopt in respect to migrant women's inequality in Europe. However, it is far from sufficient to effectively respond to this issue. Not all instances of discrimination can indeed be attributed to a legal embrace and enforcement of stereotypes. Particularly with respect to issues of substantive equality, a broader consideration of migrant women's disadvantage and specific needs is required.

Legal awareness of migrant women's structural disadvantage is indeed crucial to ensure substantive equality. By overlooking this disadvantage, apparently neutral norms can indirectly discriminate against migrant women by treating different situations alike. Moreover, a consciousness of broader socio-economic structures hampering migrant women's equality is key to broaden law's focus beyond moments of crisis. Thus, in addition to addressing extreme forms of exploitation such as domestic slavery, the exclusion of women migrant workers' from basic labour protections would be questioned. Similarly, legal provisions aimed at providing assistance to migrant women victims of domestic violence would not be merely found in criminal law, but would also tackle the issue of the inequality and dependence within the family fostered by family migration regimes. As interpreted by the ECtHR, the right to substantive equality includes reasonable accommodation of difference and pursuit of social inclusion within positive state obligations under Art. 14 ECHR, together with the duty to remedy *de facto* inequalities that foster disadvantage.[35] The concept of equality proposed here implies a further step, consisting in identifying such factual inequalities as obstacles to freedom of choice and to the full realization of one's capabilities.

A second crucial perspective, then, concerns the need to re-think the traditional understanding of legal subjects in order to take these issues into account. The liberal ideal of the legal subject as perfectly independent, autonomous and self-sufficient – with endless possibilities of self-determination – has been exposed as a fiction by a diverse legal scholarship at least since the 90s onwards.

Within this theoretical realm, some have focused on the inherent vulnerability of the legal subject.[36] Vulnerability, as an inescapable human condition, makes in-

---

[35] Charilaos Nikolaidis, *The Right to Equality in European Human Rights law: The Quest for Substance in the Jurisprudence of the European Courts* (Routledge 2015) 85 ff.

[36] Martha Albertson Fineman 'Equality and Difference – The Restrained State' (2014) 15 Emory Legal Studies Research Paper 100 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2591689> accessed 17 May 2016 (hereinafter Martha Albertson Fineman 'Equality and Difference – The Restrained State'); Martha Albertson Fineman and Anna Grear (eds) *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2013) (hereinafter Martha Albertson Fineman and Anna Grear (eds) *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*); Martha Albertson Fineman 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 Yale Journal of Law and Feminism 1 (hereinafter Martha Albertson Fineman 'The Vulnerable Subject: Anchoring Equality in the Human Condition').

dividuals dependent from relationships of care – not only with others but also with the state. This more realistic appraisal of legal subjects would also allow legislators and courts to move beyond the aim of formal equality and truly fulfil the right to substantive equality for all. Indeed, a legal acknowledgment of vulnerability inevitably unveils the socio-economic, cultural and institutional structures of subordination that generate dependence for some subjects, undermining their equal enjoyment of rights and entitlements formally recognised to them. Since 2004, Martha Albertson Fineman has developed her vulnerability theory as a critical deconstruction of the isolated and self-sufficient legal subject.[37] Because vulnerability is embedded in the human condition, the ideals of autonomy and independence embraced by liberal legal theory are a mere fiction. While the degree of each individual's vulnerability may vary depending on their resources and personal characteristics, Fineman argues that as human beings we are inevitably exposed to various forms of harm.

This theory does not equate vulnerability with weakness. Fineman is careful to argue against the association of vulnerability with victimhood and disenfranchisement. The core of this construction is rather its relational component. Ultimately, her aim is to argue that human beings are inherently dependent from the care of others, which places them within broader structures of family and social relationships. The ways in which individuals are situated within these structures in turn affects their opportunities. Similarly, state institutions such as education, healthcare and employment systems deeply affect the degree of vulnerability experienced by each legal subject as well as their resilience.

