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Family Reunification: A Right for Forced Migrants?

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1 Introduction

The refugee regime is generally considered to be predicated on the persecution of individuals – specific targeting based on personal beliefs and activities – but this does not mean that refugees should or can be studied as individuals outside social networks. The most crucial and basic social grouping is the family, fulfilling a host of functions in human life. For this reason, family unity is recognized as important for human development and well-being. For refugees and other forced migrants, family unity cannot be taken for granted, as the situations that cause displacement commonly disperse families.

As family unity cannot always be maintained during refugee crises, its reestablishment is often dependent on family reunification programs or policies. Family reunification – the act of bringing together separated family members across international borders – is politically sensitive because it involves border-crossing. The control of those very borders is intimately tied with state sovereignty. An examination of family reunification must elucidate the tension between sovereignty and immigration control on the one hand, and on the other hand the rights and desires of individuals to reunite.

The following is the story of three Angolan children given refugee status in Canada and their attempts to reunite with their surviving parent. This serves as an example of hurdles refugees may face as they try to regroup the family in their new country of residence.

After the arrest and murder of their father, three Angolan sisters, Claudia, Yara and Elisangela (thirteen, sixteen and eighteen years old) were sent by their mother to seek refuge in Canada. Their mother had herself been arrested and afterwards suffered a stroke, which left her in a wheelchair. The [Canadian] Immigration and Refugee Board took only two hours to decide that the sisters needed Canada's protection. Elisangela said: "I was confident our case would be accepted. We also prayed a lot". Even though they have been accepted as refugees, the sisters have no way to bring their mother to Canada, even though she is still in danger in Angola, and they clearly need their surviving parent's care (names are changed, CCR 2004: 6).

This is an example of how prerequisite conditions for family reunification may obstruct its realization. In this particular case unaccompanied minors in Canada are excluded from reuniting with their parents (CCR 2008c). To sponsor someone for Family Class immigration (which is the procedure through which family reunification takes place), one must be 18 years or older and able to support incoming family members. One can only sponsor one's dependent children and spouse, apart from in exceptional circumstances. Furthermore, only adults are allowed to include family members on their permanent residence application (CCR 2004: 6). Unaccompanied minors are thus disqualified from family reunification on all accounts. Their only recourse is presently to apply for reunification on humanitarian or compassionate grounds, but this is not guaranteed to succeed as such applications have a low success rate (CCR 2008b). Furthermore, a March 2008 proposal to amend Canadian immigration legislation would allow immigration authorities to discard such applications without review (CCR 2008a; CCR 2008d). If this

proposal is made law, as is currently expected¹, no realistic recourse will remain for these applicants.

This paper is an attempt to shed light on some of the core issues surrounding family reunification. Is there a right to family reunification for forced migrants? What is the scope of such a right? I will discuss the conflict between legal rights and immigration control, as family reunification brings out the conflict between individual and state interests. This hinges on a discussion on the meaning and extent of the family. I will focus on reunification in liberal democracies in the global North. Family reunification is construed as a corollary to the right to family unity – a means to redress ruptured unity. As such, this paper does not address family formation migration, as in the “importation of fiancé(e)s”. To address the questions at hand I rely on an examination of relevant international legal instruments and on literature from migration studies, political science and international law. I have also looked at material from certain advocacy organizations working on family reunification, and some media coverage of current developments, particularly in Canada, along with material from certain UN organizations.

I use the expressions “refugees” and “forced migrants” interchangeably, unless I am making a particular distinction between 1951 Convention refugees and other forced migrants. I use both expressions to refer to migrants who did not come to the host country by choice, and who were fleeing a situation they cannot be expected to return to. While I believe this is the most fruitful way to approach this analysis, as I consider that breaking it up would seem artificial, it may not always be correct in light of international law. Refugee law, by its nature, distinguishes quite clearly between Convention refugees and other forced migrants. However, as I will note, rights to family reunification are largely absent from refugee law, and are found in other areas of international law where these differences in status carry less significance. Having said this, there is no doubt, as I will show, that in practice Convention refugees are often treated more favourably than other forced migrants.

In the first section I examine the family in a forced migration context and engage in a discussion of the nature of the family. What is a family? This will help to address the question of who to reunify. In the second section I look at family reunification from an international law perspective. Is there an international legal right to family reunification? On what basis does such a right rely? How expansive is it? What is the linkage between family unity and family reunification? In the third section I will look at political aspects of reunification to attempt to explain states’ reluctance to acknowledge reunification rights. What is the place of family reunification in immigration? Finally I will look at alternative approaches to family reunification, to re-centre family reunification within a rights optic. Can we better understand family reunification by re-conceptualizing it as a right for forced migrants?

¹ The Conservative government made this proposal within a budget implementation bill, which the opposition is unlikely to vote down as it has been made clear that it would be interpreted as a vote of no confidence (*Toronto Star*, 2008). It is interesting in itself that changes to refugee protection regulations are proposed within a budget context – this highlights the purely economic lens through which immigration is interpreted. Family reunification is no priority within such an interpretation.

2 Forced Migration and the Family

The Family in a Forced Migration Context

Refugee-producing situations pose specific challenges to the family, and while refugees are usually conceptualized as individuals – surely influenced by the prevailing interpretation of the 1951 Convention as conferring an individual status (see Jastram and Newland 2003: 557) – a family perspective is “crucial to the understanding of the refugee experience” (Chambon 1989: 3).

The Pervasiveness of Separation

Family separation is a natural consequence of conflict and war. While reliable statistics on the prevalence of separation are elusive, the following offers an indication of the scale of the problem. After the Second World War, 13 million children were counted as separated due to the hostilities (Bonnerjea, 1994: 16), and a herculean effort was launched by ICRC and various states to trace family members and reunite them. Large numbers of families have also been separated in the Middle East, Korea and other major conflicts. For this reason family tracing is a core activity of the ICRC (ICRC 2000).² More recently, the ICRC registered 119,577 separated children in Rwanda, out of whom less than half had been successfully reunited with family members by 2000 (Merkelbach 2000).³

There are three major causes of family separation. Firstly, separation can be accidental, “with family members compelled to follow different routes or to flee based upon available opportunities or resources”. Secondly, it can be a “chosen temporary strategy, such as helping a child escape military recruitment or sending a politically active member into hiding” (Sample 2007: 50; see also Jastram and Newland 2003: 562). An example of such strategic separation is the Kindertransport before the Second World War: Jewish parents in Germany and Austria sent their children to seek refuge in England in the time immediately before the War (AJR 2008). Finally, separation can occur as family members are abducted or imprisoned. During the Second World War many families were split this way, as members were deported to forced labor in Germany and children were abducted through Nazi adoption programs (Bonnerjea 1994: 16). Separation is seldom intended to be long-term (Sample 2007: 50).

It is not a given that families should always live together – people commonly spend time away from their families for work or studies. However, refugee families did not choose separation. The uprooting is forced, and refugees usually “go to great lengths to reassemble the family group” (Jastram and Newland 2003: 562). Furthermore, as Chambon emphasizes, the situation is often highly uncertain: “The circumstances of upheaval that characterize the separation are, in most instances, combined with the impossibility to predict the length of separation or even whether reunification will take place” (1989: 6). This element of force and uncertainty gives poignancy to the issue of

² Indeed, the Central Tracing Agency of the ICRC dates back to the Franco-Prussian war of 1870 (ICRC 2002a).

³ 62,593 had not been reunited; out of these 48,715 cases had been suspended and searches were still ongoing in the other 13,878.

family separation among refugees, and helps explain why reunification is particularly important.

The Special Characteristics of Refugee Families

During the course of conflict and its aftermath, it is thus not unusual for families to be split, and for children to find themselves separated from their parents. It may be unclear whether relatives are dead or alive. Child-headed households are increasingly common in many African countries as a consequence of both conflict and AIDS (Machel 2001: 45), and informal adoptions frequently take place, as extended family members take care of the children of their lost relatives or neighbors. In Rwanda, for example, as a consequence of the genocide and the AIDS epidemic, there are currently 810,000 orphans, out of whom more than 100,000 live in child-headed households (UNICEF 2008).

The complicated circumstances of the refugee experience imply that refugee families are perhaps particularly fragmented and “denuclearized”. As Sample asserts, “as a result of high mortality, family groupings are very often not ‘nuclear’. The refugee experience causes many families of choice or circumstance to be formed” (2007: 51). Refugee families frequently deviate from the norm (or ideology) of the nuclear family, which will be discussed later in this section.

It may be difficult for refugees to achieve family reunification with their close ones through formal channels in the case of these families of “choice or circumstance”, as they do not fit standard criteria. Nuclear family members may be dead or lost, and in order to move on, new relationships are formed. In such circumstances reunification difficulties can be a new source of separation, anxiety and loss. To make matters worse, some argue that “only the family that existed before departure should be recognized for reunification purposes” (Jastram and Newland 2003: 585). This seems to presume that the families “of choice and circumstance” are invented to circumvent immigration regulations, which does not seem to be a valid assumption (*ibid.*).

