

Transnational mothering, national migration policy and international human rights law

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Abstract

Recently there has been some debate concerning the effect of international human rights law upon national immigration policies. On the one hand, there are writers who express a strong belief in the growing impact of international human rights law upon immigration policy. On the other hand are sceptics who point out that international human rights law, like any other form of law, can only be effective to the extent that it is implemented within a concrete national context.

In my paper, I shall examine what role, if any, article 8 of the European Convention of Human Rights – which deals with the right to respect for family life – has played in mitigating restrictive Dutch policies regarding family reunification. I shall particularly focus upon the situation of single and divorced mothers, originating from third world countries, who have left their children behind with family when coming to the Netherlands. After an empirical description of the role that migration plays in the life strategies of these mothers, I shall discuss the developments within Dutch immigration law that have led to the exclusion of their children. Finally I shall describe some recent developments in the jurisprudence of the European Court of Human rights before addressing the more general question: to what extent can single and divorced mothers from third world countries pry open the gated communities of the West by appealing to international human rights law?

Introduction

Early this year I received a letter from a young woman - let's call her Joyce - who had come to the Netherlands, from Columbia, in the summer of 1997, to visit her sister and explore the possibilities that Europe had to offer. She had left a six-year-old daughter - let's call her Emily - behind with family. Joyce had never married Emily's father, and their paths had separated soon after Emily was born. Joyce was therefore faced with the task of supporting both herself and her daughter.

Joyce's tourist visa expired after three months, but she decided to stay on in the Netherlands and try her luck a little longer. After a year or so of staying with her sister and friends, earning money with odd jobs, cleaning and babysitting, she met a Dutchman, fell in love and decided to stay for good. Getting a residence permit however took longer than she had hoped. Her new boyfriend had his own business and it took some time before he was able to convince the authorities that he would be able to support Joyce.

When the matter was finally settled, Joyce returned to Columbia to pick up Emily. By then they had been separated for well over two years. Back in the Netherlands, Joyce was told that she would first have to produce a verified birth certificate, before she could apply for a

residence permit for Emily. Getting the required documents from Columbia took several months. Finally, early in 2000, Joyce had collected all the papers she needed and she sent in an application for a permit. When she received a summons from the immigration authorities, she went to her appointment expecting good news.

A big disappointment awaited her however. Emily's request for a residence permit had been turned down. The reason: too much time had elapsed between the moment that Joyce and left Emily behind in Columbia and the moment that she had applied for a residence permit. The appeal against this decision was turned down, and the subsequent court case was lost. By then, Joyce had become a Dutch citizen and had given up her Columbian nationality. She and her Dutch boyfriend had been living together for nearly five years and had had a child together. Returning to Columbia to start a new life there with Emily was out of the question. Joyce wasn't prepared to send Emily back to Columbia for good, either. Was Emily doomed to an illegal existence in the Netherlands? In desperation, Joyce wrote to me, hoping that I, as an academic specialised in family migration policy, could suggest some way out of this legal bind.

Two years ago, I might have concluded that Emily's chances of getting a Dutch residence permit were virtually nil. Just over a year ago however the European Court of Human Rights passed judgement in a case that, in many respects, resembled that of Joyce and Emily. And the verdict was that the Dutch policies regarding the admission of children had, in that case, led to a violation of article 8 of the European Convention of Human Rights guaranteeing the right to respect for family life.¹ I therefore advised Joyce to persist in her application for a Dutch residence permit for Emily, with reference to this judgement of the European Court. Unfortunately, I don't know how Joyce's and Emily's story ends. Nor do I dare make any predictions as of yet.

The debate on national immigration policies and international human rights law

Joyce's story raises a number of issues that I would like to explore further. In particular it raises the issue to what extent the universalistic values of western liberal tradition, as exemplified in international human rights law, actually can mitigate restrictive national immigration policies. This is an issue that has been subject to some academic debate in recent years. On the one hand, there are writers who express a strong belief in the growing impact of international human rights law upon immigration policy. Yasemin Soysal for example argues that a reconfiguration of citizenship has taken place from a more particularistic one based on nationhood to a more universalistic one based on personhood. As a result, rights that used to belong solely to nationals are now, according to her, being extended to foreign populations. More and more, in her view, claims of individuals are being legitimated by ideologies grounded in a transnational community. She particularly refers to the jurisprudence of the European Court of Human rights to substantiate this assertion.²

On the other hand are sceptics who point out that international human rights law, like any other form of law, can only be effective to the extent that it is implemented within a concrete national context. Law alone is incapable of ensuring a fair and just society. The

¹ Article 8 of the European Convention reads as follows:

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.