In this light, Fineman argues for a shift from a formal to a substantive equality model.[38] The liberal fiction of the autonomous legal subject indeed prevents the creation of a more responsive state to issues of inequality. On the other hand, acknowledging vulnerability allows the state to gain awareness of the structural disadvantage created by its own institutions, correcting their disparate impact when needed. State institutions, indeed, "form systems that play an important role in lessening, ameliorating, and compensating for vulnerability".[39]

Migrant women have been qualified as vulnerable by several soft law sources in the European context. The Parliamentary Assembly of the Council of Europe con-

---

[37] Martha Albertson Fineman 'Equality and Difference – The Restrained State'; Martha Albertson Fineman and Anna Grear (eds) *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*; Martha Albertson Fineman 'The Vulnerable Subject: Anchoring Equality in the Human Condition'.

[38] In her work, Fineman also supports a post-identity understanding of discrimination. This important aspect of her theory however goes beyond the scope of this chapter, and will therefore not be discussed.

[39] Martha Albertson Fineman 'The Vulnerable Subject: Anchoring Equality in the Human Condition' 13.

siders them at particular risk from domestic violence,[40] discrimination[41] and abuse by employers and spouses alike.[42] Similarly, the CEDAW Committee analysed several sources of vulnerability for women migrant workers in its General Recommendation No. 26.[43] Vulnerability to employers' abuse and exploitation was a specific concern of the Recommendation, in conjunction with sex discrimination.

In these contexts, vulnerability is understood in the traditional sense – as a synonymous of weakness – rather than in that proposed by Fineman. Nonetheless, a certain degree of recognition of the impact of domestic laws and policies on migrant women's vulnerability is observable in these sources. Vulnerability is thus construed as the result of factual and legal factors. In respect to domestic violence, for instance, the granting of an individual legal status to migrant women entering trough family reunification schemes is recommended as a preventive strategy.[44] Another telling example concerns the encouragement to States Parties to include sectors dominated by women migrant workers within general labour law protections. This recommendation has concerned the domestic work sector in particular, in response to the exploitation and abuse that often characterises it.[45]

The need for a holistic response to migrant women's vulnerability has not equally permeated hard law sources. European and domestic laws do not incorporate effective preventive measures and exclusively focus on moments of crisis. For instance, an increased attention at EU and domestic level towards severe forms of exploitation of migrant domestic workers (predominantly female) has merely provoked a criminal law response. Other crucial areas of prevention, such as the extension of labour law protections to this category, have been overlooked.

Fineman's links between vulnerability and substantive equality are a particularly fitting theoretical framework for this issue. The idea of vulnerability as embedded in human condition highlights the need for law to move beyond a response to vulnerability as an exceptional moment of crisis and address its structural causes – whether socio-economic, cultural or legal. This construction can ground a state obligation to ensure that all areas of law interact so as to foster migrant women's substantive equality instead of generating disadvantage and further vulnerability.

The willingness to pursue substantive equality has also inspired scholars who argue in favour of a greater legal consideration of the actual possibilities of each individual – and thus of the factors that hamper these possibilities.[46] The concept of

---

[40] Resolution (1697)2009.

[41] Resolution 1478(2006).

[42] Resolution 1811(2011).

[43] CEDAW General Recommendation no. 26.

[44] Resolution 1811(2011) 4; Resolution 1697(2009) 4.1.1; Resolution 1478(2006) 5.1.1.

[45] Resolution 1811(2011) 7.3.1; CEDAW General Recommendation no. 26, 26(b).

[46] Martha C. Nussbaum *Women and Human Development: the Capabilities Approach* (Cambridge

