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FAMILY REUNIFICATION REGULATIONS AND WOMEN: THE PERSPECTIVE OF INTERNATIONAL LAW

Abstract:
The concept of family reunification is well established in contemporary migration laws, at both the national and international levels. Focusing on international and EU law, in this article I argue that while existing provisions on family reunification are formulated in neutral language, from the gender point of view the enforcement of these substantively neutral rules may, in certain situations, result in discrimination, or at least bring about negative consequences, with respect to women in cases both when they are the sponsors of migration or the bearers of consequences of male migration. Following presentation of the international legal framework on family reunification and the relevant international jurisprudence, I deal with some rather common aspects relating to the personal scope of family reunification regulations, covering only the issues of who can, and who cannot, join their family member(s)/sponsor(s) in a foreign country (i.e. the unmarried minor rule, excluded forms of marriages – polygamous and forced marriages - and age limits). Some procedural aspects of family reunification are then dealt with (waiting periods, delays in proceedings, and end of a relationship as a cause for termination of residence rights.). These issues are examined with respect to concerns that they may cause indirect, or even direct, gender discrimination in some cases, while in others they may affect women more negatively than men.

Keywords: Directive 2003/86/EC, family reunification, gender discrimination, international law, women's rights

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INTRODUCTION

The concept of family reunification is well established in contemporary international law, particularly in international human rights law. It can be described in simple terms as a situation whereby a family member or members join another member of the family who is already residing lawfully in another country (the sponsor).

Family reunification is directly connected with immigration, which explains why is not only a purely legal issue but also a highly sensitive political one. This is especially true in the developed world and the migrant-receiving countries, for instance in the EU countries, where family reunification "is generally believed to account for a large proportion of immigration."[1] In previous years these figures were very high in some of these countries, accounting for almost 60% of all accepted immigrants.[2] However, due to the current (2015-2017) refugee crisis in Europe and mass influx of migrants seeking refugee status, the percentage of migrants receiving residence permits based on family reunification is, compared to the overall numbers of immigrants in many European countries, much lower.[3] This is probably one of the reasons why many migrant-receiving states are so reluctant to accept the idea of family reunification as a basic human right, or support stronger international obligations in this area.[4]

In looking at the international regulations on family reunification from the point of view of the rights of women and the elimination of gender discrimination, one should first of all observe that both in international human rights law as well as in EU law the exercise of specifically detailed rights (e.g. the right to family life) should be enforced without discrimination, including sex discrimination.[5] The obligation to respect and ensure human rights without distinction of sex can be found not only in human rights treaties of general application (e.g. in Articles 2 and 3 of the ICCPR[6]),

[1] R. Lawson, *Family Reunification Directive – Court of Justice of the European Communities*, 3(2) European Constitutional Law Review 324 (2007), p. 324.

[2] K. Groenendijk, *Family Reunification as a Right under Community Law*, 8(2) European Journal of Migration Law 215 (2006), p. 215.

[3] *E.g.* Danish statistics for 2015 show that the number of residence permits granted on the basis of family reunification accounted for around 15% of all entry permits granted for that year – *see* The Danish Immigration Service, *Statistical Overview Migration and Asylum 2015*, Copenhagen: 2016, at p. 2.

[4] A clear example of such reluctance is reflected in the position taken by Japan, Liechtenstein and Switzerland towards the rather vague provisions on family reunification in Article 10(1) of the Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3) (CRC). Japan registered a declaration and the other above-mentioned countries entered reservations, all of which aim to protect their states' absolute freedom in deciding on family reunification – *see* UN Treaty Collection.

[5] While having in mind the differences between "sex" and "gender" discrimination, I follow the dominant practice in the literature on this subject and use both terms interchangeably. For an example of their interchangeable usage, *see, inter alia,* M. Nowak, *U.N. Covenant on Civil and Political Rights. CCPR Commentary*, N.P. Engel Publisher, Kehl: 2005, *passim.*

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

but also in more specific international instruments (e.g. Article 1 of the ICRMW[7] and the 1979 Convention on the Elimination of All Forms of Discrimination against Women – CEDAW – *passim*).[8] Also one can find gender equality provisions in primary EU law,[9] in particular the provision that the EU "in all its activities (…) shall aim to eliminate inequalities, and to promote equality, between men and women" (Article 8 of the TFEU).[10] The same is true for the ILO Conventions. Edel rightly observed that all "declarations of rights inherited from the Enlightenment tradition (...) guarantee equality between human beings by prohibiting discrimination",[11] obviously including sex discrimination. As will be shown in part 1, all of the above-mentioned instruments are relevant to family reunification.

Hence international legal instruments and regulations which contain, or from which one can derive, provisions on family reunification are not only formulated in neutral language from the gender point of view, but also the application of these instruments/regulations should take place without sex discrimination. For instance the CEDAW Committee, in its General Recommendation No. 21 (Equality in marriage and family relations), argued that "[m]igrant women who live and work temporarily in another country should be permitted the same rights as men to have their spouses, partners and children join them."[12]

In most cases, the principal problems with women's rights in the context of family reunification regulations (similarly as to other fields) lie with the enforcement of substantively neutral rules, rather than with the rules as such. This is especially true in situations where a restrictive approach to family reunification is taken. In such instances there is no room for a case-by-case approach or for taking the special circumstances of a given case into consideration. Restrictive practices may entail negative consequences predominantly (but not exclusively) for women in both possible situations. i.e. when women are the sponsors of immigration or bear the consequences of male migration. There is an extensive literature on the gender aspects of migration and the common understanding is that migration negatively affects women more than men (in the sense that women migrants are more often victims of forced labour, different forms of violence, deterioration of skills, and other forms of injustice and arbitrary treatment).[13] It is also

[7] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3 (ICRMW).

[8] Convention on Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).

[9] *E.g.* Article 2 of the Treaty on European Union (Maastricht Treaty, as amended), consolidated version, OJ [2010] C 83/13 (TEU).

[10] Treaty on the Functioning of the European Union, consolidated version, OJ [2010] C 83/47 (TFEU).

[11] F. Edel, *The Prohibition of Discrimination under the European Convention on Human Rights,* Council of Europe Publishing, Strasbourg: 2010, p. 7.

[12] CEDAW, General Recommendation No. 21, UN Doc. A/49/38 (1994), para. 10.

[13] For the European perspective *see, inter alia,* the recent collection of interdisciplinary studies: H. Stalford, S. Currie, S. Velluti (eds.), *Gender and Migration in 21st Century Europe*, Ashgate, Farnham-

postulated that the gender perspective is neglected by states in their internal immigration policies, which contributes to furthering gender stereotypes.[14] Linking this to family reunification regulations and practices, one can point out, for instance, that a rather principal condition for family reunification is that the sponsor of family reunification should legally reside in the receiving country. Many women migrant workers do household work or take care of elderly and sick persons in their homes,[15] and this area of employment (personal care/domestic work sector) in many migrant-receiving countries is outside of the official labour market, even for their nationals. In the case of migrant workers, this means that these women migrants are often undocumented, i.e. do not have legal residence in the countries where they work, and as such fall outside the family reunification system. One can also pose the question: How does gender influence states in the process of balancing their sovereign right to decide on the conditions upon which aliens' may enter their territory with the aliens' rights to respect and protection for their family life? In many cases, this kind of balancing is the core issue when states decide whether to grant permission to enter their country for family reunification reasons.

Further empirical – and not only legal – studies are needed to answer this question and to verify the above-stated observations concerning undocumented women migrant workers, especially in the light of the fact that in many countries there are other areas of illegal employment occupied predominantly by male migrant workers (e.g. building sites). It is also extremely difficult to suggest any clear-cut solutions to these problems. While these matters are not completely neglected in this article, by and large they fall its scope and the research perspective.[16]

While the public international law perspective is dominant in this work, some references to private international law are also necessary, with the main observation being that private international law, traditionally very liberal in recognizing, for instance, different forms of marriages, is used instrumentally in the area of family reunification to justify restrictive positions taken by most of the migrant-receiving countries.

Burlington: 2010. For a global perspective *see, inter alia,* the recent collection of contributions: T. Truong, D. Gasper, J. Handmaker, Bergh S. I. (eds.), *Migration, Gender and Social Justice. Perspective on Human Insecurity,* Springer, Heidelberg-New York-Dordrecht-London: 2014.

[14] *See, inter alia,* M. Chou, *EU Mobility Partnerships and Gender: Origin and Implications*, in: R.A. Sollund (ed.), *Transnational Migration, Gender and Rights,* Emerald, Bingley: 2012, pp. 11-31. Possible examples of gender stereotyping were also suggested by Sherlock in her observation: "[i]f migrant women are considered more to be consumers of welfare and state resources than men, then arguably the criteria of selection of family members of admission will have a gendered aspect" – *see* C. Sherlock, *Gender, Family Unity and Migration: Discourses and Dilemmas*, in: Stalford *et al.* (eds.), *supra* note 13, p. 224.