² Yasemin Nuhoglu Soysal. *Limits of Citizenship. Migrants and Postnational Membership in Europe*. Chicago and London: University of Chicago Press, 1994.

substantive content of decisions must more or less covertly be supplied from political, economic or ethical considerations. While the exercise of power can be legitimated within a nation-state by the generation of consensus via democratic process, there is as yet a lack of democracy in the international sphere. Hence the legitimacy of international law itself remains fundamentally problematic.³

Specifically regarding immigration law, Linda Bosniak has pointed out that national regimes have recently become more rather than less restrictive, curtailing the human rights of immigrants rather than extending them. Although she does not deny the significance of international human rights for debating the legitimacy of such measures in the national context, she is less convinced than Soysal of the inevitable triumph of the universalistic principles of international law over nationalism as a political factor. Rather, she signals the enduring tension that exists between the exclusionary and universalistic commitments that the concept of citizenship implies.⁴ Moreover, her analysis suggests that this tension can not simply melt away in an evolutionary progression towards universal citizenship. For how citizenship is practiced within a national community's borders is determined, in part at least, by how those borders are drawn by that same national community.

Jane Kelsey for example has argued that nationally organised solidarity, and the distinction between nationals and non-nationals that it implies, has provided important forms of security to, among others, single mothers. When nationally organised bureaucracies abdicate their distributive power to a transnational market, those who are not in a good position to compete on that market, tend to become more socially marginalised. Their situation is aggravated by the fact that family hierarchies, of which they are often also dependent, can no longer be neutralised by alternative, nationally controlled sources of social security.⁵ On the other hand, as I hope to make clear in this paper, policies designed to restrict access to the nation can undermine freedoms that form part of the quality of life that national citizenship is meant to represent.

Looking at matters from Joyce's perspective, the debate concerning the impact of international human rights law upon restrictive immigration policies also ties into a feminist debate as to what role, if any, law can play in serving women's interests, and particularly those of black and Third world women. Even if the national concept of citizenship has been expanded in the past to include workers, women, blacks and ethnic minorities, it has done so as a result of struggle. While the gains of these struggles have undeniably resulted in important forms of formal equality whose significance should not be underestimated, the fact is that substantive inequalities persist, even within national communities, and continue to affect the way in which formally acquired rights are interpreted and implemented in practice.⁶ The nation, in fact, has many borders, although some are more subtly drawn than others. By the same token, international human rights law may have its foundational roots in the emancipatory ideals of liberty, equality and solidarity, but in actual practice it has been and continues to be implicated in projects of empire and unequal power struggles between nations.⁷

³ See for example: Sol Picciotto. *Fragmented States and International Rules of Law*, in: *Social & Legal Studies*, Vol. 6 (2), 1997, p. 259-279.

⁴ Linda Bosniak. *Universal Citizenship and the Problem of Alienage*, in: *Northwestern University Law Review*, Vol. 94 (3), 2000, p. 963-984.

⁵ Jane Kelsey. *Rolling Back the State. Privatisation of power in Aotearoa/New Zealand*. Wellington: Bridget Williams Books, 1993.

⁶ See for example: Carol Smart. *Feminism and the Power of the Law*. London: Routledge, 1989.

⁷ See for instance: Keebet von Benda-Beckmann. *Western Law and Legal Perceptions in the Third World*. In: Jan Bertinh, Peter R. Baehr, Herman Burgers, Cees Flinterman et al. (ed). *Human Rights in a Pluralist World*.

In actual practice then, law – both nationally and internationally based – does not necessarily serve the interests of all individuals equally. Its effectiveness remains dependent of the specific context of power relations in which it is mobilized. Even assuming that Dutch national law will formally give her access to certain basic human rights on the basis of international law, can a woman like Joyce – a single mother and a third world immigrant to boot – actually play that game and win, or are the dice too heavily loaded after all?

Migrant mothers, Dutch family reunification policy and the European Convention on Human Rights

In order to gauge the significance of any human right for an immigrant's participation in and involvement with the society in which he or she lives, it is important to relate that human right to the material circumstances of his or her life. Human rights are primarily about human dignity, but human dignity relates in significant ways to basic issues of material welfare or even survival.⁸ Before exploring the possibilities that international human rights law may or may not have to offer them, I shall therefore first take a closer look at women like Joyce to see what role migration plays in their life strategies. For Joyce's story is by no means unique. While interviewing immigrants in Amsterdam on the effects that Dutch immigration law has had upon their own family relations, I heard similar stories and during the two years that I clerked at the Amsterdam immigration court, I regularly sat face to face with mothers pleading for the right to have their children reside legally with them in the Netherlands.