The Importance of Family Networks

At the same time, the precariousness of the refugee experience makes family relationships particularly vital. The family can be an important anchor in a social world turned upside down; sometimes remaining the only stable social structure in an otherwise disintegrated society (Jastram and Newland 2003: 563). Family members are an important “source of support for one another during a traumatic situation” (Chambon 1989: 5). The presence of parents is particularly important: “children can cope with horrible experiences and high levels of stress if they have a secure relationship with parents or effective adult substitutes” (Barwick *et al.* 2002: 49). Until family reunification is achieved, “settlement stresses are compounded by worried and uncertainty about the safety of family members left behind” (*ibid.*: 45). The presence of family members facilitates the difficult process of moving on; one is no longer fixated on the object of reunification and anxious about the safety and whereabouts of loved ones (Jastram and Newland 2003: 565).

Haour-Knipe's study (2001) of North American expatriate workers with international companies or organizations in Geneva may provide valuable insights into the importance of family in settlement and integration, although it addresses issues of a different type of (voluntary) migrants. She finds that the family unit provides important social support and helps individual members cope better with loneliness and encounters with new value systems. Families who score highly on coordination, defined as "the family's belief that they, in fact, occupy the same experiential world, a world which operates in the same way for all of them" (Reiss 1981 cited in Haour-Knipe 2001: 138), are particularly well equipped to adjust to a new environment (Haour-Knipe 2001: 138-9). One might infer from this that long-term separation is detrimental to the integration of refugees into new societies.

Family members from beyond the nuclear family may also fulfill the support function Haour-Knipe refers to. The ICRC emphasizes that when it is impossible to reunite refugee children with their birth parents, their priority is to reunite them with other members of their family.⁴ The main objective is to re-create a sense of normalcy, bringing the children in contact with familiar faces and thus easing readjustment and further mental development.

What is a Family?

The rules of kinship are an anthropological feast, wonderfully varied and highly seasoned (Walzer 1983: 228)

For all the benefits of tight and united families, the fundamental task of attempting to define a family turns out to present a significant challenge in a discussion of family reunification. Conceptions of the family vary between different cultures and are not static over time. Who is it that should be reunited?

International human rights instruments that promote the respect and protection of the family do not define the family as such. Furlanos suggests that there is no international legal definition of the family, which, he argues, is because "a universally accepted concept of family can hardly be said to exist" (1986: 88; 92). This lack of common definition obscures the question of admittance through family reunification, as "the size of the family differs considerably from one region to another" (1986: 91). Whereas "in most Western societies, the family is relatively small", elsewhere "it can be quite large, sometimes consisting of a whole clan (mainly in Africa)" (1986: 91). As Furlanos argues (perhaps a bit exaggeratedly), "what one region may regard as an acceptable number of individuals seeking admission on the basis of family unity, might constitute a case of mass-influx of aliens in other parts of the world" (1986: 91). As we understand, defining a family is difficult, but the following sections will introduce some thoughts how to go about it.

⁴ In Rwanda attempts were made to find any of the following: "father, mother, brothers and sisters, uncles and aunts, grandparents, first cousins, stepbrothers and sisters, parents-in-law and adopted parents" (ICRC 2002b).

Bases for Family Ties

Family ties can be determined with reference to different criteria: marriage or its equivalent, dependency, or genetic ties. However, none of these criteria are unambiguous. There are also no family constellations that “seem to be theoretically required or even generally preferable” (Walzer 1983: 231).

Marriage

The meaning of a marriage is not internationally agreed-upon. To take an example: within Nigeria there are three different conceptions of marriage. There is a western-style statutory marriage with one wife and one husband; a customary law marriage where a husband can take a limitless number of wives; and a marriage under the Maliki School of Islamic law that permits a man to marry four wives with an “obligation to treat them equally” (Ipaye 1998: 33).

Our perceptions of Western, “traditional” marriage are also being challenged. Fewer and fewer heterosexual partners get married, and many live together and have children without officially marrying each other. Furthermore, several countries have introduced legislation allowing homosexual partners to wed.⁵ Up to half of all marriages end in divorce in many countries.⁶

Generally speaking, a marriage entered into in one country is recognized elsewhere, and host countries often depend on laws in the country of origin “to determine whether or not the requisite family relationship has been established” (Perruchoud 1989: 514). However, they simultaneously “impose their own standards for the definition of the family” (*ibid.*). As such, polygamous marriages are illegal in many Western countries, and thus not recognized for the purpose of family reunification. Likewise, few countries that do not themselves permit same-sex marriage or civil unions recognize such relationships entered into abroad.

Genetic and Biological Ties

The significance of genetic ties is also opaque. Should there be distinctions between “real” children and adopted children in relation to family reunification? Western formalized adoption does not exist *per se* in Islamic law, where the closest equivalent is a type of permanent fostering called *kafala*, which does not entail rights of inheritance and other rights that “real” children have (UNICEF 2007: 99). By emphasizing genetic ties or their equivalent we may delegitimize important social relationships such as these, and prioritize relatives who have no emotional bond over those who do (Stalford 2002: 117). Although we may intuitively accord special importance to biological family ties (supposedly “blood is thicker than water”) (Ruddick 1998), this may be a questionable proposition.

⁵ Same-sex marriage is currently permitted in Belgium, Spain, South Africa, Canada and the Netherlands, and the state of Massachusetts, while 16 countries permit same-sex civil unions. As this is written, same-sex marriage is being legalized in Norway and California.

⁶ In the UK, the Office of National Statistics reported “that the proportion of men and women in England and Wales choosing to marry was at the lowest level since the figure was first calculated in 1862” in 2007, while the proportion of marriages eventually ending in divorce was calculated at “45 per cent in 2005” (Ford, 2008).

Children born into relationships in Western societies are generally “automatically accepted as the children of that relationship” without genetic testing to confirm biological fatherhood (Taitz *et al.* 2002: 794), but not so in immigration matters. In many countries, the process of ascertaining family ties and thus determining eligibility for reunification is complicated and burdensome. To be eligible, applicants must provide compelling evidence that the entrants are indeed their close family members. This is typically achieved by way of birth certificates or other official documentation, which is unproblematic for most migrants coming from “countries which regularly issue high quality documents” (CCR 2004: 12). But this may present greater difficulties for forced migrants. Firstly, many refugee-producing countries are underdeveloped and chaotic and do not provide documentation recognized by the authorities in the receiving country. Norway, for example, does not recognize any official documents from Afghanistan, Iraq and Somalia, as they regard it as impossible to determine their veracity (NOAS 2008). While this may be understandable – how can documents be checked when the issuing state hardly exists? – it is interesting to note that these countries are also among the top refugee countries of origin.

Secondly, during conflict births and marriages may not be properly recorded; and if records exist, the refugees’ fear of persecution may prevent them from obtaining them (CCR 2004: 12). Thirdly, if the refugees were previously in possession of such documentation, “its destruction [may have been] effectively compelled to avoid visa controls, carrier sanctions, or other impediments to their escape and entry into an asylum state” (Hathaway 2005: 840-841). Since 9/11, states have become ever stricter with documentation requirements, due to heightened security concerns. Reunification procedures have become more protracted as a result (Jastram and Newland 2003: 562).

Dependency

The third and potentially more flexible basis for family ties is dependency. Defining family for reunification on the basis of dependency may permit accommodation of different types of family relationships. While no authoritative international definition of dependency exists, UNHCR operates with the following working definition: “a dependent person is someone who relies for his or her existence substantially and directly on another person, in particular for economic reasons, but also taking emotional dependency into consideration” (Jastram and Newland 2003: 585). A family unit defined with reference to dependency could be construed as containing members other than the biological nuclear family, as non-biological and extended family members could be dependent members of the household.

However, states demand documentation of family relationships for reunification, and this could present difficulties. The criterion of economic dependency could be employed, but it may be difficult to provide papers attesting to its existence. In these cases, family ties must be established on a case-by-case basis. Dependency could be particularly difficult to prove after more long-term separation, which in itself could be used to refute claims of dependency. This was previously the case in Dutch immigration law. To apply for a family reunification with one’s children in the Netherlands, one was required to prove the existence of “an effective family bond” and that the children were still fully dependent upon the applicant, having not been “definitively taken up in another household”.

Providing such evidence became extremely difficult for parents who had long been separated from their children, leaving them in the care of grandparents or other relatives (van Walsum 2003: 512).⁷

Adopting the criterion of dependency may also raise privacy concerns. In determining whether a relationship of dependency is present, the state would be obliged to make subjective determinations through interviews which might be perceived as intrusive (Motomura 1997: 97). Such procedures would be particularly resource-intensive, and difficult in a forced migration context where the family members in question are left behind in uncertain and insecure situations far away.