[15] This is especially true for Filipina workers. This phenomenon has been the subject of extensive studies –*see, inter alia,* R.S. Parrenas, *Migrant Filipina Domestic Workers and the International Division of Reproductive Labor*, 14(4) Gender and Society 560 (2000), and the references therein.

[16] Another issue which needs further studies and, as such, won't be considered in this article is intersectional discrimination in the context of family reunification. For an empirical study on the intersectional discrimination experienced by women migrant workers, *see* E. L. Sweet, S. S. Lee, S. Ortiz Escalante, *A Slow Assassination of Your Soul: Race, Citizenship and Gender Identities of New Economic Places*, in: Sollund (ed.), *supra* note 14, pp. 99-126.

In part 1 a brief overview of the current legal framework on family reunification (which at the same time coincides with the scope of this study) and international jurisprudence on family reunification and women's rights are presented. Next, in parts 2 and 3, the analysis is conducted from the point of view of specific areas and issues related to family reunification regulations which seem to be especially prone to produce either direct or indirect discrimination against women, or bring about negative effects to predominantly women. These parts deal with some aspects of the personal scope of family regulations, but only in relation to the issues of who can, and who cannot, join their family member (sponsor) in a foreign country (i.e., the unmarried minor rule; excluded forms of marriages – polygamous and forced marriages; and age limits). The conditions in place in many jurisdictions and in international regulations relating to the sponsor (e.g. stable income, adequate housing) will not be discussed, mainly because there is not enough evidence to link them directly to women's rights and the elimination of sex discrimination (similarly to the issue of legal residence, mentioned above).[17] Some procedural aspects of family reunification are then examined (waiting periods, delays in proceedings, and end of a relationship as a cause for terminating legal residence). With regard to some of the above-mentioned issues, doubts are raised regarding indirect, and in some cases even direct, discrimination. Other doubts are presented in the context of affecting women more negatively than men.

The conclusions contained in part 4 offer some general considerations on how and why the restrictive rules make women victims in many cases, summarize the main findings of the study, and propose some recommendations.

1. THE INTERNATIONAL LEGAL FRAMEWORK ON FAMILY REUNIFICATION AND INTERNATIONAL JURISPRUDENCE ON FAMILY REUNIFICATION AND WOMEN'S RIGHTS

In international law, specific provisions on family reunification are rather rare. In most situations they result from the obligation of states to protect family and the right to respect for family life, as is laid down in both universal and regional instruments of human rights protection (e.g., Articles 12 and 16(3) of the UDHR,[18] Articles 17 and 23(1) of the ICCPR, Article 10(1) of the ICESCR,[19] Article 8 of the ECHR,[20] and Articles 11(2) and 17(1) of the American Convention on Human Rights[21]). In interna-

[17] However, further studies are needed to determine if there is a gender bias in family reunification regulations, having in mind that the person entitled to family reunification, in most cases, is a sponsor who is male.

[18] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).

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

[20] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (adopted 4 November 1950, entered into force 3 September 1953) (ECHR).

[21] American Convention on Human Rights "Pact of San Jose, Costa Rica" (adopted 22 November 1969, entered into force 18 July 1978) OAS Treaty Series No. 36 (ACHR).

tional human rights law, the ESC,[22] the CRC,[23] and the ICRMW[24] are the only treaties to include specific articles addressing the issue of family reunification. It has to be noted, however, that the CRC is almost universally accepted (196 parties), while the ICRMW has been ratified by only 49 states and only a few of them can be described as migrant-receiving countries.[25] And the ESC, adopted within a regional international organization, i.e. the Council of Europe, has been ratified by only 27 of the 47 member states.

More detailed provisions on family reunification can be found in the 1975 ILO Convention No. 143.[26] However, the most detailed regulations on the family reunification are found by far in two regional – European – legal instruments.

The 1977 European Convention on Legal Status of Migrant Workers,[27] adopted within the Council of Europe, deals with family reunification in detail in its Article 12(1)[28] followed by provisions on possibility of entering declarations (Article 12(2) and

[22] European Social Charter (adopted 18 October 1961, entered into force 26 February 1965), CETS No. 35 (ESC). State parties are obliged to undertake "to facilitate as far as possible the reunion of the family of a foreign worker permitted to establish himself in the territory" (Article 19(6)).

[23] Article 10(1) requires states to ensure that applications for family reunification which involve children "shall be dealt with by State Parties in a positive, humane and expeditious manner". In the case of refugee children, under Article 22(2) state parties are obliged to cooperate, i.e. with the UN, to "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." For more on these provisions, *see S.* Detrick, *A Commentary on the United Nations Convention on the Rights of the Child*, Martinus Nijhoff Publishers, The Hague: 1999, pp. 183-202, *see also* 361-375.

[24] Article 44(2) requires state parties to "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."

[25] *See, inter alia,* J. Schneider, *Demystifying the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families: Why Are States so Reluctant to Ratify*?, in: D. Henschel, S. Graf Kielmansegg, U. Kischel, C. Koenig, R. A. Lorz (eds.), *Mensch und Recht. Festschrift fürEibe Riedel zum 70. Geburtstag,* Duncker&Humblot, Berlin: 2013, p. 153. One of the reasons for the reluctance of so many States towards this treaty is its provisions on family reunification – *see* M. Grange, M. d'Auchamp, *Role of Civil Society in Campaigning for and Using the ICRMW*, in: P. de Guchteneire, A. Pécoud, R. Cholewinski (eds.), *Migration and Human Rights. The United Nations Convention on Migrant Worker's Rights*, Cambridge University Press-UNESCO Publishing, Cambridge: 2009, p. 78; and in the same book: R. Ryan, *Policy on the ICRMW in the United Kingdom*, pp. 285-286; H. Oger, *The French Political Refusal on Europe's Behalf*, pp. 307-309; K. Touzenis, *Migration and Human Rights in Italy: Prospects for the ICRMW*, p. 353.

[26] Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (adopted 24 June 1975, entered into force 9 December 1978) 1120 UNTS 323. Its Article 13(1) provides that "[a] Member may take all necessary measures which fall within its competence and collaborate with other Members to facilitate the reunification of the families of all migrant workers legally residing in its territory", and Article 13(2) provides that "the members of the family of the migrant worker to which this Article applies are the spouse and dependent children, father and mother." The latter provision is rather unique as the other international provisions on family reunification refer only to the nuclear family (spouses/partners and one or more children).

[27] European Convention on Legal Status of Migrant Workers (adopted 24 November 1977, entered into force 1 May 1983), CETS No. 93.

[28] "Article 12 – Family reunion

derogations (Article 12(3-5). It has to be noted, however, that among the 11 state parties (again, out of 47 member states), three[29] entered a declaration under Article 12(2) with the effect of making family reunification "further conditional upon the migrant worker having steady resources sufficient to meet the needs of his family."[30]

In the context of the European Union, family reunification is regulated in an even more detailed way, in EU Directive 2003/86/EC on the right to family reunification.[31] In the Directive's preamble, special mention is made that

> Member States should give effect to the provisions of this Directive without discrimination on the basis of sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinions, membership of a national minority, fortune, birth, disabilities, age or sexual orientation (Recital 5).

The Directive contains a legal definition of family reunification:

> the entry into and residence in a Member State by family members of a third country national residing lawfully in that Member State in order to preserve the family unit, whether the family relationship arose before or after the resident's entry.[32]

Based on the practice of international courts and treaty monitoring bodies, this definition could be rewritten to create a broader definition of more general use (not only within the EU context), which would also include not only positive obligations towards aliens, but some negative ones too, and cover situations where citizens are involved. Such a definition could be as follows: "The entry into and residence in or remaining in a State by family members of an alien residing lawfully in that State, or of alien family members of a citizen residing in that State, in order to preserve the family unit."

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1. The spouse of a migrant worker who is lawfully employed in the territory of a Contracting Party and the unmarried children thereof, as long as they are considered to be minors by the relevant law of the receiving State, who are dependent on the migrant worker, are authorised on conditions analogous to those which this Convention applies to the admission of migrant workers and according to the admission procedure prescribed by such law or by international agreements to join the migrant worker in the territory of a Contracting Party, provided that the latter has available for the family housing considered as normal for national workers in the region where the migrant worker is employed. Each Contracting Party may make the giving of authorisation conditional upon a waiting period which shall not exceed twelve months."

[29] France, the Netherlands and Norway.

[30] The possibility of entering these kinds of declarations ("at any time") contained in Article 12(2), as well as temporal derogations (again "at any time") from Article 12(1), provided for in Article 12(3) are quite unusual and as such confirm a reluctance towards and constraints on family reunification obligations.

[31] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ [2003] L 251/12. However, this is not the only legal source of family reunification in the EU. For instance, if the sponsor of family reunification is an EU national, admission of his family members is governed by Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states, amending regulation (EEC) No 1612/68 and repealing directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ [2004] L 158/77.

[32] Article 2(d).