Next I shall delve into the history of the specific rule of Dutch immigration law that migrant mothers run up against - the assumption that, after a certain period of time, there will be no real bond any more between them and their children and hence no reason for admission on the grounds of family reunification. The changes that have taken place within Dutch immigration policies regarding the admission of children, reflect broader changes that have taken place within Dutch society regarding family ties and their implications for citizenship. These changes in turn reveal how legal discourse regarding national belonging has shifted from being primarily gendered, to being increasingly laden with preoccupation with ethnic - some would even say racial - difference. In the process, the gender bias that originally characterised this legal discourse has not so much disappeared, as been recast in ethnic terms.

Finally, I shall describe the role that article 8 of the European Convention on Human Rights has played - and will continue to play - in national Dutch immigration policy. A close look at the relevant jurisprudence can, I believe, help clarify to what extent and under which conditions, supranational rules, inspired by universalistic principles, can in fact mitigate the exclusionary effects of national immigration policies. Following a somewhat technical discussion on the interaction of national and international law, I shall move on to a more theoretical treatment of the question of agency. Can single mothers from third world countries effectively appeal to international human rights law to pry open the gated communities of the West for their children, and if so, how and to what extent?

Transnational mothering

Individuals and Collectivities. Middelburg: Meckler Corporation in association with the Netherlands Commission for UNESCO and the Roosevelt Study Center, 1990; Andrew Hurrell. Power, principles and prudence: protecting human rights in a deeply divided world. In: Tim Dunne and Nicholaas J. Wheeler, ed. *Human Rights in Global Politics*. Cambridge: Cambridge University Press, 1999.

⁸ James C. Scott. *Domination and the Arts of Resistance*. New Haven: Yale University Press, 1990.

While doing my research for my Phd thesis,⁹ I interviewed roughly forty people who had migrated from the former Dutch colony of Surinam to the Netherlands. The purpose of my research was to trace how care and material support, provided via transnational family obligations, were being affected by Dutch immigration policies. Among other things, I was interested in how childcare was being affected.

In the course of my research it became clear to me that among the people of Surinam, childcare was structured via a complex interplay of nuclear family and extended family ties and of the responsibilities and obligations that these entailed. While parents (and particularly mothers) were primarily responsible for raising, supporting and caring for their children, they could often only meet these responsibilities by delegating the day-to-day work to (primarily female) family members, particularly mothers and mothers-in-law, although siblings and aunts could play a role as well, or friends or neighbours who had become so intimate with the family that they acquired the status of surrogate relatives.

Thus working mothers or housewives with more children than they could manage would ask their mothers or other female relatives to take one or more children into their homes for shorter or longer periods of time. Or mothers living far off in the countryside would ask family in the city to take in one or more of their children so that they could attend school there. Or mothers living and working in the city would send their children to family in the countryside to be looked after there. Reversely, couples who were unable to have children of their own would ask if they could take on someone else's child to raise and set to work in the home, on the farm or in the family business.

Such arrangements could be for shorter or longer periods of time. Some children only stayed outside the parental home during the week, returning to their parents in the weekends. Others were removed from the parental home at birth and never knew, until they reached maturity, that the woman who had raised them was not actually their mother. In most cases however, the natural parents, and particularly the mother, continued to see themselves as ultimately responsible for their children's welfare, for their identity as parents and the responsibilities that this entailed formed a core aspect of their identity as adults. Often they viewed the alternative caring arrangement as temporary, and would take the children back into their own home once circumstances allowed.

Given these prevailing arrangements, it is hardly surprising that parents who wished to make the leap of migration to the Netherlands, would leave their children behind in the care of relatives, while they explored the possibilities abroad. In fact, given the wide prevalence of shared child-care, the children would as often as not have already been taken up in the grandparents' or some other relative's home before the parents actually considered leaving the country. Consequently, not only fathers would leave children behind when migrating, but mothers too - both married and unmarried - would prefer to leave the children in the care of relatives until they were properly settled in the Netherlands.

Once parents were settled in the Netherlands, it wasn't always easy to determine when would be the most opportune moment to let the children leave their trusted surroundings to join them. Parents had to take the feelings of the children and of the relatives who had been looking after them into consideration, as well as the material circumstances and possibilities both in the Netherlands and in Surinam. One woman told me her mother had been so attached to the children, that she hadn't let them come all at once, but one at a time at two-year intervals. This not only suited the grandmother and the children, but the mother as well, who had had nobody at hand to babysit a pre-schooler, and thus preferred to have her children stay in Surinam until they were old enough to attend primary school.

⁹ Sarah van Walsum. *De schaduw van de grens. Het Nederlandse vreemdelingenrecht en de sociale zekerheid van Javaanse Surinamers*. Deventer: Kluwer/Gouda Quint, 2000.