Reach of Family Ties

Another difficulty is establishing the reach of the family. What is the status of extended family members in reunification? Most jurisdictions prioritize lineal or vertical family ties over horizontal ones, precluding siblings from reuniting. Reunification is usually difficult even for refugee families where the parents have passed away and older siblings fulfill parenting roles (CCR 2004: 7).

Fourlanos suggests that international law primarily protects the family nucleus (the spouse and dependent minor children). The nuclear family is a lowest common denominator, upon which all culturally specific definitions of the family agree. This nuclear interpretation is echoed widely in the EU Family Reunification Directive (2003)⁸. While there are some dispensations for dependent elderly relatives (Art.10(1)), this is left at the discretion of States. And while it is possible for member states to be more liberal in regards to extended family members of refugees, only reunification with the married spouse and dependent, minor, unmarried children is strictly promoted (ECRE 2003).

While it is sometimes possible to apply for reunification with other family members such as siblings in traditional countries of immigration, this type of family reunification is usually submitted to a numeral capping system, meaning reunification can take a very long time. In the United States, applicants from certain countries have waited for decades. Those Filipinos who applied to reunite as “fourth preference” family members (brothers and sisters of an applicant older than 21) in 1977, only achieved reunification in 1995 (Motomura 1997: 90).

However, it is undeniable that extended family members are often important to family life. This has been recognized in domestic legal rulings; for example, in the American Supreme Court case *Moore v. City of East Cleveland*, it was “held that a grandmother who filled a parental role was a constitutionally protected family member” (Anderföhren-Wayne 1996: 374). Extended family members (including siblings, by the common definition) are rarely accorded rights in terms of reunification. This is problematic, as some authors suggest that immigrants rely more heavily on extended family support

⁷ These regulations were revised after the 2001 ruling by the European Court of Human Rights (ECtHR) in the case *Sen v. the Netherlands*.

⁸ The Family Reunification Directive was adopted in 2003 after 3 years of negotiations. It sets minimum standards for reunification for third-country nationals “residing lawfully” in the EU (ECRE 2003).

networks than others because, as newcomers, they lack alternative social support (Suárez-Orozco 2000: 198). We start to perceive a differing approach to family ties domestically and in the immigration realm. This disjuncture will be further explored.

Changing Conceptions of the Family

Some authors suggest that the privileging of the Western nuclear family model is justifiable in immigration because the extended family is losing importance worldwide due to urbanization and westernization of modes of living (van Krieken 2001; Jastram 2003). Other authors argue that this is ideological. According to Jones-Pauly it is wrong to imagine that the nuclear family is “at the apex of an evolutionary pyramid” (1998: 286). Different forms of the family have existed side by side throughout history, and family forms are constantly evolving. I have already alluded to the increase in child-headed households, which typically go unrecognized in family reunification procedures.

The so-called Western nuclear family is changing in many ways as well. I have already referred to the legalization of same-sex marriage and the prevalence of divorce. There is evidence that children in Western liberal democratic states are dependent on their parents for increasingly long periods as they obtain higher education qualifications (Jones-Pauly 1998). Such developments could lead us to question the decisions of states to progressively lower age limits in family reunification matters. In Germany reunification is reserved for dependent children under the age of 16 (Kofman 2004: 254). In that same country, a study from the 1990s showed that “75 per cent of all adult persons between 18 and 28 years of age receive help of some kind from parents”, of whom 48 per cent were “totally dependent on parental support” (Jones-Pauly 1998: 286).

Questioning the Motives

In light of the discussion in this section, it becomes apparent that the relatively strict adherence to nuclear family criteria for family reunification purposes can be challenged on many grounds. We may wonder why the state imposes a model of the family upon immigrants that is challenged even within the country. While it may be unreasonable to expect the state to approve of forms of the family that are in contravention of its own laws (by for example permitting the reunification of polygamous spouses), we may challenge its restrictiveness. Is it ethical to treat foreigners and nationals differently in terms of the kind of families that are recognized? And should refugees be treated just like other migrants? There also seems to be stronger protections of family life for non-nationals in matters of deportation than in matters of family reunification⁹.

This leads us to consider the conflict between family reunification and immigration control. It is perhaps no wonder that states have adopted the smallest and most restrictive definition of the family in family reunification cases as it allows them to restrict entry to the greatest possible extent. This conflict will be further examined later in this paper, and the ethical implications will also be considered. First, however, an examination of family reunification from a legal rights perspective is due.

⁹ Viz. ECtHR rulings in *Chahal* and *Berrehab*, or the US ruling *Antoine-Dorcelli v. INS*, where deportation of a live-in Haitian servant was suspended as the woman in question considered her employers the only family she had ever had. See Anderföhren-Wayne (1996).

3 Family Reunification and the Law

Introduction

This section will consider family reunification for forced migrants from an (international) legal perspective. This examination is necessary because family reunification rights for forced migrants appear to be “weakly enunciated” (Kofman 2004: 253); which is puzzling considering the ample evidence that refugee-producing situations lead to widespread dispersal of family members. Indeed, the problems of separation were not unknown in the post-war context in which the 1951 Refugee Convention (CSR51) was written. As mentioned, vast numbers of children were separated from their families during the Second World War. The Convention drafters were mindful of this, and Recommendation B of the Final Act of the Conference of Plenipotentiaries pertains to family unity, recommending that states “take the necessary measures for the protection of the refugee’s family”, “considering that the unity of the family [...] is an essential right”.

According to Hathaway, “the drafters of the Refugee Convention assumed that the family members of a refugee would benefit from the protection of the Refugee Convention” (2005: 541). However, they made only oblique references to family reunification in the Convention itself, making provisions for religious education for the children of refugees, for example (Art. 4)¹⁰. The 1967 Protocol also lacks provisions for family reunification (Lahav 1997: 358). We must thus look beyond refugee law to find a legal basis for family reunification for refugees (Jastram and Newland 2003: 569). For this reason, I believe it is legitimate to discuss family reunification for both refugees and other forced migrants simultaneously in this section.

Establishing whether there is a right to family reunification in international law depends on locating a state obligation to ensure it, but these duties appear to be “imperfectly and badly allocated” (Bader 2005: 338). This section will first survey the relevant established human rights norms, before examining this question of obligation. It will then look at the interplay between the law and different conceptualizations of the family.

Relevant Established Human Rights Law

It is widely recognized that refugees and other forced migrants should have full enjoyment of their human rights, starting with the preamble to the Refugee Convention¹¹. This is based on principles of non-discrimination, as well as basic human rights norms, and thus valid for both refugees and other forced migrants. Human rights law, as codified over the past 60 years, is “grounded upon the premise that all persons, by virtue of their humanity, have fundamental rights” (Weissbrodt 2007: 222). Human rights law thus limits states in their treatment of refugees and other non-citizens, not just their own citizens. The Human Rights Committee, which oversees the implementation of

¹⁰The following articles in CSR51 make references to the family: Art. 4 (religious education for children), Art.12 (recognition of marriage), Art. 22 (provision of elementary education) Art. 24 (social security/family allowances).

¹¹Preamble to CSR51, first paragraph:

The High Contracting Parties, considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination.

International Covenant on Civil and Political Rights (1966) (ICCPR66), has affirmed that while ICCPR66 does not grant aliens the right to enter a specific country¹², it may afford aliens its protection

in relation to entry or residence, for example, when conditions of non-discrimination, prohibition of inhuman treatment and respect to family life arise... [non-citizens] may not be subjected to arbitrary or unlawful interference with their privacy, family, home, or correspondence [emphasis added by Hathaway] (UN Human Rights Committee 1986 cited in Hathaway 2005: 548).

It is, furthermore, widely accepted in human rights law that everyone has a right to family unity.¹³ The major human rights instruments regard the family as a fundamental unit of society, giving the family a “right to recognition of a legal relationship between family members” (Anderführen-Wayne 1996: 349). An early expression of this was the Universal Declaration of Human Rights of 1948 (UDHR48); its Art. 16(3) states that “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State”. This is repeated in ICCPR66 Art. 23¹⁴, where we also find the right to marry and found a family (Art. 23(2)). ICESCR66 Art. 10 further elaborates; emphasizing the role of the family in “the care and education of dependent children”¹⁵. Furthermore, as per ICCPR66 art. 17¹⁶, states cannot arbitrarily¹⁷ interfere in family life; including the family life of non-citizens. This should prohibit states from splitting refugee families, but might not obligate them to take positive steps towards reuniting families already torn apart. ICESCR Art. 10 goes further, insisting that “the widest possible protection and *assistance* should be accorded to the family” (my emphasis). According to Van Krieken, this indicates an obligation on behalf of the state to adopt a “fairly active approach” toward family rights, “over and above ‘protection’“(1994: 20).¹⁸

¹² There is no right in international law to enter any country except for one’s own (van Krieken 2001: 130).

¹³ For a more thorough survey, see Perruchoud (1989: 510).