human capabilities has been proposed as a central reference in this sense, to illuminate how social, economic and cultural factors affect women's equality. In her seminal book *Women and Human Development*,[47] Martha Nussbaum built an account of basic constitutional principles necessary to guarantee human dignity that could be applied and respected in any nation of the world. As a philosophical basis for this theory, she proposed the idea of human capabilities, namely a basic list of capacities that every individual may actually realize. This approach, in Nussbaum's view, is closely related to equality because "discrimination on the basis of race, religion, sex, national origin, caste, or ethnicity is taken to be itself a failure of associational capability"[48]. The central question asked by the capabilities approach, then, concerns what every woman is in the position to do and to be – what are her actual opportunities and liberties.[49] In Nussbaum's view, the capabilities approach has great potential in the field of human rights. By pushing the question of women's capabilities to the fore, this approach unveils the many ways in which their self-determination and freedom of choices are hampered by structures of subordination within society and in private realms (most notably, the family).[50] Care plays a central part in Nussbaum's analysis. She identifies care as "one area of life that contributes especially greatly to women's inequality".[51] Women worldwide carry disproportionate care burdens, which limit their possibility of fulfilment in other areas of life such as employment and citizenship. At the same time, unpaid care work within the household is devalued and often not recognised as work at all. The promise of the capabilities approach, however, goes well beyond the important issue of the de-valuation of care.

Sandra Fredman has applied the capabilities approach to substantive equality in a more strictly legal perspective.[52] In her view, an understanding of equality based on the capabilities approach would be richer than mere equality of opportunity. Individual autonomy and the different needs of differently situated individuals are indeed both part of this construction.[53]

University Press 2000) (hereinafter Martha C. Nussbaum *Women and Human Development: the Capabilities Approach*); Sandra Fredman 'Substantive Equality Revisited' (2014) 70 Oxford Legal Studies Research Paper <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2510287> accessed 18 May 2016 (hereinafter Sandra Fredman 'Substantive Equality Revisited').

[47] Martha C. Nussbaum *Women and Human Development: the Capabilities Approach*.

[48] Ibid 86.

[49] Martha C. Nussbaum 'Women's Capabilities and Social Justice' (2000) 2 Journal of Human Development 219 (hereinafter Martha C. Nussbaum 'Women's Capabilities and Social Justice').

[50] Martha C. Nussbaum, 'Capabilities as Fundamental Entitlements: Sen and Social Justice' (2003) 9 Feminist Economics 35; Martha C. Nussbaum, *Creating Capabilities: the Human Development Approach* (Harvard University Press, 2011), 62 ff.

[51] Martha C. Nussbaum 'Women's Capabilities and Social Justice', 222.

[52] Sandra Fredman 'Substantive Equality Revisited'.

[53] Ibid 24 ff.

The focus on whether and to what extent each individual is actually capable of exercising choice – in addition of being formally recognized with a right to do so – also unveils the need for law to recognize their different constraints. Fredman stresses the problematic character of the very idea of choice, since law must also intervene to correct the disadvantage and socio-economic constraints that may steer individuals towards undesired situations which may be wrongfully perceived as freely chosen. The capabilities approach can promote structural change, accommodating difference and thus realising substantive equality.

For migrant women in Europe, the capabilities approach holds great potential. It can bring to the fore their specific difficulties and burdens, turning legislators' and courts' attention towards them. As this book will show, not only law often fails to take into consideration these factual difficulties, but in some instances it aggravates them by creating unnecessary legal obstacles to the effective enjoyment of their rights in the host country. Raising the question of what migrant women are actually capable of doing is crucial to assess the proportionality of formally neutral normative demands in these context. A telling example concerns the imposition of purely economic prerequisites as a precondition to enjoy certain rights and entitlements – such as the right to family life.

At the same time, this approach can reveal the often hidden ways in which law itself hampers migrant women's capabilities, generating inequality in every realm of their lives. This issue affects the areas of family life and employment equally. Within the first, for instance, family reunification regimes may enforce a view of incoming spouses (still predominantly female in Europe) as mere commodities of their sponsors. They might be prevented from working for the initial period of their stay, and often their residence status is dependent on that of the sponsor. In the field of employment, labour migration schemes for professions dominated by women (e.g., domestic work, services or entertainment) prevent migrant workers to change employers. As a result, immigration law aggravates imbalances of power within the family and employment relationships. Law itself, therefore, can be a source of vulnerability for migrant women and an obstacle to the fulfilment of their capabilities.