Another woman told me that her youngest child had missed her grandmother so much after coming to the Netherlands, that she had sent her back for a few years. Such stories however applied only to those families who had come to the Netherlands before Surinam gained its independence in 1975. Since these people and their children still had Dutch nationality at the time, they were free to come and go as they pleased. As we have learned from Joyce's story, transnational parenting has become a good deal more complicated since then.

While the arrangements that were described to me during my interviews were clearly shaped by the Javanese Surinamese background of those involved, it would be a mistake, I believe, to see them as some exotic custom. The very flexibility, fluidity and indeterminacy of the relationships that were described betray a degree of creativity and improvisational skill that may have been culturally inspired, but was certainly not culturally predetermined. In fact, the people I interviewed all subscribed to the same nuclear family ideal as most Dutch. In delegating their caring responsibilities to relatives, they weren't departing from this ideal, but inventing new ways to circumvent the practical difficulties they encountered in trying to live up to it.

Moreover, such tactics of shared child-care are not unique to the Javanese of Surinam. The practices they described are common to all the various ethnic populations of Surinam.¹⁰ And during my two years as a CUSO volunteer in Ghana I observed very similar arrangements. In any society where schools and health centres are widely scattered, where publicly financed childcare is virtually non-existent and where there are little or no provisions to compensate for loss of income while caring for a child, similar caring arrangements will be made for the simple reason that they are necessary. Nor is this an exclusively third world phenomenon. Deborah Grayson has for example pointed out that within many African American communities in the United States, child-care is commonly shared between a mother and an "othermother".¹¹ And it is a well-kept secret that in the Netherlands too, as more and more mothers enter the workforce, more and more grandparents, neighbours and (mostly female) friends of the parents have become involved in childcare.¹²

Single and divorced mothers

For single or divorced mothers, the need for support in raising, caring for and providing for children is particularly acute. Not only do they have to provide for themselves and their children, having no husband they also have no in-laws who can help out with raising and caring for the children. Moreover, having broken with the nuclear family norm, they may be estranged from their own family. The results of my research showed that, among the Javanese Surinamese, this was particularly the case for those women who had never married at all. One woman for example told me that she had three children by three different men, none of whom she had ever married. She received no support from her family and was coolly received within the Javanese community as a whole. Inventive and resourceful as she was however, she had managed to find a solution. She asked her next-door neighbours, who had more mouths than they could feed, if their three oldest children could move in with her. While these adolescents

¹⁰ They have in fact been formalized in the Civil Code of Surinam. See: Hamid Ahmad Ali. *Overeenkomst tussen het Koninkrijk der Nederlanden en de Republiek Suriname inzake het verblijf en de vestiging van wederzijdse onderdanen*. Utrecht: Stichting Landelijke Federatie van Welzijnsstichtingen voor Surinamers, 1979, p. 22-23.

¹¹ Deborah R. Grayson. *Mediating Intimacy: Black Mothers and the Law*. In: Lauren Berlant (ed.) *Intimacy*. Chicago and London: University of Chicago Press, 2000, p. 307.

¹² Chantal Remery et al. *En als Oma nu ook een baan heeft? De toekomst van de informele kinderopvang in Nederland*. The Hague: NIDI, 2000.

cleaned her house and looked after her babies, she went out to work. Being well educated, she could earn a reasonable salary. In return for the work the neighbours' children did for her, she fed, housed and clothed them and put them through school.

Single or divorced mothers with less education and good fortune than this woman have more difficulty coping with life in Surinam. Since independence, the economic situation in Surinam has deteriorated steadily, and jobs are scarce and/or poorly paid, particularly for women with little education. Prospects on the marriage market aren't very good either for women with children, so there is little chance of finding a husband to support them. Like many male breadwinners, these women too must consider migration as one of the possible options for supporting their family. And like emigrating couples, they too will generally prefer to leave their children behind with family or friends, rather than put them through the hardships and uncertainties of an initial period abroad. After all, the jobs that await migrant women in countries like the Netherlands, in sweatshops, as a prostitute, a nanny or live-in maid, do not combine easily with child-care. Moreover, these are not the sort of professions that lead to a residence permit, at least not in the Netherlands, so that the women involved remain illegal and uninsured. However, despite their highly insecure position in the Netherlands some single or divorced mothers still opt to take their children with them on a tourist visa. Having no one who is willing or able to look after the children in their country of origin, they take them along in the hope that soon they will be able to legalise their own position and that of the child. In the meantime, if they are lucky, they may find family or friends in the Netherlands who will give the necessary support in looking after the child.