According to the UN International Migration Reports, most, but not all, migrant-receiving countries have provisions allowing for family reunification under certain conditions.[33] In spite of the fact that in most cases these provisions are designed to implement the above-mentioned international obligations of these countries, the interpretation of these provisions and the determination of the conditions under which family reunification is permissible vary among countries. One of the reasons for the considerable diversity of family reunification regulations and practices is the fact that, as Cholewinski rightly observed, "specialist international instruments, both of universal and regional scope, invoke the principle of family reunion, although they do not go so far as to recognize it as a right."[34] In consequence, states are not bound by international law to guarantee family reunification. However, decisions on granting family reunification can fall within the scope of protected rights, like for instance the right to respect for family life. In this context only, most international courts and treaty monitoring bodies[35] set minimal standards for family reunification and monitor States' practices.

When considering international jurisprudence on family reunification and women's rights one should focuses on two cases which have become of interest to international judicial bodies, both of which considered issues relating to family reunification directly in the context of the prohibition of discrimination on the grounds of sex.[36] Both cases are from the 1980s, and both are clear examples of regulations on family reunification which discriminate against women in a direct way and, as such, are reminiscent of the past, when openly discriminatory (on the grounds of sex) regulations in different fields of law were common even within Western European legal systems.[37] The first of the two cases (chronologically) was considered by the Human Rights Committee.

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[33] 2006 International Migration Report of the UN Department of Economic and Social Affairs, p. 10. Azerbaijan is an example of a country which recently experienced waves of immigration without legislation on family reunification. This situation was recently criticized by the UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families during consideration of the second periodic report of Azerbaijan under Article 73 of the ICRMW (CMW/C/AZE/CO/2, para. 38).

[34] R. Cholewinski, *Family Reunification and Conditions Placed on Family Members: Dismantling a Fundamental Right*, 4(4) European Journal of Migration Law 271 (2002), p. 275.

[35] Apart from the courts and those bodies which can interpret and deal with family reunification directly, based on specific regulations. This is the situation especially with respect to the CWM Committee (Article 44(2) of the ICRMW) and the CJEU (EU Directive 2003/86/EC), and also to a lesser extent, having in mind the fragmentary regulation of the CRC (Articles 10(1) and 22(2), the CRC Committee. The ILC Convention No. 143 and the European Convention on Legal Status of Migrant Workers do not provide for either monitoring or judicial bodies.

[36] Family reunification was also mentioned in the facts of a case submitted to the CEDAW Committee (under the Optional Protocol to the CEDAW), but the main issues in this case were child custody and the execution of domestic court judgments; *see M. K. D. A.-A. v. Denmark*, Communication No. 44/2012 (2013).

[37] There are numerous examples confirming this statement. For example, the first serious revisions of the directly discriminatory provisions on the legal status of married women in the French Civil Code began only in 1964; *see* B. Audit, *Recent Revisions of French Civil Code*, 38(3) Louisiana Law Review 747 (1978), *passim.*

The Human Rights Committee considered several communications concerning family reunification submitted under the Optional Protocol to the ICCPR.[38] Only in one of them,[39] that being one of the first cases that was brought to HRC, was a gender discrimination claim raised. In this case, the allegedly threatened family unit concerned persons with different citizenships, including persons with citizenship of the state in which the family was going to live, and the alleged threat to the family related to the risk of an inability to stay in the country, and not refusal to enter that state by a family member. In the case of *Shirin Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius,*[40] the complaint's authors claimed that changes made (with retroactive effect) in the law on the legal situation of aliens (foreign husbands must apply to the Minister of the Interior for a residence permit and in case of refusal of the permit they have no possibility to seek redress before a court of law[41]), were discriminatory for Mauritian women and infringed on, *inter alia*, the right to respect for family life (Article 17) and the obligation to protect family (Article 23(1)). In relation to the three applicants who were married to a foreigner,[42] the HRC focused, in the first instance, on the alleged violations of Articles 2(1) and 3 in conjunction with Article 17 of the ICCPR. In this context, it noted that "[t]he authors who are married to foreign nationals are suffering from the adverse consequences of the statutes discussed above only because they are women."[43] It formulated the following justification for finding a violation of the provisions contained in the Articles:

> Whenever restrictions are placed on a right guaranteed by the Covenant, this has to be done without discrimination on the ground of sex. Whether the restriction in itself would be in breach of that right regarded in isolation, is not decisive in this respect. It is the enjoyment of the rights which must be secured without discrimination. Here it is sufficient, therefore, to note that in the present position an adverse distinction based on sex is made, affecting the alleged victims in their enjoyment of one of their rights. No sufficient justification for this difference has been given.[44]

A similar conclusion and justification ended the short analysis of the infringement of Article 23(1),[45] however this time in connection not only with Articles 2(1) and 3,

[38] Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (OP-ICCPR).

[39] In other cases regarding family reunification, the HRC did not consider claims of gender discrimination. *See, inter alia A. S. v. Canada (A. S. v. Canada)*, Communication No. 68/1980 (1984), *Benjamin Ngambi v. France (Benjamin Ngambi v. France)*, Communication No. 1179/2003 (2004).

[40] *Shirin Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius*, Communication No. R.9/35 (1981).

[41] *Ibidem*, para. 7.2.

[42] The remaining seventeen were unmarried. In relation to this group, the HRC stated that one could not speak about any infringement of the ICCPR, since they were not actual victims of the infringement of its provisions, and their complaint, as *actio popularis.*

[43] *Ibidem*, para. 9.2 (b) 2 (i) 6.

[44] *Ibidem*, para. 9.2 (b) 2 (i) 8.

[45] *Ibidem*, para. 9.2. (b) 2 (ii) 1-4.

but also in connection with Article 26 (principle of equality before the law and equal protection of the law).[46] Mauritius subsequently informed the HRC that it had amended the discriminatory provisions of the laws in question.[47] The *Shirin Aumeeruddy-Cziffra* case is a clear example of discrimination on the grounds of sex in regulations directly connected with the exercise of rights relating to respect for family life and the obligation of a state to protect family. It is not a typical case of family reunification, since the families of the applicants, as a result of the discriminating regulations, could be only potentially divided. However, the very existence of discriminatory regulations reduced the legal certainty of not only the applicants' families, but also of future families placed in situations typically related to family reunification.

The problem of discrimination against women also appeared also in the first case considered by the Strasbourg court concerning family reunification,[48] i.e. in the case of *Abdulaziz, Cabales and Balkandali v. The United Kingdom.*[49] The applicants were three women, foreigners, living legally and permanently in the United Kingdom, whose husbands (not having British citizenship) were refused to remain or reunite with them in the United Kingdom. According to the immigration laws in force at the time of the case, stricter conditions existed for husbands seeking to remain or reunite with their wives than for the wives of settled men (i.e. the Court found that "[w]ives admitted under these rules [on family reunification – author] would be given indefinite leave to enter; husbands would be initially admitted for twelve months."[50]).[51] The applicants claimed that this practice violated, *inter alia*, their right to respect for family life (Article 8) and that it was discriminatory on the grounds of sex and, as such, was contrary to Article 8 in conjunction with Article 14 (prohibition of discrimination).

The Court, finding that "the applicants have not shown that there were obstacles

[46] For more on the nature of the anti-discriminatory clause in Article 26 of the ICCPR, *see especially* Nowak *supra* note 5, pp. 597-634, C. Edelenbos, *The Human Rights Committee's Jurisprudence under Article 26 of the ICCPR: The Hidden Revolution*, in: G. Alfredsson, J. Grimheden, B. G. Ramcharan, A. De Zayas (eds.), *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Möller*, Martinus Nijhoff, The Hague-Boston-London: 2001, pp. 123-127; E. W. Vierdag, *The Concept of Discrimination in International Law.* Martinus Nijhoff, The Hague: 1973, pp. 120-127.

[47] *See* A. de Zayas, J. Th. Möller, T. Opsahl, *Application of the International Covenant on Civil and Political Rights under the Optional Protocol by the Human Rights Committee*, 28 German Yearbook of International Law 9 (1985), p. 59.

[48] Until 1 November 1998, the entry into force of Protocol 11 of the ECHR, there were two judicial organs – the European Commission on Human Rights, and the European Court of Human Rights.

[49] ECtHR, *Abdulaziz, Cabales and Balkandali v. The United Kingdom* (App. Nos. 9214/80, 9473/81, 9474/81), 28 May 1985. Similarly to *Shirin Aumeeruddy-Cziffra,* this case is also unique and novel. It was the first example of a substantive examination into a complaint by aliens under Article 14, and one of the first cases in which the Court found a violation of Article 14 (*see* Edel *supra* note 11, p. 12).

[50] ECtHR, *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, para. 23.

[51] For more information on the origins and the legislation history of these provisions and the background of the case, *see* J. Bhabha, S. Shutter, *Women's Movement. Women under Immigration, Nationality and Refugee Law*, Trentham Books, Stoke-on-Trent: 1994, pp. 55-76.

to establishing family life in their own or their husbands' home countries or that there were special reasons why that could not be expected of them",[52] held that Article 8, when taken alone, had not been violated. On the other hand, it unanimously found a violation of Article 14, taken together with Article 8.