¹⁴ ICCPR66 Art 23:

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

¹⁵ ICESCR66 Art 10 (1):

The States Parties to the present Covenant recognize that: The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

¹⁶ ICCPR66 Art. 17:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family [...]
2. Everyone has the right to the protection of the law against such interference or attacks.

¹⁷ There is no definitive standard by which to define arbitrariness, but according to Nowak one must to investigate whether the act in question is in conformity with national law and with the purpose of the Covenant, as well as whether it is predictable, reasonable and proportional (cited in Hathaway, 2005: 549).

¹⁸ It is not surprising that ICESCR66 goes further than ICCPR66 – it is generally reckoned that while the latter deals with negative rights, the former codifies positive rights. However, ICESCR calls for progressive, rather than immediate, realization of these rights (Art. 2(1)), making the obligation weaker and more difficult to enforce.

From Family Unity to Family Reunification

While family unity, in principle, is a relatively unambiguous human rights matter which can usually be fulfilled domestically with reliance on negative rights and obligations, such as the right to non-interference in private and family life, family reunification is a “fairly different issue altogether” (van Krieken 1994: 20). Although family reunification cannot be divorced from family unity – indeed, the former may be a necessary means of executing the latter (Anderführen-Wayne 1996: 351) – it brings up a host of thorny additional issues. Family reunification across borders is a matter of relations between states and distribution of obligations between them; with at least two states involved (Perruchoud 1989: 509). In cases where the applicant is seeking to be reunited with family members that are in another country of first asylum, a key issue is to establish where reunification should take place. Which state has responsibility to reunify?

This ties in with a bigger question, namely whether refugees can choose where to seek asylum. While there is at least a weak right to “seek and enjoy asylum”¹⁹ in international law, and thus a concomitant obligation upon *a* state to grant it (or at least not to practice *refoulement*), it is not clear upon which state such an obligation would fall. Can refugees choose which state? And can they choose where the family should be reunited if family members are scattered across multiple countries of asylum?

The broader question is beyond the scope of this paper, and answering the question of choice in country of reunification may also be beyond its ambitions, but it should not be ignored. Indeed, the approach of the European Court of Human Rights (ECtHR) to family reunification is intimately linked to this question. Family rights in Europe are protected by ECHR50 art. 8²⁰. The Court has, as a rule, been more willing to protect family rights in relation to expulsion/deportation than in relation to entry (John 2003: 2), but where family rights have been upheld in an immigration context, it has largely been based on an “elsewhere approach” (John 2003: 33). This means that the Court will examine whether the family can reasonably be expected to pursue family life somewhere else (i.e., in another state). This has been very strictly applied: in the 1996 case *Gül v. Switzerland* a Turkish man residing in Switzerland on humanitarian grounds was refused reunification with his young son, as the Court reasoned that family life was strictly speaking possible in Turkey.

Despite this fairly negative picture in terms of family reunification, the past 20 years have seen a partial codification of family reunification rights in international law; most notably through the Convention on the Rights of the Child (1989) (CRC89), which regulates family reunification where children are involved. CRC89 is the world’s most widely ratified human rights treaty, only matched in international law by the four Geneva Conventions on the law of warfare (Abram 1995: 426). Somalia and the United States are,

¹⁹UDHR48 art. 14.

²⁰ ECHR50 art. 8: 1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

famously, the only countries not to adhere to the Convention. The prompt and widespread ratification is impressive also because CRC89 is among the most recent human rights treaties.

The overarching message of the Convention is a concern for the best interest of the child, which should inform all decisions relating to children (Art. 3(1); Luke 2007: 77). The convention applies equally to all children within the jurisdiction of the state (Art. 2(1)); it can thus logically be read to grant refugee and other non-citizen children the same rights as nationals (Abram 1995: 416).

To briefly summarize the relevant articles, art. 9(1) is an important starting point. It stipulates that “States Parties *shall* ensure that a child *shall* not be separated from his or her parents against their will” (my emphasis). This very strongly worded article, according to Abram, requires states to “take all positive measures necessary to assure the realization of [the right to be with both one’s parents]” (1995: 418). Art. 10(1) of the convention elaborates that in cases where children are separated from their families across borders, states *shall* deal with entry or exit applications “for the purpose of family reunification [...] in a positive, humane and expeditious manner”. Furthermore, Art. 22 specifically concerns refugee children, calling on states to give them “appropriate protection and humanitarian assistance”. Additionally, it calls upon states to co-operate with the UN and other agencies in order to assist children to “trace the parents or *other members of the family* of any refugee child in order to obtain information necessary for reunification with his or her family” (my emphasis).

However, some countries have made reservations against certain obligations codified in CRC89, stating that they do not see themselves bound by the Convention in immigration matters or in their treatment of non-nationals. The UK is the most notable country in this respect. Jastram and Newland argue that these reservations only serve to reinforce the argument that the Convention confers obligations to reunify families – otherwise, countries would not make reservations in the first place (2003: 579).

Some argue that the CRC89 does not necessarily protect reunification of a child and parent with the second parent (van Krieken 1994: 21). This seems to be a minority opinion – Detrick argues that the *travaux préparatoires* indicate that art. 10 is supposed to allow for both eventualities, and that the right in question is a right to be with both parents, not just one (Detrick 1996: 104; Jastram and Newland 2003: 578).

The prompt and widespread ratification of CRC89 may be read as important progress towards a right to family reunification where children are involved; even acknowledging the special needs of refugee children. However, this right is still weak and not of universal application, as the Convention limits itself to concern for families with children. It also does not take into account reunification of children with their siblings, which may be an important issue when parents are dead or lost.

Surprisingly, the other international treaty that stipulates a right to family reunification is the International Convention on the Protection of the Rights of All Migrant Workers and

Members of Their Families, which came into force in July 2003. Its Art. 44(2)²¹ gives migrant workers who are “documented or in a regular situation” a right to family reunification, even with an unmarried partner. This creates a curious situation where voluntary migrants may have more extensive international legal rights to family reunification than forced migrants, for whom this right is arguably more important. However, the Migrant Workers Convention has yet to be ratified by any major country of immigration (Cholewinski 2007: 259). Furthermore, Cholewinski highlights that art. 44(2) of the Convention leaves wide discretion to states (1997: 172), and art. 79 includes an important caveat: “Nothing in the present Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families” (see Cholewinski 2007: 259).

An Emerging Conflict: International Law and Concepts of the Family

Migration represents a highly complex area of international law, as exit and entry are governed both by national rules and international regulations (Goodwin-Gill 1978: 5-6). Family reunification introduces the added difficulty of conflicting legal norms relating to the family. As mentioned, there is no authoritative legal definition of the family. As we examine family reunification we have to grapple with conflicting definitions of the family between different national jurisdictions and international law.

Domestic Law and the Family

It is widely acknowledged, as I explored earlier in this paper, that the family is a nebulous concept that may encompass a number of different types of relationships. Courts in Western countries have acknowledged the variety of family life by protecting various types of family relationships. Although these developments are not tremendously expansive so far – the nuclear family model has long been dominant in these societies – the law offers increasing recognition of new and different types of families. Eskridge argues that “a shift in emphasis from status to choice” has taken place in modern family law, reflecting the consequences of the “liberal’ conception of self” as an autonomous actor (1997: 276).

I referred above to the US Supreme Court case *Moore v. East Cleveland*, in which a grandmother’s care for her grandson was ruled a constitutionally protected family relationship; indeed, the case established that extended families had the right to the same protection as nuclear families. As Justice Powell noted,

Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable [ancient] and equally deserving of constitutional recognition.

²¹ Migrant Workers Convention art. 44(2): States Parties shall take measures that they deem appropriate and that fall within their competence to facilitate the reunification of migrant workers with their spouses or persons who have with the migrant worker a relationship that, according to applicable law, produces effects equivalent to marriage, as well as with their minor dependent unmarried children.

I have also already alluded to a number of new legal developments, including the legalization of same-sex marriage. It appears that domestic family law is slowly but surely adapting to emerging family norms.

International Law is Lagging Behind

As it appears that family rights are becoming more extensive domestically, it is interesting to examine whether there is a parallel development in international law and immigration law. In brief, it seems that such a development is lagging. Some argue that only married, heterosexual couples are protected by ICCPR66 Art. 23, as it refers to “men and women”’s right to “found a family”. Hathaway, however, calls this reading “fallacious”. As he notes, it does not say that it has to be “a man and a woman” (2005: 555). Furthermore, the UN Human Rights Committee (HRC), which oversees implementation of ICCPR66 and advises on its interpretation, calls for a broad construal of the family (2003 cited in Hathaway 2005: 552).

While the above restrictive interpretation does not seem widespread, we need not look very far to discover that refugees and other migrants do not benefit from many rights at all in relation to extended family members, for example. Reunification of a grandmother and a grandchild is not contemplated in legislation of any major Western country. Reunification with extended family members (by definition anyone other than the spouse and minor children) is generally thought to be entirely at the discretion of the state (SOPEMI 2006).