Most immigrant women who come to the Netherlands will only be able to acquire a secure position through marriage. Even then, many will have to wait before they can apply to have their children legally admitted. During the first three years of married life in the Netherlands, foreign wives remain dependent of their relationship for maintaining legal status. Should the marriage break down, then they will be thrown back into the uncertainties of a clandestine existence. Since not all men are willing to take in the child of another, some women, fearing a conflict that could end their relationship, wait the three years before applying to have their children legally admitted. By then however, as Joyce's story shows, it is usually too late.

Dutch family migration policy: 1965-2002

The Dutch regulation of family migration initially primarily benefited Dutch men with foreign wives. When Dutch employers first started to recruit foreign labour in the late 1950's, family reunification with workers from abroad was actively discouraged. The official policy was that foreign workers were to be admitted on a temporary basis only. Since it was feared that workers who brought over their wives and children would settle permanently, celibacy was stipulated as a recruitment criterion. The first workers recruited from Italy were therefore unmarried. This policy backfired however in the sense that these single men often became romantically involved with young Dutch girls. Their celibacy actually increased their chances of staying permanently, rather than diminishing them! These transnational romances gave rise to some consternation, and during subsequent recruitments, celibacy was no longer stipulated as a criterion.¹³

¹³ Will Tinnemans. *Een gouden armband. Een geschiedenis van mediterrane immigranten in Nederland (1945-1994)*. Utrecht: Nederlands Centrum Buitenlanders, 1994.

But although wives and children were to be allowed – albeit grudgingly¹⁴ – to follow husbands and fathers to the Netherlands from the late 60's onwards, it would take until 1974 before foreign women employed in the Netherlands would be allowed to bring over their family members. Even then, one of the set conditions was that the woman should be married, and that the marriage should have lasted at least one year. The underlying idea was that in this way men could be prevented from gaining easy access to the Dutch labour market via a bogus marriage.¹⁵ A side-effect was that single and divorced mothers continued to be unable to have their children join them legally in the Netherlands.

Few women, however, were to profit from this change of rules in any event. Even after family reunification had become officially permitted for women migrants – to the extent at least that they were married – the Dutch government continued to discourage it indirectly by refusing Dutch employers permission to recruit foreign women who were married or had children. Although the family situation of women coming to the Netherlands to work wasn't controlled very thoroughly, women ran the risk of losing their residence permit once they applied for family reunification for, by doing so, they revealed that they had lied about their family situation when applying for admission. And residence permits issued on the basis of false information were generally retracted or not extended.¹⁶

In 1979 the official requirement that migrant women must have been married for at least one year in order to qualify for family reunification was scrapped. By then however, an official end had been brought to the recruitment of foreign labour and it became very difficult for migrant workers from outside of the European Community to find legal employment in the Netherlands. Only those women who had already settled in the Netherlands, then, were to benefit from this change in policy.

The transformative power of marriage

Although migrant women were officially refused permission for family reunification during the 60's and early 70's, single or divorced mothers who wished to bring over their children could achieve this aim by marrying a Dutchman. Up until 1985, preserving the unity of the male-headed family formed a dominant principle within both Dutch nationality law and Dutch immigration policies. The assumption was that Dutch men should be able to build up their future, including family life, in their country of origin, the Netherlands. Consequently, their wives and (step)children had easy access to admittance, to protected status and, ultimately to Dutch citizenship. Marriage in effect had the power to transform a migrant mother's status and that of her children much in the same way that, up until the late 1970's, marriage

¹⁴Only wives without children could enter on the same basis as their husbands. Mothers and/or children could only enter once the husband had worked at least two years (later: one year) in the Netherlands and could meet set income and housing requirements (Nota buitenlandse werknemers, TK 1969/70, 10504, nr. 2, p. 9; Vc 1972, page G-4-11.

¹⁵ C.A. Groenendijk. Mensenrechten tussen retoriek en praktijk: gebruik van klachtenrecht in Straatsburg en de bescherming van vreemdelingen. In: L. Heyde et al. (ed): *Begrensde vrijheid. Opstellen over mensenrechten aangeboden aan Prof. Dr. D.F. Scheltens bij zijn afscheid als hoogleraar aan de Katholieke Universiteit Nijmegen*. Zwolle: W.E.J. Tjeenk Willink, 1989, p. 191-229.

¹⁶ Margaret Chotkowski. 'Baby's kunnen we niet huisvesten, moeder en kind willen we niet scheiden'. De rekrutering door Nederland van vrouwelijke arbeidskrachten uit Joegoslavië, 1966-1979, in *Tijdschrift voor Sociale Geschiedenis*, vol. 26 (1), 2000, p. 76-100. In this respect it is interesting to note that, to this day, migrant women who come to the Netherlands to work as an au pair will not be admitted unless they are unmarried and childless (article 3.43 Vb 2000).

transformed unwed Dutch mothers and their children from social outcasts to respectable and legitimate members of Dutch society¹⁷.