It is worthwhile reconstructing the way in which the analysis with regard to the sex discrimination claim was conducted by the Court. The Court observed that it was not disputed that under immigration law it was easier for men to obtain permission for their spouses to enter or remain in the UK than for women.[53] The Government argued that the difference in treatment was primarily justified "by the need to protect the domestic labour market at a time of high unemployment" and invoked statistics that "men were more likely to seek work than women, with the result that male immigrants would have a greater impact than female immigrants on the said market."[54] In the Court's opinion those arguments were not convincing,[55] especially in the light of formerly made observations that

> the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe. This means that very weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention.[56]

It seems that in the light of the above-quoted final sentence[57] it is now difficult to imagine a regulation concerning family reunification which would, in a direct (open) way, distinguish between the legal situation of women and men and at the same time be regarded as compatible with the Convention. Similarly to the case of *Shirin Aumeeruddy-Cziffra,* one should totally agree with the Court's decision regarding discrimination on the grounds of sex.

There have been no other cases considered on the merits in which sex discrimination claims were raised. However, the European Commission on Human Rights declared two applications where such claims were raised as inadmissible. In both cases sex discrimination claims were put forward in the context of polygamous marriages and the rejection of permission to enter the United Kingdom for a second wife, in addition to

[52] ECtHR, *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, para. 68.

[53] *Ibidem*, para. 74.

[54] *Ibidem*, para. 75. Bhabha and Shutter suggested rather bluntly that a part of the concern in the United Kingdom which caused the different treatment was based on prejudices and stereotypes closely connected also to race, that is, on the one hand, the preferable treatment of male migrants was because of "white British men's fears that 'their women' might become sexually associated with these 'wifeless' black men"; and on the other hand the restriction on entry of women's spouses was designed to make it easier for "white British men to select their wives from whatever part of the world they wished" by preventing women "from bringing in husbands from abroad" – *see* Bhabha & Shutter, supra note 51, p. 56.

[55] ECtHR, *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, para. 79.

[56] *Ibidem*, para. 78.

[57] The expression "very weighty reasons" was used for the first time by the Court in this judgment – *see* Edel *supra* note 11, p. 131, and since then it has been used quite frequently by the Court in cases concerning not only sex discrimination, but also discrimination on other grounds.

the one already residing in the country. In case of *R. B. v. The United Kingdom*,[58] the Commission concluded that the application is manifestly ill-founded (Article 35(3a) of the ECHR) and in the case of *Khan v. The United Kingdom*[59] that the applicant hadn't complied with the six-month rule (Article 35(1). In spite of the Commission's conclusions, one can find interesting statements in both of the decisions. The principles applied by the Commission in the first case were summarised as follows:

> The family life circumstances in the present case do not outweigh the legitimate considerations of an immigration policy which rejects polygamy and is designed to maintain the United Kingdom's cultural identity in this respect. (…) The relevant domestic immigration law permits, in principle, a British citizen or an alien settled in the United Kingdom, to be joined by his or her foreign spouse. The entitlement is granted to just the one spouse for the duration of the marriage. The discrimination of which the applicant complains flows essentially from the practice of polygamy by the applicant's father, for which the respondent Government is not answerable under the Convention.

In the latter case, the Commission recalled the argument submitted by the Government with approval:

> The Government recalls that bigamy is a criminal offence in the United Kingdom, and notes that the applicant has not in fact been prevented from marrying twice by United Kingdom law or the application of the Rules. They submit that a polyandrous woman would not be permitted to be joined by more than one husband, as a request for such leave to enter would be refused as not being conducive to the public good.

I will come back and comment on these decisions later when discussing, in more detail, polygamous marriages in the context of family reunification regulations and women.

2. WHO IS PERMITTED TO JOIN?

There are a wide variety of frequently occurring conditions in the national laws of different states which have to be met in order to be allowed to join a family member for family reunification reasons. Some of them are also confirmed in international regulations or by international courts and treaty monitoring bodies. This part will discuss those conditions which raise serious doubts in terms of the subject matter of this study.

2.1. Unmarried minor

The requirement that a child who is mentioned in an application for family reunification must not be in a marital union can cause, at least in some cases, negative conse-

[58] ECtHR, *R. B. v. The United Kingdom* (App. No. 19628/92), 29 June 1992, Admissibility decision.

[59] ECtHR, *Khan v. The United Kingdom* (App. No. 23860/94), 29 November 1995, Admissibility decision.

quences for women. Such provisions, limiting the subjective scope of family reunification, can be found in, e.g. Directive 2003/86/EC (Article 4(1), ICRMW (Article 44(2), The European Convention on Legal Status of Migrant Workers (Article 12(1), and also in the internal law of many countries (e.g. Argentina, Brazil, Canada, China, Denmark, Guatemala, New Zealand, Norway, the United States, and Canada).

The above-mentioned negative consequences can occur in the situation of formally married women who do not live with their husband, and who are not divorced and cannot get a divorce. Such situations take place most frequently in some of the Islamic States, in connection with the regulations on divorce stemming from *shariah* law, where the husband can unilaterally terminate a marriage by repudiation (*talaq*), while the wife may do so only in exceptional situations and only through a court proceeding (*tatliq*).[60] The scale and gravity of the problems encountered by women in order to obtain a divorce in some Islamic States are confirmed by the number and nature of cases submitted to Western courts relating to divorce disputes among migrants. Indeed some of the courts, taking women's interest into account and trying to reconcile secular and religious law, when granting a divorce on the basis of domestic law at the same time oblige the husband to perform *talaq*, so that such divorce will be recognised in the country of origin of the former spouses.[61] One can imagine a situation whereby a young woman leaves her husband, and for whom reunification with her parents (e.g. with her mother) in another country may be her only chance for a dignified life, but who, in failing to meet the necessary conditions for family reunification, will be excluded from the country on account of being married.

Such situations become even more dramatic when one bears in mind cases of forced marriages or child marriages. These issues directly give rise to another situation whereby the unmarried minor rule makes women the most likely to suffer, a situation which was recently presented and critically appraised by Mustasaari.[62] Her argument is based on the case from the Swedish Migration Court of Appeal, where an application for family reunion with a father residing legally in Sweden was refused to his sixteen-year-

[60] For more details on Islamic family law, *see* D. S. El Alami, D. Hinchcliffe, *Islamic Marriage and Divorce Laws of the Arab World,* Kluwer Law International, London-The Hague-Boston: 1996. For more on Islamic divorce (from the Islamic perspective), *see* M. J. Maghniyyah, *Divorce according to Five Schools of Islamic Law,* Islamic Culture and Relations Organization, Tehran: 1997.

[61] For an overview of practice of German courts, *see* K. Siehr, *Divorce of Muslim Marriages in Secular Courts*, in: J.-P. Ancel *et al.* (eds.), *Vers de nouveaux équilibres entre ordres juridiques: Liber amicorum Hélène Gaudemet-Tallon*, Dalloz, Paris: 2008, pp. 811-813; M. Rohe, *Recognition and Institutionalization of Islam in Germany*; in: M.-C. Foblets, J.-F. Gaudreault-DesBiens, A. Dundes Renteln (eds.), *Cultural Diversity and the Law. State Responses from Around the World*, Bruylant, Bruxelles: 2010, pp. 153-156. For examples from the practice of Dutch courts, *see* T. Loenen, *Family Law Issues in a Multicultural Setting: Abolishing or Reaffirming Sex as a Legally Relevant Category? A Human Rights Approach*, 20(4) Netherlands Quarterly of Human Rights 423 (2002), pp. 423-424. For more on the recognition of *talaq* in European courts, *see* S. Rutten, *Recognition of Divorce by Repudiation (talaq) in France, Germany and the Netherlands*, 11(3) *Maastricht Journal of European and Comparative Law* 263 (2004).

[62] *See* S. Mustasaari, *The Married Child Belongs to No One. The Legal Recognition of Forced Marriages and Child Marriages in the Reuniting of Families*, 26(3) Child and Family Law Quarterly 261 (2016).

old Iraqi daughter (and her one-year-old child), based on the fact that she was, under Iraqi law, in a valid marital union.[63] In rejecting the application the Swedish court, relying on the mechanism of private international law, recognized the validity of her marriage, despite her claims that she was only fifteen when entering into it and never gave her consent to it. As Mustasaari demonstrated, this case was an example of "[t]he interplaying norms and tensions between migration law, family law and human rights law," as well as private international law,[64] which brings about many complex and sensitive legal problems. In my opinion however, despite sharing some of the concerns put forward by Mustasaari (including the rationale behind a restrictive application of the *ordre public* clause[65] and the ambiguities in applying the principle of the best interest of a minor child to these kinds of cases), this case has to be considered in the light of the provisions of EU Directive 2003/86, which is the basis for the Swedish laws on aliens in this regard. An application of its Article 5(5) (the principle of the best interest of a minor child), the rationale of Article 4(5) (preventing forced marriages), and the guideline of Recital 5 of the Preamble (to "give effect to the provisions of this Directive without discrimination on the basis of sex") to similar cases should result in decisions not to recognize such marriages and, in consequence, result in the compliance of such situations with the unmarried minor rule. Based on different facts, the European Court of Human Rights in its recent judgment, *Z.H. and R.H. v. Switzerland*, stated that the ECHR "cannot be interpreted as imposing on any State party to the Convention an obligation to recognise a marriage, religious or otherwise, contracted by a 14 year old child."[66] I would argue that there should be an obligation not to recognise child marriages, except for exceptional circumstances.