The UN Human Rights Committee has suggested that “the notion of the ‘family’ should be interpreted not in the abstract, but on the basis of social norms in the society concerned” (1988 cited in Hathaway 2005: 554). While this ensures respect for the variety of family forms found within the country, it may entail that forms of the family that are common in countries of origin may be considered invalid for immigration.

Polygamous marriages exemplify this particularly well – while they are common in many African and Muslim countries, they are generally illegal in the West. For family reunification purposes, a number of countries restrict reunification to one wife and only to the children of that wife (EU Family Reunification Directive Art. 4(4); Carens 2003: 98). This is worthy of note because it appears that polygamous marriages are recognized for other purposes than immigration in Western countries.

For example, “Parties to an actually polygamous marriage are not entitled to permanent resident status as a family unit in Canada, because of the possibility that they would practice polygamy in [that] country in violation of the *Criminal Code*” (Status of Women Canada 2005). However, several Canadian court cases have recognized succession rights, eligibility for spousal support and rights in marital property division for parties to polygamous marriages (*ibid.*). This brings into view an interesting paradox: while it appears that countries find ways of accommodating polygamous marriages in matters of domestic and private international law, they do so to a lesser extent in immigration. Intriguingly, France recognized polygamous marriages for immigration during the 1980s, considering it a part of private international law, but later withdrew such recognition

(Kofman 2004: 257 at note 5; Carens 2003: 98). Furlanos argues that states cannot be bound to respect family ties that would be illegal or abnormal within the country, such as polygamous marriages (1986: 92-93).

While a discussion on the rights and wrongs of polygamous marriages is beyond the scope of this paper, one may feel suspicious about such differing approaches in immigration and in other areas of law. Why is it impossible to accommodate varying legal norms and family relationships in immigration, when it appears to be possible in other situations of conflicting laws? It seems that the best way to understand this is by reference to the politics of immigration control – perhaps especially because the groups that would be affected by a ban on family reunification for polygamous relationships are from parts of the world which tend to be viewed as particularly different and foreign.

The polygamous marriage situation is only one potential scenario where the family life of refugees may go unrecognized in immigration law. The constitutional protection available to *Moore* in the United States is not extended in the immigration realm due to the plenary power doctrine²² (Hawthorne 2007: 811); and judicial deference towards the executive in immigration matters is widespread not only in the United States.

An Evidence Issue or a Control Issue?

To give states the benefit of the doubt, it may be very difficult to obtain evidence of family relationships for forced migrants. As previously highlighted, documentation from refugee-producing countries may be unreliable or unavailable. States fear fraud, particularly since 9/11, and strive to preserve the legitimacy of their immigration procedures in the eyes of their publics. Formal marriages and biological children may surely be more easily documented than other types of family relationships.

However, one may suspect that these measures result in a targeting of specific populations. Is it a coincidence that the forms of family which are the most restricted in immigration coincide with norms in Third World countries from which immigration is politically controversial? It may appear that states are only willing to recognize new forms of family life that develop domestically, not abroad. We may also legitimately ask, as Hawthorne does: “If our own [...] society cannot reflect the ideals of our laws, how can we expect others to conform to our idealized standards?” (2007: 827). If this is an effort to protect values within the society, such as it may be argued in relation to polygamous marriages, one may suggest that the value system being protected (the nuclear heterosexual family) is somewhat illusory and mythical.

It flows from this discussion that whatever right one can locate to family reunification is of limited application, as it is associated with a number of caveats and conditions. The right is only claimable, as it is, by persons in a nuclear family constellation, with few rights accorded to extended family members or persons in “untraditional” (by Western standards) family constellations.

²² Since 1889, the US Supreme Court has held that regulating immigration is within the purview of Congress, not the Courts. Plenary power, in effect, means power that is “complete in every respect” (“plenary” 2008).

This leads us to the next part of this paper, namely a discussion of family reunification as a part of immigration policy. We need to understand family reunification through the optic of immigration control to understand the difficulty that many families face in attempting to reunite, and to understand the restrictive family definitions that are applied. The next section will explore the politics of immigration, the particular challenge posed by family reunification and the responses of states to this challenge.

4 Family Reunification as Immigration Policy

Introduction

Immigration policy, under which family reunification is generally subsumed, can be intensely political. Contemporary political discourse in liberal democracies is frequently dominated by narratives of control, whereby politicians promise to “tackle immigration” or be “tough on border control”. Elections in many European countries have hinged upon immigration issues, and the electoral success in recent years of right-wing politicians such as Jean-Marie le Pen in France and Jörg Haider in Austria owe much to the politicization of immigration issues. This section will discuss the political issues associated with immigration and attempt to situate family reunification in political discourses of border control.

While family reunification is not the form of migration most targeted in public discourse, which in many European countries is dominated by discussions about so-called “bogus asylum seekers” or “economic migrants”, it is the mode of migration by which the most persons enter most liberal democracies (Kofman 2004: 243). What are the main issues that arise in relation to family reunification? To explore these issues, we must look at the role of immigration in general in the politics of liberal democracies.

Sovereignty and Border Control

Modern nation-states have, since the 1648 Treaty of Westphalia, shared a number of characteristics: “population, territory, effective and legitimate government [and] independence” (Nicholson 1998). The government, which is the administrative branch of the State, acts in its name and rules sovereign over the population and the territory. Border control is a key feature of this rule. As Lahav argues, “defining citizenship and deciding who should enter a country are a state’s prime tasks” (2004: 113).

The state performs its activities on behalf of the population; with the presumption that it is “pursuing the ends of the governed” (Held 1995: 43). State sovereignty is legitimate because the state ensures security and peace (Held 1995: 41). Border control is a part of state efforts to protect the community against tangible and intangible threats to its security. Tangible threats include threats to the physical integrity of the territory or the citizens. Intangible threats are more difficult to define, but would include threats to the identity or character of the population.

While it is generally not thought that states wish to keep all foreigners out, it is presumed that they want to retain freedom to admit only those that possess skills or characteristics

making them likely to integrate or fulfil needs in the labor market. They want to make sure that they can exclude those they find “undesirable”, particularly those who may represent a security threat. “Management-speak” has found its way into discourses about migration, as in so many areas of modern life. States would ideally manage not only which applications to accept, but also who can apply to begin with. This can be done by way of conditions, like the Canadian points system, which awards points to immigrants based on characteristics Canada is looking for (language skills, education and so forth), and sets a minimum sum which immigrants must obtain. New legislation in that country would also allow the Minister of Immigration to discard applications deemed not interesting without review (CCR 2008d).

Through border control, states can control the character of society²³, reassure citizens against security concerns and appear to be in control in their own house. In the post-9/11 era, the need to keep up appearances in relation to border control is perhaps particularly important. Appearing to be in control is crucial for a government’s legitimacy and electability. Border control has to a large extent been tied up with concerns about state security, which we can see examples of even in pop culture: A popular new Canadian television show called “The Border” revolves around the efforts of Immigration and Customs Security, an agency created after 9/11, to keep the border between Canada and the United States safe (CBC 2008). The very name of this agency, which is not itself fictional, hints at the close linkages of migration and security, and the symbolic importance of borders.

The Challenge of Family Reunification

“Closed Borders” No More

There is an extensive body of literature on the politics of immigration, where case studies of European countries are particularly well represented (see Geddes 2003 or Spencer (ed.) 2003). Unlike countries such as Australia, Canada and the United States, which have defined themselves throughout their existence as countries of immigration, European liberal democracies have rarely conceived of themselves as such, and academic work on these countries often highlights this contradiction between self-image and reality, as most of these countries are now net immigration countries.

While many European countries experimented with labour immigration in the decades following the Second World War, by the 1970s they all tried to close the door on would-be migrants, following the steep rise in the price of oil (Geddes 2003: 17). This era of labor immigration between 1950 and 1973 was a period of unprecedented economic boom; a period of full employment, where domestic labor supply did not meet demand. By 1973, however, economic recession was a fact and unemployment was on the rise. Foreign workers were no longer needed, and borders were “closed”.

Nevertheless, largely due to family reunification, immigration did not cease. As Hansen ominously contends, “the deed was done” (2003: 27). While the foreign population of the German Federal Republic increased by 500,000 between 1973 and 1980, the number of

²³ As in upholding specific cultures or ethnic compositions, viz. the White Australia policy (Walzer 1983: 47).

guest workers was reduced by 500,000 during the same period (Geddes 2003: 82). This reveals the main trend in migration to liberal democracies since the 1970s: while some highly skilled immigrants have been allowed to enter, most entrants have come to join family members.

According to Hansen, politicians would have had it otherwise. Several countries made efforts to curb family reunification, but were prevented by the courts (2003: 27). For example, the French government suspended “labor and family migration in 1974 through two circulars”, but family migration was resumed in 1978 after “the Council of State overturned the suspension [...] because it contravened the constitutional rights to family life” (Geddes 2003: 54). However, Lahav contends that rather than expand the rights of immigrants, these court rulings have merely attempted to “limit or perhaps to slow down a contraction of such rights” (1997: 351). Evidence of political will to retract family reunification rights is still seen, such as in an April 2008 House of Lords report which “raised the prospect of cutting the rights of people to follow relatives who have settled in the UK” (BBC 2008).