Single or divorced migrant fathers, by contrast, could only gain access to the Dutch nation for themselves and their children through paid labour and a naturalization process that took at least five years. Marriage to a Dutch woman did not transform them but, on the contrary, transformed the Dutch woman who, up until 1965, automatically lost her Dutch nationality. Dutch wives who joined the family of a foreign male were namely assumed to have joined his nation and, if necessary, to follow him "back home". After 1965, Dutch women marrying a foreigner could keep their Dutch citizenship. None the less, it took until 1977 before the foreign family members of Dutch women were granted the same protection under immigration law as those of Dutch men.¹⁸ Dutch immigration law of the 1960's and 1970's may have been strongly imbued with the principle of family unity, it was clearly the family of the father or step-father residing in the Netherlands that was to be kept intact, not that of the mother or step-mother.¹⁹

By 1979 all distinctions based on sex were eliminated in Dutch immigration policies and in 1985, Dutch nationality law too was finally reformed, putting an end to sex discrimination. From then on, both husbands and wives could be admitted to the Netherlands on the same terms and enjoyed the same (modest) advantage when applying for naturalisation.²⁰ Also, Dutch mothers could now pass on their nationality to their children at birth, on the same basis as Dutch fathers.

The introduction of the "effective family bond" criterion: part of a process of levelling down

By now however it has become clear that the equal treatment of men and women in Dutch immigration and nationality law has had its price. For in the end, the equal treatment of men and women has not resulted in more security for Dutch women with foreign family members. Rather, the privileges that were previously enjoyed by transnational families headed by a Dutch male have gradually been rescinded. Thus, while foreign family members of Dutch men were originally protected against deportation, since 1994 no foreign family members enjoy any such protection any more. Nor are any exceptions made, any more, for Dutch citizens regarding income requirements for family reunification. In other words, not only have the formal distinctions between men and women disappeared, the privileges that Dutch citizens once held regarding family reunification have also disappeared. Dutch citizens, be they male or female, are no longer assumed to have a stronger claim to family life in the Netherlands than foreigners residing with a temporary permit.²¹

Moreover, it is important to note that gender and family bonds have continued to influence family reunification policies, although in subtler ways than before. Thus

¹⁷ Nora Holtrust. De geschiedenis van de afstands moeder. Dikke bult, eigen schuld. In: Carla van Splunteren (ed.) *Publiek geheim. Deprivatisering van het vrouwenleven*. Amsterdam: Clara Wichmann Instituut, 1995, p. 45-59.

¹⁸ The foreign wife and (step)children of a Dutchman were protected against deportation on whatever grounds, as long as they continued to effectively form part of his family.

¹⁹ See further: Betty de Hart. *Onbezonnen vrouwen. Gemengde relaties in het nationaliteitsrecht en het vreemdelingenrecht*. Aksant, 2003.

²⁰ That is to say, they could naturalize after a period of three years of marriage, rather than after a period of five years residence in the Netherlands. However, three years of marriage to a Dutch citizen was not in itself sufficient. The foreign spouse had to be residing legally in the Netherlands at the moment that naturalisation was requested. In other words, he or she still had to have met the admittance criteria of Dutch immigration law.

²¹ De Hart 2003 op cit. On the whole, foreigners who had been admitted as refugees or who had managed to acquire a permanent resident status enjoyed many, although not all, of the same privileges regarding family reunification as Dutch citizens.

increasingly rigid income requirements have made family reunification more problematic for women than for men, given the fact that women in the Netherlands on the whole earn less than men.²² And while the possibilities for labour migration have increased considerably the past few years, it remains very difficult to find legal employment in those professions that are easily accessible for women coming from third world countries.²³ Despite all the changes that have taken place, for many single and divorced mothers coming to the Netherlands, finding a partner there remains the only option available for gaining a secure status for themselves and their children. While the situation of Dutch women with foreign family members hasn't improved significantly, that of foreign women marrying Dutch men has actually deteriorated.