In any case, both of the above-mentioned situations are clear examples of the negative consequences for women of this frequent condition – the unmarried minor rule – attached to family reunification. Although written in neutral language from the strict point of view of sex, this condition also causes doubts when analysing it from the perspective of possible indirect discrimination,[67] especially having in mind the fact that

[63] MIG 2012:4. Kammarrätten i Stockholm, Migrationsöverdomstolen, available at (in Swedish): http://lifos.migrationsverket.se/dokument?documentAttachmentId=39376 (accessed 30 May 2017).

[64] Mustasaari, *supra* note 62, at p. 262.

[65] Numerous regulations of private international law (conflict of laws) contain public order (*ordre public*) clauses, pursuant to which a foreign law may not be applied if the application thereof would result in a contravention of the fundamental principles of legal order of the state.

[66] ECtHR, *Z.H. and R.H. v. Switzerland* (App. No. 60119/12), 8 December 2015, para. 44.

[67] The legal definition of indirect discrimination can be found in the EU anti-discrimination directives (including, *inter alia*, Article 2b of the Council Directive 2004/113/EC of 13 December 2004, implementing the principle of equal treatment between men and women in the access to and supply of goods and services – OJ [2004] L 373/37, which defines indirect discrimination as a situation: "where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary", pointing out that this concept was established and developed in EU law (previously community law). It will be hard to find a recognized exception from this definition in family reunification cases. For more on indirect discrimina-

those who are "put in particular disadvantage" in these kinds of situations will be probably be almost exclusively, if not exclusively, women. It is particularly striking that no such doubts were raised towards the regulation under EU law, where the idea of indirect discrimination is very well-developed. Recently, public consultations were carried out based on the European Commission's "Green Paper on the right to family reunification of third-country nationals living in the European Union (Directive 2003/86/EC),"[68] but regrettably no similar concerns were submitted.[69]

While in the Swedish case private international law was applied in a liberal manner, meaning that a child marriage (and probably a forced marriage) was recognized, in the cases involving polygamous marriages and family reunification there is rather an opposite tendency. In both cases private international law is applied in a way so as to justify restrictions and protect the interest of the state and, as such, it may be said it is applied in isolation from the human rights perspective. This is crucial in the case of child and forced marriages, but perhaps less so when it comes to polygamous marriage. But nonetheless all of these three types of marriages are classic examples of the fact that, as Siehr rightly observed, different legal traditions clash the most often in family law.[70] Hence when analyzing polygamous marriages below, some general observations on this issue also need to be made.

2.2. Polygamous marriage

While the requirement of being unmarried, treated strictly in formal terms, may in some situations discriminate against women *indirectly*, the limitations concerning polygamy in the context of family reunification can be regarded even as a manifestation of direct discrimination on the grounds of sex. However, everything depends on what legal tradition or point of view will be adopted for analysis.

Polygamous marriage is directly mentioned in EU Directive 2003/86/EC. Its Article 4(4) states that "[i]n the event of a polygamous marriage, where the sponsor already has a spouse living with him in the territory of a Member State, the Member State concerned shall not authorise the family reunification of a further spouse." And with regard to children of polygamous marriages, it provides: "[m]ember States may limit the family reunification of minor children of a further spouse and the sponsor." On the national level, similar regulations have been adopted not only in the European states bound by the Directive, but also in, *inter alia*, the United Kingdom, Denmark,

tion in EU law, *see* E. Ellis, P. Watson, *EU Anti-discrimination law*, Oxford University Press, Oxford: 2012, at pp. 148-156.

[68] COM(2011) 735 final, Brussels 15 November 2011.

[69] Website, with all the comments received, available at: http://ec.europa.eu/dgs/home-affairs/what-is-new/public-consultation/2012/consulting_0023_en.htm (accessed 30 May 2017). For an overview of the consultation process from the gender perspective, *see* E. Morris, *Family Reunification and Integration Policy in the EU: Where Are the Women?*, 16(3) Journal of International Migration and Integration 650 (2015), pp. 650-657.

[70] Siehr, *supra* note 61, at p. 809.

Norway, Turkey, Canada, and the United States. In the case of Norway there is even a practice of posting official information on family reunification, addressed to Islamic States, on the websites of several Norwegian embassies, stating clearly that forced and polygamous marriages are not recognized in the country and that in the case of a latter only one of the spouses is entitled to family reunification.[71]

Thus in these states polygamous marriages are not fully recognized for the purpose of deciding on family reunification applications. However, in some areas other than immigration law, foreign polygamous marriages are recognized (e.g. in some provinces and territories of Canada for the purposes of succession, spousal support rights and obligations, marital property division, etc.,[72] and in Germany for the purposes of, *inter alia*, maintenance).[73] Hence the states' practice in this area is not consistent, although when analysing restrictions in regulations on family reunification with respect to polygamy (and also on forced marriages) from the point of view of Western legal tradition, they seem to be obvious and non-controversial. The internal law of countries belonging to the Western culture stands in clear contradiction to, e.g., regulations allowing polygamy. In the field of private international law, it seems that the *ordre public* clause should be taken into consideration in the event of possible reference, in the context of conflict of laws rules, to at least some family law regulations based on *shariah*.[74] Apparently, however, this is not the case in at least some fields of law.

Affirmation of a restrictive position towards not only polygamy, but also towards other peculiarities of some family law regulations based on *shariah,* can also be found in international law. Polygamy has been of interest to treaty monitoring bodies. Some specific institutions of traditional legal systems, such as *shariah* law, are definitely contrary to the human rights standards and as such violate international human rights law. The UN human rights treaty bodies have been involved in this issue, both within their general actions (e.g. the strong stance taken by the CEDAW Committee in its General Recommendation No. 21)[75] and when considering periodic reports of state

[71] *See* http://www.norway.org.pk/studywork/visaandresidence/visa/RESIDENCE-PERMIT/Information_to _family_reunification_applicants/ (accessed 30 May 2017).

[72] M. Bailey e*t al.*, *Expanding Recognition of Foreign Polygamous Marriages: Policy Implications for Canada*, Queen's University Legal Studies Research Paper No. 07-12*,* 2006*,* pp. 9-16; available at: http://ssrn.com/abstract=1023896 (accessed 30 May 2017).

[73] M. Rohe, *The Application of Islamic Family Law in German Courts and its Compatibility with German Public Policy*, in: J. Basedow, N. Yassari (eds.), *Iranian Family and Succession Laws and their Application in German Courts*, Mohr Siebeck, Tübingen: 2004, pp. 27-28.

[74] For a recent study on this topic from the comparative perspective, *see* N. Bernard-Maugiron, B. Dupret (eds.), *Ordre public et droit musulman de la famille en Europe et en Afrique du Nord,* Bruylant, Bruxelles: 2012.

[75] "States parties' reports also disclose that polygamy is practised in a number of countries. Polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependents that such marriages ought to be discouraged and prohibited. The Committee notes with concern that some States parties, whose constitutions guarantee equal rights, permit polygamous marriage in accordance with personal or customary law. This violates the constitutional rights of women, and breaches the provisions (…) of the Convention" – *see supra* note 11, para. 14.

parties.[76] As was mentioned above, a similar position was taken – of particular importance to this work on family reunification – by the European Commission of Human Rights. In rejecting the applicants' claims of discrimination in the case of *R. B. v. The United Kingdom,* the Commission suggested that the practice of polygamy as such is discriminatory, and not the UK's restrictions on polygamous marriages. Also, the European Court of Human Rights (ECtHR) takes a particularly strict attitude towards *shariah* law in its jurisprudence. In *Refah Partisi (The Welfare Party) and the others v. Turkey*, the Court stated that the

> introduction of sharia, [is] difficult to reconcile with the fundamental principles of democracy, as conceived in the Convention taken as a whole. It is difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on sharia, which clearly diverges from Convention values, particularly with regard to (…) its rules on the legal status of women.[77]

However, this does not change the fact that a substantial part of the world's population lives in a culture which, to a large extent, takes a different approach to these issues. Therefore, when analysing the above-discussed regulations on family reunification from the perspective of, e.g., the Islamic legal tradition (for instance the rule that in the case of polygamous marriages only one wife can join her husband under family reunification rules), and also from the individual point of view (e.g. that of the second wife, who is refused permission to reunite with the family), one may consider them discriminating, or at least putting women in an especially unfavourable situation. The argument submitted by the UK government in another (above-mentioned) case on polygamous marriages with regard to family reunification (*Khan v. The United Kingdom*), i.e. that discrimination claims should be rejected because "a polyandrous woman would not be permitted to be joined by more than one husband" it is not convincing, since the practice of polyandry is extremely rare.