The Numbers Game: Family Reunification and the Migration Multiplier

This leads us to the main challenge of family reunification – that of the immigration multiplier, defined by Jasso and Rosenzweig as “the total number of future immigrants generated by one original immigrant who is not him or herself sponsored for a family reunification visa by a previous immigrant” (1989: 585). As the adage goes, *migration breeds migration*; as “every immigrant generates a set of future potential immigrants” (Jasso and Rosenzweig 1989: 859).

Numerous writers have attempted to compute the immigration multiplier, with varying results. A certain amount of skepticism is in order as we survey these numbers – it appears that different authors operate with diverse definitions of the multiplier. According to van Krieken, a “guesstimate” puts the immigration multiplier at about 2.5, but he does not provide a source for this (2001: 117). Jasso and Rosenzweig put it significantly lower at between 0.63 and 1.40 when examining American visa classes requiring a citizen sponsor (1989: 865). A recent American calculation by Bin Yu estimates that “each principal immigrant would bring 2.1 family members to the United States as part of the unification process” (2006: 13); a number that would increase with every generation, but at a diminishing rate as each sponsor has fewer family members still outside of the country. Chains also generally break after a while (Hing 2006: 136-37). Presumably, the immigration multiplier is higher in the United States and Canada, where there are more possibilities to sponsor extended family members, than in Europe where there are not.

Unwanted Immigrants?

Another “problem” with migrants joining their families is that they are not selected by the state, and are not necessarily migrants that the state would have selected. Meyers cites a 1970 Dutch foreign policy paper to this effect: “our country needs manpower and not the immigration of families” (Meyers 2004: 118). Compared to the earlier waves of labor immigration, family immigration from the 1970s onward was ostensibly feminized, as

wives and children of the earlier migrant workers started to come (although women were also present in earlier waves (Geddes 2003: 17)). In the case of the United States Schuck argues that “those entering under family visas are more likely to compete for the jobs that the unions covet than those entering under employment visas, who are[...] more highly skilled workers” (1998: 114).

On another note, Hing argues that the traditional preference for family-based immigration in the American system became increasingly controversial once it became clear that it was used by Asian and Latino immigrants to a larger extent than by white Europeans (Hing 2006: 118). This suggested a racial component to this “unwantedness”. In this view, family-based immigration is a way for under-qualified people from the Third World to bypass more desirable (Western/white) immigrants in line.

The Political Response

The Defining Power

The main tool at the disposal of the state for managing family reunification is the power to impose a definition of the family. The first section of this paper showed that defining the family is no impartial or neutral activity, but one that is deeply embedded in a particular cultural understanding and that depends on what the definition is for. What immigrants understand as a family may conflict starkly with what the state understands as a family, but “migrants cannot determine for themselves the persons who constitute their family” for the purpose of family reunification (Kofman 2004: 245). According to Lahav, “narrow definitions of the family function almost as a selective mechanism to monitor the flow of certain migrant stocks, whose concept of family differs and who constitute the majority of migrants in Europe (i.e., Third World migrants)” (1997: 363). Similarly, Minow argues that the definition of family for immigration purposes reflects “a public policy to restrict immigration” (1997: 251). We have already seen that international law is of little help in terms of upholding extensive family definitions.

The common definition in immigration is, as we have seen, the nuclear family model. However, it is in some instances ever more restrictive. The idea that the primary migrant was the male breadwinner has been particularly ingrained, and the UK’s family reunification policy was strictly biased against female primary migrants attempting to bring their spouses until the 1980s, as these male spouses were presumed to be exploiting the family reunification system. They were obligated to “prove” that the “primary purpose” of their move to Britain was marriage and not immigration (Kofman 2004: 254). Even a nuclear family constellation was insufficient if it was female-headed. Additionally, it is practice in several European countries to only allow reunification with children under the age of 16 (notably Germany, see Lahav 1997: 364)²⁴, although the CRC89 is applicable to children up to the age of 18,²⁵ and these same states do not expect

²⁴ The EU Family Reunification Directive permits states to request that reunification applications must be submitted before the child has attained the age of 15, see art. 4(6).

²⁵ CRC1989 art 1: “For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”

their national 16-year-old children to be self-sufficient²⁶. Indeed, parents may be expected to care for their children even as they reach university age: in many countries student loans are dependent upon parental income levels (Minow 1997: 264; Hawthorne 2007: 818). It is interesting that even definitions of dependent children are more restrictive for non-nationals.

Conditions

The second power at the state's disposal is the possibility to make the right to reunite conditional. Indeed, family reunification is often subjected to a number of conditions. Firstly, the applicant must have obtained permanent residency before applications can be submitted. In most countries, family reunification is only an immediate possibility for those with full refugee status – those with complementary protection²⁷ do not benefit from such an automatic right and must usually wait longer after they obtain their status before they can apply (Kofman 2004: 246 and 255). Obtaining any kind of status – be it Convention status, complementary protection or humanitarian grounds – can take several years. As an asylum seeker, one has no rights to reunification (Kofman 2004: 250). There is no obvious legal justification for reserving family reunification for Convention refugees, as reunification rights are derived from human rights norms and not directly from the 1951 Convention.

Additionally, requirements regarding income and housing are usually imposed. This may be a reasonable expectation when it comes to ordinary economic migrants seeking to bring their family members, but it is more questionable to impose such requirements on forced migrants, as they were not admitted based on their economic viability and earning potential, but in most cases based on state obligations (i.e. *non-refoulement*). In the EU Family Reunification Directive, reunification is conditional upon “the availability of appropriate accommodation, sickness insurance, and stable resources as well as the imposition of a waiting-period before family reunion can take place” for all other than Convention refugees²⁸ (Cholewinski 2002: 274). These conditions in themselves make the right to family reunification fragile, and they may be unduly harsh; preventing reunification for low skilled, low-paid workers and persons with health problems who are unable to support incoming family members (Cholewinski 2002: 283).

While Convention refugees are largely exempted from these requirements, this is not the case for those with complementary protection, who must generally comply with the same requirements as ordinary migrants.²⁹ Such a differentiation of rights seems to presuppose

²⁶ EU treaty law permits EU citizens working in other EU countries to bring unmarried children up to the age of 21 with them (Stalford 2002: 412).

²⁷ Complementary protection is protection awarded by a state based on a recognition that the person is in a refugee-like situation although he or she does not fall within the narrow legal definition of a refugee.” It stems from legal obligations preventing return to serious harm” (McAdam 2007: 3).

²⁸ Although Convention refugees must comply with these conditions if they do not apply for reunification within three months of getting status (ECRE 2003).

²⁹ The rights of recipients of complementary protection are governed by a separate EU directive which does not at any point mention family reunification, even for unaccompanied minors (Qualification Directive 2004). This directive appears only to protect family unity when the family arrives together, not when some family members remain in the home country or elsewhere (House of Lords 2002, ECRE 2003).

that complementary protection is substantially different from refugee status; notably that it is of shorter duration. However, McAdam argues that “complementary protection is not ‘an emergency or provisional device’” 2007: 3). Such status is awarded to persons who do not qualify for status according to the five Convention reasons (race, religion, political opinion, nationality, membership in a particular social group), but who may still require permanent protection and settlement for other reasons. States have a duty not to return them to their country of origin, and their status is awarded to them based on this duty and not based on compassion.

Exclusion

The third and final tool at the state’s disposal is that of exclusion. The EU Family Reunification Directive states that “Member States may reject an application for entry and residence of family members on grounds of public policy, public security or public health” (Art 6 (1)). These three grounds could cover a range of eventualities and are open to interpretation by states (ECRE 2003: 4).

As another stark example, a Canadian policy permanently prohibits reunification with family members who were not declared to immigration authorities at the initial point of entry of the applicant³⁰. This regulation is in place to prevent fraud – making it impossible to “invent” family members at a later date. However, such a rule is highly problematic and perhaps particularly so for many forced migrants coming to Canada. There is no possibility of appeal regardless of the reasons for omitting family members from the initial interview. Nevertheless, applicants may fail to declare family members for a number of legitimate reasons. The Canadian Council for Refugees has collected stories of persons failing to declare children born since they first submitted their claim for resettlement to Canada; fearing that doing so would unduly delay the process, and assuming they would be able to bring the toddler to Canada afterwards (CCR 2008b: 3).

Others have failed to declare children born out of wedlock out of shame. Forced migrants may find themselves in situations where family members are thought dead and thus not declared. If, through serendipitous circumstances, they have survived and contact has been re-established with family members now in Canada, they are forever ineligible to reunite. The only way around this “life sentence” is to apply on humanitarian and compassionate grounds, but these applications are often rejected, and Canadian immigration authorities will no longer need to consider them if the proposed immigration regulations are implemented (CCR 2008b; CCR 2008d).