It is in the context of this levelling down that I think one must view the introduction of the "effective family bond" criterion in admission policies in 1979, the same year in which all formal distinctions between men and women were eliminated in Dutch immigration law.²⁴ As of then, both foreign Dutch men and Dutch women could, in principle, apply to have a foreign spouse's children admitted. However, at the same time a new requirement was introduced, namely that the child should effectively belong to the family.²⁵ In the first published version of the Dutch immigration circular, which came out in 1982, the meaning of the term "effective family bond" was explicated as follows. This bond between parent and child was assumed to be definitively broken once the child had been taken up indefinitely in another family while the parent(s) either no longer enjoyed parental authority or had ceased to provide financial support.²⁶

Initially, this criterion seems to have been primarily applied to prevent divorced *fathers* from bringing over children after they had acquired status by remarrying in the Netherlands.²⁷ Not infrequently, these fathers would have let their children come over on a tourist visa and stay with them illegally, until all income and housing requirements necessary for legalized reunification had been met. Their subsequent attempts to acquire a residence permit for the children then failed, on the grounds that the "effective family bond" had been severed.

Such refusals often led to consternation and court cases. Some foreign fathers, together with their Dutch wives – stepmothers by then to the children – even went so far as to have the children placed under the protection of the Court in order to prevent expulsion.²⁸ Court cases show that immigration authorities took the position that even when a child had

²² De Hart 2003 op cit.

²³ Thomas Spijkerboer. *Het VN-vrouwenverdrag en het Nederlandse vreemdelingenrecht*. The Hague: Adviescommissie voor vreemdelingenzaken, 2002.

²⁴ Previously, an effective family bond was required in order to qualify for protected family status *after* the child had actually been admitted. The underlying idea was that only children who were still dependent of their parents needed such protection. At the time, legal commentators assumed that this criterion couldn't be used to refuse admission: "The fact that they (the parents SvW) are responsible for the child and have the power to determine his domicile, in conjunction with the child's right to an effective family life, seems to preclude this" (A.H.J. Swart. *De toelating en uitzetting van vreemdelingen*. Alphen aan de Rhijn: Kluwer, 1978, p. 153.)

²⁵ Vc, 33rd update, p. C - 26m. Moreover, article 11 of the present Dutch nationality law stipulates that children do not follow in the naturalisation of their parents, in the event that naturalisation has been made conditional. An administrative circular of March 31st 1992 introduced as a general condition that the child must have been admitted to the Netherlands before it can share in the naturalisation of its parent. As a result, the "effective family bond" criterion can still be applied to refuse a child's entry, even after his or her parent has become a Dutch citizen.

²⁶ Vc 1982 B-19.2.2.2

²⁷ See: S. van Walsum, M. Hop and M. Klabou. Het recht op gezinsleven in Nederland, voor buitenlanders, in *NJB* vol. 62 (36) 1987, p. 1150-1155.

²⁸ Kinderrechter Rotterdam, beschikking 12 juni 1979, FJR 5/1 (januari 1983) p. 22.

had an effective bond with his father in the country of origin, he could never the less be refused entry since he had never belonged to the family that had subsequently been established by the father in the Netherlands. The fact that the child had, in many cases, been taken up in his father's new home, albeit illegally, was generally not considered relevant, since it was a basic principle of Dutch immigration law that no rights could be acquired through illegal residence.

The authorities further justified their refusal by referring to the interests of the child's mother in the country of origin. The reasoning was that she needed to be protected against forced separation from her child.²⁹ It soon became evident however that the Dutch administration's concern for the family life between a foreign mother and her child only lasted as long as the mother remained abroad.³⁰ As the number of single and divorced mothers migrating to the Netherlands and subsequently acquiring status through marriage increased, it soon became evident that they too would run up against the "effective family bond" criterion. In 1985, for example, a Moroccan woman applied for residence permits for her two daughters who were then respectively 19 and 20 years old. This woman had been divorced from the girls' father in 1968, in Morocco, and had subsequently lost all contact with him. In 1976 she left for the Netherlands, leaving the girls behind with their maternal grandmother. She remarried, in the Netherlands, in 1977, but divorced once more in 1980. After having remarried for a second time in 1982, she finally acquired permanent residence status in 1985.

Although the mother had continued to support her daughters and had visited them each year, the Dutch Council of State (at the time, the highest court of appeals in immigration cases) ruled that the government could reasonably have concluded that the "effective family bond" between the mother and the daughters had been severed. The Council of State seemed to be particularly impressed by the fact that the mother had remarried twice after having left her children behind in Morocco.