While not unambiguously resolving these highly sensitive – not only legal, but also social and political – issues, when treating the question of full recognition of polygamous marriages (and other forms of marriage substantially different than those in the *lex fori*), one should pose a more general question, including in the context of family reunification regulations. It is one which has already been raised in the doctrine: To what extent should one legal system accommodate different norms and values? It seems that in the context of family reunification regulations one can postulate a solution dubbed by some scholars "weak legal pluralism"[78] or "limited accommodation."[79] Such a solu-

[76] The HRC in its Concluding observations on the fourth periodic report by Cameroon observed: "The Committee reiterates its concern about the continuing existence of polygamy in the State party" (CCPR/C/CMR/CO/4, para. 9).

[77] ECtHR, *Refah Partisi (The Welfare Party) and the others v. Turkey* (App. Nos. 41340/98, 41342/98, 41343/98, 41344/98), 31 July 2001, Chamber Judgment, para. 72.

[78] Loenen, *supra* note 61, pp. 441-442.

[79] P. Cumper, *Multiculturalism, Human Rights and the Accommodation of Sharia Law*, 14(1) Human Rights Law Review 31 (2014), pp. 45-56.

tion starts from the perspective of individuals and their rights and, as such permits, in "exceptional, individual cases on the basis of the specific circumstances of the case",[80] a derogation from general rules and recognition of different norms and values. With regard to polygamous marriages and family reunification, similar suggestions have been made, in the Canadian context, based on "the hardship of left-behind wives" and the argument that "[i]mmigration policy should not further harm women who may already suffer disadvantages from being in a polygamous marriage."[81]

However, it is easier to postulate than it is to introduce concrete proposals into practice, especially at the level of administrative proceedings. It seems that room for discretion and flexibility is possible only, if at all, at the level of a court proceeding. Nevertheless, at the same time there are occasionally seemingly obvious cases where such an approach should be taken, such as in the Canadian case *Awwad v. Canada (Minister of Citizenship & Immigration)* where, surprisingly, the court confirmed the rejection of a family reunification application of the second wife and mother of three children living with the husband and the first wife in Canada.[82] The possible outcomes of this case-by-case approach undermine predictability and may be even provocative when it comes to the situation of granting recognition to discriminatory legal traditions, but as Fournier concluded in her research on how the Western courts deal with Islamic *mahr*,[83] if we want to accommodate the specific situation of the individuals concerned, "courts ought to pay attention to distributional consequences rather than to doctrinal consistency."[84]

2.3. Age limits

With regard to another quite common condition required for a successful family reunification application, i.e. age limits for spouses, the only claims that can be made in terms of discrimination are that it brings more disadvantages to women than to men.

Article 4(5) of EU Directive 2003/86/EC states that: "[i]n order to ensure better integration and to prevent forced marriages Member States may require the sponsor and his/her spouse to be of a minimum age, and at maximum 21 years, before the spouse is able to join him/her."[85] Indeed, increasing the minimum marriageable age requirement, and also adopting the same age for women and men, is perceived as one of the

[80] Loenen, *supra* note 61, p. 441.

[81] Bailey *at al.*, *supra* note 72, p. 13-16.

[82] 1999 CanLII 7392 (F.C.J.), available at: http://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/39593/index.do (accessed 30 May 2017).

[83] Mandatory payment or promise of future payment by the groom (or his family) to the bride at the time of marriage.

[84] *See* P. Fournier, *Muslim Marriage in Western Courts. Lost in Transplantation,* Ashgate, Farnham and Burlington: 2010, p. 151.

[85] This condition was recently confirmed by the Court of Justice of the European Union (*see* CJEU, *C-338/13 Marjan Noorzia* (2014)).

ways of combating not only child marriages, but also forced marriages.[86] The issues relating to giving consent to marriage and minimum age have been the subject of international legislation (the 1962 UN Convention on Consent to Marriage, Minimum Age of Marriage, and Registration of Marriages).[87] In Article 16 of the UDHR there is a clear statement that both spouses have to be „of full age" and „marriage shall be entered into only with the free and full consent of the intending spouses." Differentiation in the marriageable age for women and men, a low minimum age for women, and also the practice of forced and arranged marriages have also been, similarly to polygamous marriages, of interest to treaty monitoring bodies (e.g. the HRC General Comment No. 28 Equality of Rights Between Men and Women (Art. 3),[88] when considering the periodic reports of state parties,[89] and to the CRC Committee in its concluding observations[90]).

However, one should differentiate between the situations of 1) requiring, with regard to family reunification, the same minimum age as in the receiving state; and 2) increasing it, as allowed by the EU Directive. Several Member States bound by the Directive did the latter (e.g. Austria, Belgium, Lithuania, The Netherlands). Denmark, not bound by the Directive,[91] introduced an age requirement of 24 in 2002. It seems that raising the minimum marriage age whereby one may be entitled to family reunification is a clear manifestation of a restrictive approach to family reunification and a desire to limit the inflow of immigrants.[92] This approach is different from the motives referred to in Article 4(5) of Directive 2003/86/EC. Hence the CEDAW Committee, for instance, when considering Denmark's reports with respect to the fulfilment of its obligations resulting from CEDAW Convention, consistently criticises

[86] This line of argumentation was put forth, *inter alia*, by France when in 2006 it amended its Civil Code by equalizing the age limit (18) for men and women – *see* B. Clark, C. Richards, *The Prevention and Prohibition of Forced Marriages. A Comparative Approach*, 57(3) International and Comparative Law Quarterly 501 (2008), pp. 507-509.

[87] Convention on Consent to Marriage, Minimum Age of Marriage, and Registration of Marriages (adopted 7 November 1962, entered into force 9 December 1964) 521 UNTS 231.

[88] "Men and women have the right to enter into marriage only with their free and full consent (…) That age should be set by the State on the basis of equal criteria for men and women. These criteria should ensure women's capacity to make an informed and unforced decision" (CCPR/C/21/Rev.1/Add.10 (2000), para. 23).

[89] The HRC in its Concluding observations on fourth periodic report by Cameroon observed that: "The Committee reiterates its concern about the continuing existence of polygamy in the State party. The Committee is also concerned about reported cases of marriage of girls as young as 12 years old and regrets that the State party has not taken measures to address the different ages for marriage between women and men, set at 15 and 18 years respectively" (CCPR/C/CMR/CO/4, para. 9).

[90] *See e.g.* Concluding observations on the fourth periodic report of Yemen, CRC/C/YEM/CO/4, paras. 48-49.

[91] *See* Directive Preamble Recital 18.

[92] Similar motives are behind changes in the definition of "dependent child" in Canada, effective 11 August 2014. Under new regulations a dependent child must be under 19 years of age, instead of the previous limit of under 22. *See* Canada Gazette, Vol. 148, No. 13, 18 June 2014, available at: http://canadagazette.gc.ca/rp-pr/p2/2014/2014-06-18/html/sor-dors133-eng.php (accessed 30 May 2017).

the establishment of the minimum marriage age for family reunification at 24 years of age, criticising Danish arguments that it is supposed to prevent forced marriages or arranged marriages.[93] One should agree with the concerns put forward with respect to these provisions. It seems that it is difficult to defend a higher minimum age in the context of aliens applying for family reunification than the age stipulated by Danish law (and that of other countries) for concluding marriage in their own country. Such differentiation raises concerns about unjustified discrimination on the grounds of nationality and/or place of residence. The CEDAW Committee, in its recommendations, rightly suggests making those limits equal, arguing that the regulations under discussion put women in an especially unfavourable situation, and at the same time, there is no evidence that it fulfils its role, i.e. preventing forced and arranged marriages.[94]

Statistics in many of the migrant-receiving countries support the position taken by the CEDAW Committee. For instance, the German statistics on third-country nationals from the years 1998-2010 shows that "based on the *immigration of spouses*, 26.8 per cent of the visas were issued to men and 73.2 per cent to women."[95] Even though in Germany the age limit is 18, the data can raise other doubts about Germany's family reunification regulations, for example the requirement that the spouse who wishes to join his or her spouse residing in Germany have a basic knowledge of the German language, confirmed by pre-entry language tests. This condition was unsuccessfully challenged before The Federal Administrative Tribunal (*Bundesverwaltungsgerich*) on the basis of, *inter alia*, its non-compliance with Article 8 of the ECHR.[96] In addition, the above-quoted report presents many other negative consequences of this rule on the individuals concerned, especially with respect to illiterate or low educated persons (e.g. furthering a long period of separation, costly language courses, unavailability of language courses in some rural areas, etc.)[97] which, in the light of the statistics, are felt predominantly by women. Coming back to age limits and German data on number of visas issued to women, the latter clearly reflects a general trend, seen in many countries, that those who are at a higher risk of being affected by this regulation are (once again) left-behind wives.