Conclusion

This section has shown that family reunification is an important part of immigration policy in terms of numbers. Immigration in general raises a number of political issues, as border control is crucial to state sovereignty. Family reunification also raises some specific issues relating to the immigration multiplier and the inability of states to pick and choose family members. However, states can, and do, use their powers to set specific parameters

³⁰ Immigration and Refugee Protection Regulations Section 117(9)(d) essentially stipulates that family members who were not declared, by definition are not family members of that person and do not qualify in the family class.

for family reunification that serve their overall immigration-political interests. This may have negative consequences for family reunification. By classifying family reunification for forced migrants as one would classify any other type of immigration, one risks creating an overly negative image of the entrants, while also obscuring the fact that family reunification is a question of human rights. This section leads us to conclude that family reunification for refugees can benefit from consideration outside of immigration policy per se. The following section will look at alternative approaches to family reunification, attempting to view it as a human rights matter, rather than a pure immigration concern.

5 Alternative Approaches to Family Reunification

Introduction

The previous sections of this paper seemed to converge on the following problem: Family reunification is unavoidably caught between individual human rights and states' widely recognized right to exercise immigration control. While refugee rights advocates argue that reunification must be considered within a rights optic, as a logical and necessary corollary to the established right to family unity, states prefer to keep family reunification within the realm of "normal" immigration. I refer to labor immigration as "normal" immigration – it is considered as being within legitimate state control. Exceptional immigration, on the other hand, is movement associated with asylum-seeking and refugees. It cannot be submitted to the same sort of control and numeral capping.

States have an incentive to frame family reunification as "just another form of immigration", and not as a rights concern, as it allows them to retain significant freedom to control it. This would explain their reluctance to expand family rights in international law, even while such rights appear to be developing in new directions domestically. This does not mean that states will never respect family unity – but it means that they will respect it on their own terms. They set conditions for family reunification; they do not give a *carte blanche*.

Viewing family reunification as an ordinary immigration matter is unhelpful for forced migrants who seek to reunite with their families. This section will seek to examine other possible conceptualizations of family reunification, attempting to dislocate it from its place in immigration politics. It will then look at the specific conditions that make this particularly desirable in relation to forced migrants and attempt to answer the following: what is distinctive about forced migrants that justifies such a dislocation?

Conceptualizing Family Reunification as a Duty towards the Refugee

Family Reunification through Derivative Status

As emphasized earlier in this paper, it appears from the Final Act of the Conference of Plenipotentiaries that the drafters of the 1951 Convention imagined that family members would be awarded derivative refugee status based on the status of the principal applicant.

Giving family members derivative status is common practice in some countries when families arrive together, but in other places it is not. Family members may be expected to all qualify as refugees individually, as in Canada where there have been cases of children getting refugee status and not parents, for example (Jastram and Newland 2003: 271). A way to improve prospects for family reunification would be to go back to this concept of derivative status, not only for family members arriving together, but for family members left behind. The presumption that family members are legitimate refugees as well leaves the burden of proof on the state to undertake potential exclusion in line with CSR51 Art 1(F). The exclusion clauses in CSR51 are in place to ensure that persons who have committed particularly serious crimes do not get refugee status – refugee status is protection against persecution, not a haven from legitimate criminal prosecution. The clauses are intended to be applied restrictively, so they would rarely be triggered.

This would keep family reunification for refugees outside of “normal” immigration, and within the more “exceptional” refugee/asylum system. In this way, an expansive right to family reunification would exist only within the asylum system, restricting the number of people who would benefit from it. This compromise may satisfy states’ control concerns regarding the consequences of opening up family reunification procedures.

Family Reunification as a State Responsibility towards an Admitted Member

When states admit refugees, they do so in large part out of a legal and moral duty toward them³¹, codified in law by the principle of *non-refoulement*, which is found in CSR51 art. 33. Even communitarian philosophers, who otherwise support the state’s right to control entry, concede a state duty to admit refugees. Walzer, for example, argues that denying asylum would necessitate using force against helpless people, which should be avoided (1983: 51).

Although the embedding of family reunification in an immigration discourse seeks to obscure the fact, state duties (albeit of a different nature) are also at stake in reunification procedures. Joseph Carens (2003) argues that states admit family members due to a moral duty toward the applicant (who is already a member of the community, in our case through obtaining refugee/subsidiary status). This moral duty is of a different nature than the moral duty that compels states to admit refugees, as it relies on “the moral claims of insiders, not outsiders” (Carens 2003: 96). Family reunification thus relies on “responsibilities of liberal democratic states towards those whom they govern” (*ibid*: 97).

Carens also tackles the question of why states need to admit family members instead of having the applicant move elsewhere to live with his or her family members. He refers to people’s “deep and vital interest in being able to continue living in a society where they’ve settled and sunk roots” (*ibid*: 97). While refugees may not have lived in the society very long, they certainly have a deep and vital interest in staying there, as it is their safe haven from persecution. They also lack alternatives – family life cannot be pursued elsewhere. This will be further discussed below.

³¹ Although political and other considerations are also important.

Another political theorist, Peter Meilaender, who generally supports states' rights to control borders, often finds himself disagreeing with Joseph Carens. However, they agree on the subject of family reunification. Meilaender highlights how denying family reunification would be unduly harsh treatment for the state to inflict upon the governed, as it would, in effect, force the applicants to choose between home and family (Plender 1988 cited in Meilaender 2001: 180). In the case of family reunification for refugees, this point becomes even stronger. In fact, the choice facing the applicant is potentially one between life and liberty and family life.

As a somewhat parallel argument to Walzer's call to avoid force against helpless refugees through *refoulement*, Meilaender emphasizes the deep and intense meaning of family relationships and the stark consequences of separation:

We are bound to our family members through a more richly complex web of relationships, and mixture of love and dependence, than we share with any other people. To deprive someone of these relationships is to deprive him of his richest and most significant bonds with other human beings. That is something we should do only in rare circumstances indeed (2001: 182).

I believe a promotion of family reunification for refugees and other forced migrants needs to be couched in a rights language. However, rights are of little value if one cannot locate a corresponding obligation. Conceptualizing family reunification as a moral duty on behalf of the state towards any settled immigrant or citizen, but which has added value for refugees, may be of help. If we look at family reunification in this manner, it cannot be submitted to numeral capping and other restrictive measures that are considered legitimate in relation to other immigrants, because the moral duty would be the same towards the family members of all refugees.

If the duty is also one to uphold particularly strong bonds, one must acknowledge that these bonds may have other bases than blood or conventional marriage. Conceived in such a way, family reunification would be a right not only for the nuclear, biological family, but for families as they self-identify.

Family Reunification as Part of a Durable Solution

Lastly, family reunification can usefully be seen a key component of any durable solution for refugees. The durable solutions contemplated for refugees are voluntary repatriation, local integration or resettlement (Jastram and Newland 2003: 564). These three options are intended to provide a "permanent resolution of the 'refugee cycle'", and "are regarded as durable because they promise an end to refugees' suffering and their need for international protection and dependence on humanitarian assistance" (UNHCR 2006: 129) While I consider refugees in liberal democracies in this paper, which usually involves one of the two latter types of durable solutions, there are some common features necessary in any kind of durable solution.

Experience shows that "refugees who are separated from close family members may be prevented by their distress and preoccupation from devoting themselves fully to build a

new life in the country of resettlement [/integration/asylum]” (Jastram and Newland 2003: 565). As such, a solution to a refugee’s plight that leaves out concern for his or her family members will rarely be perceived by him or her as being durable or satisfactory. As long as family members are separated and potentially in danger, there is no rest for those who have escaped. States have international obligations to seek durable solutions for refugees, and it can thus be argued that family reunification is integral to this duty.

What is Distinctive about Forced Migrants that Justifies an Alternative Approach?

Forced Migration and the “Elsewhere Approach”

Forced migrants are distinguishable from other migrants by the fact that they were forced to move and would not necessarily have done so under other circumstances. They are forced to move and they cannot return to their home country should they wish to do so, except at risk to themselves. This places them in a particular position, where the state can only with difficulty apply the “elsewhere approach” to reunification, which I explored above in the context of the ECtHR. If family members with whom the refugee seeks reunification are in the home country, the elsewhere approach is not applicable, as the refugee has a well-founded fear of persecution and cannot be refouled to that country.

If family members are in different countries of asylum, this assessment is less clear-cut. When children are involved, the “best interest of the child” standard could be employed to assess where reunification should take place, and a similar approach could perhaps be used in relation to adults. The question should not be whether it is at all possible to continue family life elsewhere, but whether it is reasonable to expect that person to do so. The “elsewhere approach”, as the derivative status, justifies a more expansive right to family reunification for refugees than for other migrants. This, again, may make such a right easier to promote as it restricts the number of persons eligible to claim it.