Within the mentioned critiques of the liberal concept of legal subjects, other scholars have emphasized the reality of every individual as inextricably linked to others through a network of relationships that affect autonomy, equality and dignity.[54] Among them, it is particularly interesting for our purposes to recall Jennifer Nedelsky's construction of the relational self.[55] Nedelsky advocates an under-

---

[54] Jonathan Herring 'Relational Autonomy and Family Law' in Julie Wallbank and others (eds) *Rights, Gender and Family Law* (Routledge 2009); for a more general theory on rights, see Jennifer Nedelsky 'Reconceiving Rights as Relationship' (1993) 1 Review of Constitutional Studies 1; Martha Minow *Making All the Difference: Inclusion, Exclusion, and American Law* (Cornell University Press 1991) 146 ff.

[55] Jennifer Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (OUP 2012).

standing of each individual as the result of a complex network of relationships – ranging from personal and family relations to those taking place in the workplace, from those between citizens and the State to those formed through migration.

Legal thought must focus on relationships. Although the latter do not define who a person is, they influence individuals' autonomy as well as equality. Legal interpretation plays a pivotal role in Nedelsky's construction, since it is considered capable to deeply affect relationships (both private and structural/societal ones), which in turn condition core rights and values such as equality and autonomy [56]. Thus, Nedelsky stresses the need to shift the focus of law and rights from the assumption of an independent self to the reality of a relational self, in order to allow individuals to develop those relationships that foster autonomy. Therefore, Nedelsky advocates for a consideration of the legal subject in context rather than as an isolated entity existing in a vacuum.

The relational approach can be particularly fruitful with respect to the fulfilment of migrant women's substantive equality. Their relationships in the public and private sphere deeply affect their access to rights and entitlements in the host country. A normative and judicial awareness of these aspects is therefore crucial to unveil their specific disadvantage and ensure their equal opportunities. Placing migrant women in the context of their social relationships is crucial to realise their full equality. Law, and immigration law primarily, is often unaware of their structural disadvantage and thus generates indirectly discriminatory effects towards them.

As to private relationships, a legal consideration of migrant women in the broader context of their families can be particularly useful to shine a light on their disproportionate care burdens. Nedelsky also shares the concept of legal subjects as inherently vulnerable and dependent from care. She argues that the devaluation of care work in the Western tradition has meant great inequality and disadvantage for those who perform it. [57] This is particularly true for migrant women. When immigration law assumes legal subjects to enjoy a complete freedom of self-determination, it fails to characterise migrant women's unpaid care work as anything other than a choice to stay inactive. It therefore fails to capture their disproportionate difficulties in satisfying certain legal requirements that embrace a liberal view of the "ideal migrant" (economically active and free from the constraints of care responsibilities). Moreover, a relational approach can encourage a legal valorisation of unpaid care work as a gateway to access rights and entitlements in the host country. The recognition of care as a core value advocated by Nedelsky can bring unpaid care work on the same level as productive work for this purpose.

Applied to judicial analysis and legal interpretations of rights, the relational ap-

---

[56] Ibid 79.

[57] Ibid 29.

proach fosters a more realistic understanding of the actual margins of autonomy allowed to each individual. Women's effective access to legal protections and entitlements has a central importance in this construction.

Lastly, a realistic account of migrant women's inequality must take into account the complexity of their experiences of discrimination, which often consist in multiple and intersectional discrimination. Intersectionality theory is then a necessary angle to adopt in order to effectively capture the discriminatory impact of apparently neutral norms on migrant women specifically.

The concepts of multiple and intersectional discrimination are sometimes used interchangeably, but they refer to two different phenomena. The former concerns discrimination on multiple grounds that can be analysed separately. The latter consists in discrimination on the basis of an inseparable interaction of multiple grounds. In intersectional discrimination, the disadvantage experienced by the targeted category stems from something more than the mere addition of two or more grounds, and cannot effectively be recognised if the synergy between these grounds is overlooked. [58]

The concept of intersectional discrimination was elaborated within U.S. legal scholarship [59] in response to the inadequate single-axis analysis of Black women's [60] experiences of discrimination. This scholarship – defined as critical race feminism – contested the theoretical and normative separation of racial and gender issues in the United States. It proposed an alternative method of legal analysis, more aware of the complex experiences of disadvantage and discrimination endured by Black women on the intersecting grounds of sex, race, and class. The proposed approach contested law's pretence of universality. Law itself can indeed embrace and reinforce structures of subordination along the lines of sex, ethnicity and class.