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[93] *See, inter alia,* Concluding observations (2002), UN Doc A/57/38(SUPP), paras. 345-346; Concluding observations (2006), CEDAW/C/DEN/CO/6, paras. 30-31; Concluding observations (2009), CEDAW/C/DEN/CO/7, paras. 11, paras. 40-41.

[94] CEDAW/C/DEN/CO/7, para. 41.

[95] K. Triebl, Ch. Klindworth, *Family Reunification: A Barrier or Facilitator of Integration? German Country Report,* Johann Daniel Lawaetz-Stiftung, Hamburg: 2012, p. 45.

[96] BVerwG 1 C 8.09: 2010, available at (in German): http://www.bverwg.de/entscheidungen/entscheidung.php?ent=300310U1C8.09.0 (accessed 30 May 2017). For more on this case *see* K. Groenendijk, *Are Third-Country Nationals Protected by the Union Law Prohibition of Discrimination on the Ground of Nationality*?, in: K. Barwig, R. Dobbelstein (eds.), *Den Fremden akzeptieren: Festschrift für Gisbert Brinkmann,* Nomos, Baden-Baden: 2012, pp. 131-141.

[97] Triebl & Klindworth, *supra* note 95, at p. 47.

3. PROCEDURAL AND ADMINISTRATIVE ASPECTS

From among the different procedural and administrative aspects of family reunification and their effects on women, two require closer consideration, i.e. waiting periods and one of the most common reasons for the termination of residence rights – the end of a relationship. Both of these seem to disproportionately affect women.

3.1. Waiting periods

The requirement of a "waiting period", i.e. a minimum period of residence by the sponsor in the receiving country before submitting an application for family reunification, is clearly permissible under Article 12(1) of the European Convention on Legal Status of Migrant Workers, which provides that "[e]ach Contracting Party may make the giving of authorisation conditional upon a waiting period which shall not exceed twelve months", and also under Article 8 of Directive 2003/86/EC: "Member States may require the sponsor to have stayed lawfully in their territory for a period not exceeding two years, before having his/her family members join him/her." In addition, under certain conditions the waiting period can be even longer, up to three years. Similar regulations can be found at the level of national law in many states (including in some state parties to the European Migrant Workers Convention and EU countries), and as such are a subject of concern to treaty monitoring bodies. For example the HRC, within its procedure of considering state reports concerning the fulfilment of obligations resulting from the ICCPR, pointed out in its concluding observations of 1997 to Switzerland's report that an 18-month waiting period for a foreign worker is much too long and brings about unjustified separation from one's family.[98] Criticism regarding the long waiting period permissible under Directive 2003/86/EC appeared already during the works on the Directive, as well as immediately after its adoption.[99] This provision of the Directive, together with its Article 4(1) and 4(5), were challenged by the European Parliament as incompatible with Articles 8 and 14 of the ECHR, but the CJEU dismissed these allegations. With regard to Article 8, the European Parliament based its claims on the observation that it "significantly restricts the right to family reunification" and "authorizes the Member States to retain measures which are disproportionate in relation to the balance that should exist between the competing interests."[100] No claims based on gender discrimination were raised.

Although prolonged separation from the spouses and children causes negative effects to persons on both sides of the barricade,[101] the situation of the family left be-

[98] CCPR/C/79/Add.70, para. 18.

[99] Cholewinski, *supra* note 34, p. 286, J. Apap, S. Carrera, *Towards a Proactive Immigration Policy for the EU?.* CEPS Working Documents No. 198, December 2003, p. 11, available at: http://aei.pitt.edu/1815/1/WD198.pdf (accessed 30 May 2017).

[100] CJEU, C-540/03 *Parliament v. Council* (2006), para. 91.

[101] In this context ILO experts observed that: "Prolonged separation and isolation of family members lead to hardships and stress affecting both the migrants and the dependants left behind, which may give rise to social, psychological and health problems, and even affect workers' productivity. Therefore, family reunification should be facilitated. Even in the case of seasonal and special-purpose workers countries should

hind is worse in many cases. This is especially true in the case of refugees and asylum seekers, because of threats to their safety as well as that of their families in their home countries. In many cases, the situation of family members of economic migrants is not good either. Even though international migration has become much more balanced in terms of sex over time,[102] still in many situations the traditional pattern is followed that a male family member leaves the country first. More detailed research and statistics would probably be required to defend the claim that waiting periods can result in indirect discrimination on the grounds of sex, but definitely there are situations, indirectly confirmed (e.g. by the above-mentioned German statistics), where prolonged separation caused by waiting periods is putting women at a particular disadvantage compared with men.

Additionally, the negative consequences of waiting periods are worsened by delays in proceedings on the applications for family reunification, which are quite common in a number of states[103] and which are criticized by both treaty monitoring bodies and NGOs. The HRC, for example, paid particular attention to this issue in concluding its observations of 2008 to France's report,[104] as did the CRC Committee in concluding its observations of 2005 to Sweden's report with regard to recognizing refugees' applications.[105] An alarming report was published in 2009 by Human Rights First concerning, *inter alia*, the lengthiness and suspension of proceedings on applications for family reunification in the United States.[106] In the wake of current migration patterns some countries (e.g. Germany) are even considering suspending family reunification procedures for some migrants for a period of two years.[107]

In the above-quoted concluding observations of the HRC to France's report, doubts were also expressed regarding "the procedure that allows DNA testing as a way to establish filiation for the purpose of family reunification."[108] DNA testing is not only costly, but also time-consuming, which causes further delays.[109]

favourably consider allowing family migration or reunification" - Report of the Tripartite Meeting of Experts on Future ILO Activities in the Field of Migration, Geneva, 21-25 April 1997, Annex I, para 6.1, *available at* http://www.actrav.itcilo.org/actrav-english/telearn/global/ilo/seura/ilomigrp.htm (accessed 30 May 2017).

[102] *The World's Women 2010. Trends and Statistics*, Report of the UN Department of Economic and Social Affairs, p. 13.

[103] And this despite the direct provisions in some international instruments which require the expeditious handling of procedures (*e.g.* Article 5(4) of EU Directive 2003/86/EC, Article 10(1) of the CRC).

[104] CCPR/C/FRA/CO/4, para. 21.

[105] CRC/C/15/Add.248, para. 41.

[106] *Denial and Delay: The Impact of the Immigration Law's Terrorism Bars on Asylum Seekers and Refugees in the United States*, Human Rights First Report, November 2009, available at: http://www.humanrightsfirst.org/wp-content/uploads/pdf/RPP-DenialandDelay-FULL-111009-web.pdfpp (accessed 30 May 2017), pp. 61-62.

[107] Announced by Germany at the beginning of 2016.

[108] CCPR/C/FRA/CO/4, para 21. For a critical analysis of French legislation on DNA testing in family reunification procedures, *see* R. Hajbandeh, *'France, Love it or Leave it': New French Law Restricts Family Reunification*, 27(2) Wisconsin International Law Journal 335 (2009), pp. 343-353.

[109] DNA testing procedure is used in other countries as well; for instance in Canada, where it causes similar controversies and is subject to criticism from NGOs. *See* Canadian Council for Refugees, *DNA*

3.2. The end of the relationship as a cause for terminating residence rights

According to the national laws of many states, when an application for family reunification is successful, the individuals involved are granted only non-autonomous residence permits. Therefore, when the relationship ends the authorities of the given states are entitled to withdraw a residence permit and ask the person involved to leave the country. The same phenomenon is directly confirmed in, *inter alia*, EU Directive 2003/86/EC (Article 16(1). In connection with this, Article 15 of the Directive provides that autonomous residence permits can be obtained after "no later than five years of residence". This means that most of the European Union member states enjoy a wide margin of appreciation in this regard.

On the one hand, at least with regard to spouses or unmarried partners, these kinds of provisions seem to be fair, as they are in line with frequently used measures to combat and prevent sham marriages. Nevertheless, strict implementation of the extended periods of non-autonomous residence in the receiving state may bring about negative consequences for spouses or unmarried partners recently admitted under family reunification regulations (or even those recently admitted in cases of 4 or 5-year residence requirements).