Acting in the State’s Interest: Particular Concerns Regarding Integration

While the previous sections of this section have focused on re-centering family reunification through a rights lens, we may also conclude that family reunification for refugees should be expanded by appealing to the more pragmatic interests of the host state. A discussion of modes of integration or the relative merits of different integration policies is beyond the scope of this paper, but it is “universally recognized that it is beneficial to include immigrants in the host society” (Lynch and Simon 2003: 251). Failing to achieve integration can create a foreign-born underclass within the society, and lead to conflicts between the native population and the immigrant population.

I have in several instances alluded to the fact that integration is more successful in the presence of family members. There is evidence that family units integrate more successfully into a new society and provide an important unit of psychological support (Hing 2006: 134-5). According to UNHCR, “the family unit has a better chance of successfully...integrating in a new country rather than individual refugees” (cited in John 2003: 2). As such, “protection of the family is not only in the best interests of the refugees themselves but is also in the best interests of States” (*ibid.*)

Refugees and other forced migrants face particular difficulties as they reach new societies and obtain refuge. In many cases, they did not want to leave in the first place, and many dream of returning. As mentioned, they also frequently struggle with trauma and the psychological impact of the difficult refugee experience. The presence of family members can alleviate both these strains (see Barwick *et al.* 2002, Chambon 1989). Firstly, once the family is reunited, it may become easier to look forward and try to build a new life, rather than look back at the life that has been lost. Family reunification may make refugees more eager to integrate and move on. Secondly, family members provide important social support for those who suffer from psychological trauma. As Sample emphasizes:

Governments should recognise that through supporting family unity the ‘economic burden’ they fear from refugees can be lessened: a family group will rely less heavily on external providers of assistance and protection [...] Refugees can be left isolated and in desperate need of support. The best way to alleviate this problem, for both governments and refugees, is to encourage self-sufficient refugee family and community groups (2007: 51-52).

Who? The Necessity of a Case-by-Case Approach

I have sought in this paper to problematize the (nuclear) definition of the family evidenced in immigration regulations and the way such a conceptualization affects family reunification for refugees. However, I have so far not attempted to provide any alternative definition or conceptualization. This is partly because this is a substantial undertaking; as no one has come up with a satisfactory international definition of the family before, I do not purport to do so. However, certain conclusions can be drawn about how to think about the family in family reunification decisions.

It is clear that the biological/nuclear family definition is insufficient, particularly in the forced migration context. Viewing the family as heterosexual couples with minor children only is highly restrictive and fails to recognize the diversity of family life. In the forced migration context, it is common for other family members to take on guardian roles as relatives die or disappear. The relationships formed on such bases should be recognized in any fair family reunification policy for forced migrants.

The conclusion we can draw, then, is that family reunification assessments should be done on a case-by-case basis – looking at the particular relationships that the applicants engage in, whether they be relations by blood or otherwise. I would suggest an approach of “substitutability”, focusing on the family nucleus – in the sense of a unit of caregivers and dependants – but which does not take into account only the blood ties that are presently given preference. DNA testing, as employed by many Western countries to establish family ties, is from this point of view an entirely erroneous approach. According to Taitz *et al.*, “58% of Somalis given DNA testing by Danish authorities between January, 1997, and September, 1998, received a negative result” (2002: 794). According to Somali community leaders, this was due to the differing conceptions of the family and misunderstandings among Somalis of the “Danish concept of who is a family member” (*ibid.*). While there may be several interpretations of this particular statistic, I think it suggests that the reliance on DNA testing has its limitations.

A substitutability approach would look at the grid of relationships in which the applicant finds himself or herself, and assess the roles played by different people in this grid. It would look at the family from a functional perspective, taking into account guardian roles played by older siblings, aunts, uncles, grandparents and other relatives; not just birth parents. It might also take into account the roles played by persons who are not in fact related, but who have formed significant relationships with the applicant during the refugee experience. In such an approach, “emotional and economic ties should in some instances be given the same weight as blood ties or marriage” (Sample 2007: 51).

This approach would, in effect, be informed by the approach to the family that appears predominant domestically. As mentioned, *Moore vs. East Cleveland* established that extended family relationships are constitutionally protected in the United States. Courts have come to recognize family relationships based on choice, not just those based on a particular status. Such a respect for the diversity of family life could with great benefits be introduced into family reunification procedures for forced migrants.

It must be conceded that such a system is not built to be “fraud proof”. But as the family is at once a subjective and an objective reality, objective “fraud proof” criteria, such as the DNA tests are intended to be, are insufficient. Documentation of such subjective relationships must also be conceded to be difficult to obtain. However, the difficulty of obtaining official documentation and permits for refugees was acknowledged already in the 1951 Convention, where art. 31 precludes states from imposing penalties on refugees “on account of their illegal entry or presence” if they identify themselves promptly as asylum seekers. It is thereby acknowledged that fear of persecution may make it impossible to obtain passports and visas. A similar system could be applied to the assessment of family relationships in the absence of official documentation: refugees cannot be expected to obtain birth/marriage certificates from the country of origin for the same reasons that they cannot be expected to obtain a passport, and family reunification should not be unduly restricted based on lacking documentation. This could be similarly justified: refugees should not be penalized for illegal entry because the consequences of returning them to where they came from are severe. Splitting families is, as Meilaender argues, also a harrowing and personally very damaging event, which should be avoided. Refugees deserve the benefit of the doubt, as they may otherwise be forever separated from their loved ones.

In the post-9/11 era, states must be conceded the right to perform security checks on incoming family members. However, one may suggest the imposition of a time limit to such procedures. At present, 20% of family reunification applications for refugees in Canada take more than 32 months to process for applicants from West Africa, more than 39 months from Pakistan and more than 37 months from Sri Lanka (CCR 2007). Such delays seem unreasonable.

Conclusion

This section started with the recognition that family reunification is caught between politics and human rights. Attempting to challenge the characterization of family reunification as part of “normal immigration policy”, I sought to suggest some alternative conceptualizations of family reunification based on refugee rights and state duties. I

argued that family reunification could helpfully be seen as derivative from refugee status of the applicant or as part of a durable solution, and that reunifying families is a duty that states have toward the applicant. This is justified because of the stark consequences of the impossibility of reunification in the lives of refugees, who cannot return to their homelands to pursue family life there. I finally made some suggestions for what a family reunification policy for refugees could look like, basing it on a case-by-case approach looking at the particular relationships of each application regardless of blood ties.

6 Concluding Remarks

The main purpose of this paper was to establish the existence and the scope of a right to family reunification for forced migrants. From an examination of international legal norms I conclude that there is an emerging, but fragile, right to family reunification that rests upon the human right to family unity. For many forced migrants, family reunification is the only way to ensure family unity. However, the right to family reunification is weakly codified, and very restricted.

As I examined the legal framework, it became clear that this framework was predicated on a narrow and specific definition of the family – namely the heterosexual nuclear family. While this family constellation has been dominant in Western societies since the Industrial Revolution, it is by no means the only type of family in existence, neither in the West nor elsewhere. It also became apparent that while legal protection for extended family members and alternative families is developing domestically, little such development seems apparent in relation to family reunification. This, I found, is interrelated with the politics of family reunification and immigration control. A restrictive family definition can be a useful tool to restrict immigration, as many foreign families, and in particular refugee families, do not qualify according to its criteria.

I sought to challenge this restrictive definition, highlighting its shortcomings from several perspectives. I highlighted how it was in contrast with emerging ideas of the family domestically, and how it was particularly problematic when applied to forced migrants who may have formed families of “choice or circumstance” during or after flight. To take a fresh look at family reunification for forced migrants, which would allow for more flexible determinations of eligibility for reunification, I finally sought to re-center family reunification in a rights discourse, emphasizing that family reunification can be better conceptualized outside of immigration politics. By bringing family reunification for forced migrants outside of normal immigration politics, and conceptualizing it within a refugee protection and human rights optic, I think it may be possible to circumvent some of the problems that currently face persons attempting to reunite with their family members.

I suggested we conceptualize family reunification as a duty of the state towards a forced migrant to ensure that he or she may live with those with whom he has a strong emotional bond. This highlights the specificity of forced migrants as they cannot pursue family life elsewhere, which would detach family reunification for forced migrants from regular

immigration politics. At the same it emphasizes the subjective nature of family ties, which can be accounted for on a case-by-case basis in a sound and humane family reunification policy.

Through my research I have realized that many areas of family migration and reunification remain unexplored. I particularly found that the family life of sexual minorities goes below the radar in research relating to family migration. I would suggest that further research be devoted to both case studies of refugee families attempting to reunite and larger quantitative studies looking at family structures and immigration policies' abilities to respond to various forms of family life. Such research would need to address difficult questions related to cultural relativism and modes of living in multicultural societies. The goal of such research could be practical: the search for fair and workable family reunification policies that acknowledge the variety of family life is far from completed.

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