Within critical race feminism, Kimberlé Crenshaw illustrated these views with particular clarity. She paid a special attention to U.S. anti-discrimination law and its judicial enforcement, stressing its focus on single-ground discrimination and

---

[58] Sarah Hannett 'Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination' (2003) 23 Oxford Journal of Legal Studies 65, 68-70; Jess Bullock and Annick Masselot 'Multiple Discrimination and Intersectional Disadvantage: Challenges and Opportunities in the European Union Legal Framework' (2012) 19 Columbia Journal of European Law 57, 62-64.

[59] Kimberlé 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 (hereinafter Kimberlé Crenshaw 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics'); Kimberlé Crenshaw 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color' (1990) 43 Stanford Law Review 1241 (hereinafter Kimberlé Crenshaw 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color').

[60] The term "Black" should be understood here in the same sense used by critical race feminism, i.e., as referred to persons of African descent resident in the United States.

thus its inadequacy to capture the experiences of individuals placed at the intersection of multiple grounds of discrimination. Crenshaw also stressed how law's failure to consider their specificities further aggravated their disadvantage and inequality. Intersectional subordination indeed is "frequently the consequence of the imposition of one [normative] burden that interacts with pre-existing vulnerabilities to create yet another dimension of disempowerment". [61]

Some scholars used these views to argue in favour of a contextual analysis of law that would expose the indirectly discriminatory effects of apparently neutral norms. [62] Others theorised intersectionality as a jurisprudential method, on the grounds of a "multiple consciousness" that would make law more responsive to the needs of "outsiders", such as women from ethnic minorities. [63] Further analyses proved the validity of intersectionality theory beyond the socio-legal context in which it was initially elaborated. Calls for a legal awareness of the interaction between different discrimination grounds have been directed at international human rights law in particular. [64]

Intersectionality theory included migrant women within its scope. Especially when critical race feminism acquired a transnational dimension, it turned its attention also to women with an immigrant background. [65] Crenshaw, for instance, commented on the discriminatory character of U.S. immigration norms on the grounds of sex and ethnic origin. She pointed out that the marriage fraud provisions under S 216 of the U.S. Immigration and Nationality Act 1957 aggravated migrant women's vulnerability to domestic violence. S 216, indeed, allowed migrants who had entered the country in order to marry a U.S. citizen or a permanent resident to apply for permanent residence status only if they had been married for at least two years. In absence of other legislative protections, this norm pushed migrant women – who were prevalent within this migration route – into a state of dependence from their partner.

---

[61] Kimberlé Crenshaw 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color' 1249.

[62] Martha Minow and Elizabeth V. Spelman 'In Context' (1990) 63 Southern California Law Review 1597.

[63] Mari Matsuda 'When the First Quail Calls: Multiple Consciousness as Jurisprudential Method' (1989) 11 Women's Rights Law Reporter 7.

[64] Penelope Andrews 'Globalization, Human Rights and Critical Race Feminism: Voices from the Margins' (2000) 3 Journal of Gender, Race and Justice 373; Berta Esperanza Hernández-Truyol 'Breaking Cycles of Inequality: Critical Theory, Human Rights, and Family In/justice' in Francisco Valdes and others (eds) *Crossroads, Directions and a New Critical Race Theory* (Temple University Press 2002) 349; Hope Lewis 'Embracing Complexity: Human Rights in Critical Race Feminist Perspective' [2003] *Columbia Journal of Gender and Law* 12.

[65] Hope Lewis 'Lionheart Gals Facing the Dragon: The Human Rights of Inter/national Black Women in the United States' (1997) 76 Oregon Law Review 567; Hope Lewis 'Universal Mother: Transnational Migration and the Human Rights of Black Women in the Americas' (2001) 5 Journal of Gender Race & Justice 197 (hereinafter Hope Lewis 'Universal Mother: Transnational Migration and the Human Rights of Black Women in the Americas').