Despite the fact that the CJEU case of *Gattoussi*[110] concerned the deportation of a male (a Tunisian husband of a German wife was asked to leave Germany when their relationship ended),[111] one can argue that, in at least in some of the countries, this kind of regulation disproportionately affects women. This is a reality, for example, in the case of many "import brides" in the Scandinavian countries. The phenomenon of local men bringing wives in from, *inter alia*, Thailand, Russia or the Philippines is a controversial topic in countries such as Norway or Sweden, and have been the subject of different studies and reports.[112] Unfortunately, in many cases, there is another side of the story – separation, which is followed, in some cases, by assault and sexual abuse.[113] Adopting an extended waiting period for spouses and unmarried partners before they are entitled

Tests: A Barrier to Speedy Family Reunification, October 2011, available at: https://ccrweb.ca/files/dna-tests.pdf (accessed 30 may 2017). For a comparison of regulations on DNA testing in three EU countries (Austria, Finland, Germany), *see* T. Heinemann, U. Naue, A.-M. Tapaninen, *Verifying the Family? A Comparison of DNA Analysis for Family Reunification in Three European Countries (Austria, Finland and Germany)*, 15(2) European Journal of Migration and Law 183 (2013), pp. 183-202. The authors of the latter article stated that at least 20 countries have incorporated DNA testing into their family reunification procedures, p. 184.

[110] CJEU, C-97/05 *Gattoussi* (2006).

[111] This case was considered under provisions of the 1995 Euro-Mediterranean Agreement (OJ 1998 L 97/1) and the main dispute focused on the fact that German authorities issued to Mr. Gattoussi not only a temporary and non-autonomous residence, but also a work permit of indefinite duration. The ruling was based on the principle of protecting legitimate expectations and of legal certainty (para 42).

[112] *See, inter alia,* K. Haandrikman, *Binational Marrieges in Sweden: Is there an EU Effect?*, 20(2) Population, Space and Place 177 (2004), pp. 177-199, and reference therein.

[113] *See* an overview of the report prepared by the National Association of Women's and Young Women's Shelters (*Riksorganisationen för kvinnojourer och tjejjourer – ROKS*), available at: http://www.thelocal.se/20110217/32110 (accessed 30 May 2017).

to autonomous residence permits and maintaining a strict approach when implementing this rule causes further distress and suffering to women in this situation.

CONCLUSIONS

Before reaching to conclusions it's worthwhile to at least try to briefly answer the question: Why were such restrictive – from the perspective of women – policies on family reunification introduced? As pointed out by many scholars, on their face migration policies are generally considered as gender-neutral. For example, Morris rightly observed that "migration policy in the EU is still, for the most part, consider to be gender-neutral" and "even most migration non-governmental organizations are relatively quiet on the importance of gender-sensitive measures in EU-level migration policymaking."[114] The same is true in the case of other international organizations and their regulations, as well as at the national level. Without viewing them from a gender perspective, we end up with migration policies shaped mostly by prejudices and stereotypes about, *inter alia*, desirable roles of men and women and concepts of family, marriage and parenthood.[115] This can negatively influence not only the legal position of migrant women but also, as de Hart in her recent study showed, the legal position of migrant fathers, who in many cases are, because of dominant ideologies about fatherhood, vulnerable in the context of their rights to family life.[116] Another significant reason for restrictions in the field of reunification are security concerns. The current refugee crisis and ongoing threat of terrorism influence the security policies of many countries and consequently shape migration polices into very restrictive ones. Other possible answers relate to some more of the more detailed issues discussed above. Regulations on polygamous marriages and the unmarried child rule were designed to fight against discrimination of Muslim women, including forced and child marriages. Other measures, like exams and tests aimed at check for sham marriages or paternity tests, are considered to be, *inter alia*, a tool to fight trafficking of human beings under the cover of family reunification.[117] Paradoxically however, as was shown in case of polygamous marriages and the unmarried child rule, in many situations these measures violate women's rights and can be perceived by them as discriminatory.

Thus by way of conclusion I would like to make following observations. Despite the obvious benefits for persons concerned and the progress in integration into a new

[114] Morris, *supra* note 69, at p. 640.

[115] *See S.* Bonjour, B. de Hart, *A proper wife, a proper marriage: Constructions of 'us' and 'them' in Dutch family migration policy*, 20(1) European Journal of Women's Studies 61 (2013), p. 62.

[116] *See* B. de Hart, *Superdads: Migrant Fathers' Right to Family Life before the European Court of Human Rights*, 18(4) Men and Masculinities 448 (2015).

[117] Some countries introduced special measures to combat misuse of family reunification by traffickers (e.g. using false declarations of parenthood). One of them is Finland – see the study produced by the European Migration Group – *Misuse of the Right to Family Reunification*, June 2012, at p. 22, available at: http://bit.ly/2svpAzJ (accessed 30 May 2017).

state, as well as the existence of international legal regulations which either refer directly to family reunification or from which one may derive the principles regulating family reunification, one cannot speak today about the existence of any precise and enforceable human right to family reunification under international law. Certainly this is one of the reasons, apart from the efforts to reduce immigration, for the existence of a quite restrictive approach towards family reunification on the part of numerous migrant-receiving countries. It seems that the last couple of years have brought about even more restrictive practices, as proven, e.g., by the above-quoted stricter regulations in Denmark and Canada, as well as the lengthened proceedings in the United States and the lack of progress in ICRMW ratification. The current (2015-2016) migration crisis in Europe is strengthening these restrictive practices. In addition, their position on the European continent is reinforced by the quite conservative positions taken by the European Court of Human Rights.

When a restrictive approach is adopted, there is less or even no room for a case-by-case approach or for considering the special circumstances of a given case. Even if the contemporary regulations on family reunification are neutral on their face, the practices regarding their enforcement may bring about negative consequences predominantly (but not exclusively) for women[118] in both possible situations, i.e. when women are the sponsors of immigration or the bearers of the consequences of male migration. While the early cases on family reunification decided at the international level (in the 1980s) dealt with sex discrimination claims raised towards regulations which were discriminatory in a direct and open way, today it is difficult to find a regulation on family reunification which would, in the same direct way, differentiate between the situation of women and men, as such discrimination would violate the principle of gender equality present in international law and in the national laws of many countries. The position of the ECtHR is of particular importance here. In the case of *Abudlaziz, Cabales and Balkandali,* the Court stated that "very weighty reasons" should be put forward to justify different treatment on the ground of sex.

Hence today the regulations on family reunification, both those at the level of international law and EU law, as well as those in the domestic law of most countries, are neutral on their face from the point of view of sex. This, however, does not mean – as has been pointed out above - that some of them cannot result, in certain situations, in particularly unfavourable consequences for women (age limits, waiting periods, the end of a relationship as a cause for termination of a residence permit) or, at the same time, even indirect discrimination on the grounds of sex (the unmarried minor rule)

[118] The authors of a comparative study on family reunification in six EU Member States (Austria, Germany, Ireland, the Netherlands, Portugal and the United Kingdom) similarly conclude, albeit in a more general (i.e. not only women's) context „[i]n all Member States, however, not only legislation determines the extent to which migrants can exercise a right to family reunification. The way requirements are applied or assessed and procedures are organized are equally important for their possibilities to bring their families" – *see* T. Strik, B. de Hart, E. Nissen, *Family Reunification: a Barrier or Facilitator of Integration? A Comparative Study,* Wolf Legal Publishers, Nijmegen: 2013, p. 109.

or direct discrimination when conducting analyses from different legal traditions or looking from the perspective of the women involved (polygamous marriages). The last two examples relate to the most controversial issues connected with family reunification regulations and women, i.e. situations wherein there is a conflict between different legal traditions (e.g., forced, arranged, and polygamous marriages; lower marriage ages for women). In this context one should encourage an approach - despite the obvious problems with its implementation – based on "weak legal pluralism" or "limited accommodation". This would allow, in certain circumstances, for the accommodation of differing legal norms and values.

Other more general recommendations are in line with the above-mentioned approach. A more flexible approach is needed; one based on the specific circumstances of a given case and awareness of the gender impact of particular regulations. This kind of approach can be introduced, even without making significant amendments, at the court level. In administrative proceedings, however, there is little or no room for the desired discretion and flexibility when considering family reunification applications.[119] Hence it seems desirable to consider amendments to at least three of the above-analyzed frequently occurring regulations, i.e. the unmarried minor rule (by excluding situations where the marital union does not, in fact, exist, as well as child marriages), waiting periods (by abolishing or at least significantly shortening them), and the end of relationship as a cause for termination of a residence permit (by shortening the period required for granting autonomous residence permits and introducing favourable treatment of former wives who are victims of violence). Another condition for family reunification which ought to be changed is the age limit for spouses or unmarried couples, which should not be higher than the marriageable age in a given state.

Even a very short overview of these recommendations suggests that the EU Directive on Family Reunification is a striking example of a transnational instrument which ought to be amended, although at the same time it must be acknowledged that such amendment seems impossible in the current political and factual conditions. If however such an amendment could be put in place, it would bring about changes in most of the EU member states, including many migrant-receiving ones. With regard to other states, the international courts and treaty monitoring bodies should be encouraged to take stronger positions.

[119] A recent study shows that cumbersome bureaucracy may cause a lot of damage to the reunification process, even in rather obvious cases - *see* A. Haile, *The Scandal of Refugee Family Reunification*, 56(1) Boston College Law Review 273 (2015).