The judgement in this case reveals that the mother had pleaded that she had not been able to initiate family reunification earlier because of the uncertain nature of her residence status. Although no details are mentioned, it is quite possible that her two consecutive husbands in the Netherlands had not been willing to co-operate, and that she therefore hadn't dared start the proceedings, out of fear of jeopardizing her marriage and hence her status, until she had acquired an independent status of her own.³¹ In any case, the Dutch Council of State did not consider this a relevant factor, and ruled that the refusal to grant entry for family reunification should be upheld.³²

Diverging views on family bonds in Dutch immigration and family law

Before the case of the Moroccan woman's two daughters came up before the Dutch Council of State, it had been reviewed by the European Commission for Human Rights, where the mother had lodged a complaint, stating that her right to family life had been violated by the Dutch government's refusal to comply with family reunification. While the European

²⁹ All of these arguments, put forward by the immigration authorities, eventually met with the sympathy of the Dutch courts. See for example: AR 3-02-1989, RO287.0337; AR 28 juli 1983, *NJ/AB* 1984 nr. 373.

³⁰ In fact, that concern seems to have been at least as much inspired by a desire to keep children out of the country as by concern for the mother's family life with her children. Thus the government defended its policy during one court case by stating that: "should children be admitted on the sole ground that a parent residing in the Netherlands has been granted custody, it would become impossible to effectively control immigration anymore." (AR 21 juni 1984, RV 1984 no. 13).

³¹ Apparently, this woman had remarried with men holding a foreign nationality (presumably Moroccans). Had she married a Dutchman in this period, she could still have opted for Dutch nationality.

³² AR RvS 24 August 1989, nr. RO2.87.1829, published in *Rechtspraak Vrouw en Recht* (Ars Aequi 1992) nr.187.

Commission accepted that the relationship between the mother and her two daughters qualified as family life, and that the Dutch government's decision to expel the two girls amounted to interference in their right to respect for family life, he ruled that this decision could be justified by the economic interests that were served by Dutch restrictive immigration policies. Particularly in view of the girls' age (by then they were respectively twenty-two and twenty-three years old) and of the fact that they had spent the first nineteen years of their lives in Morocco, the Commission ruled that their forced return to Morocco could not be said to be disproportionate to the legitimate aim pursued.³³

Surprisingly, despite the European Commission's ruling that the relationship between the mother and her daughters qualified as family life, the Dutch Council of State confirmed the government's contention that there was no "effective family bond" between them. This is striking because, in the jurisprudence of the European Court of Human Rights, the term family life has always been interpreted to mean an effective and factual bond. At the time that he wrote his authoritative work on Dutch immigration law in the late 1970's, Swart actually assumed that the "effective family bond" criterion in Dutch immigration law should mean the same thing as "family life" in the sense of article 8 of the European Convention.³⁴ By the mid 1980's however, the effective family bond demanded by Dutch immigration policy was clearly perceived to be of a different order than the term "family life" as applied by the European Court of Human Rights. While the fact that the mother had remarried was clearly no reason, for the European Court, to assume that family life between her and her daughters had ended, for the Dutch immigration authorities and courts, this same given led to the conclusion that the girls no longer "belonged" to their mother's family. In other words, in the context of Dutch immigration law, a child could not belong to two separate family units at the same time. Parent and child were assumed to have made a "clean break".

This twist of reasoning in Dutch immigration law contrasts sharply with developments that were taking place at the same time in Dutch family law. For in the course of the 1980's, the right to respect for family life, as guaranteed by the European Convention of Human Rights, was to prove to be a powerful instrument in Dutch family law for unmarried and divorced fathers. By appealing to this fundamental human right, they managed for example to acquire the right to recognise children born out of wedlock even when the mother refused permission, as well as the right to share custody and parental authority with a child's mother outside of marriage. Men even won the right to recognize children born out of an adulterous relationship, a step that in the eyes of some feminist lawyers brought Dutch family law suspiciously close to condoning polygamy.³⁵ Clearly then, in the context of Dutch family law, children could belong to two separate family units at the same time. For Dutch fathers and their children, the break following divorce or separation wasn't very clean at all.³⁶

The divergence between the underlying moralities of Dutch immigration and Dutch family law eventually became so manifest, that restrictive immigration policies did, to some extent, crack under the pressure. Already in June 1988, the European Court of Human Rights ruled in the Berrehab case that the expulsion of a divorced Moroccan father from the Netherlands was in violation of article 8 of the European Charter of Human Rights, even though he and his Dutch daughter had never actually lived together in the same family unit.³⁷

³³ European Commission for Human Rights, September 8 1988, nr. 13654/88, published in: *RV* 1989/13.

³⁴ Swart 1978 op cit p. 167.

³⁵ Els van Blokland. Het culturele conflict. Afstammingsrecht versus vreemdelingenrecht, in *Nemesis* 1998 nr. 4, p. 85-87.

³⁶ Cf: Alison Diduck. Images of Family in English Child Support Law, in *Recht en Kritiek*, vol 22 (3) 1996, p. 231-253.

³⁷ European Court of Human Rights, June 21 1988, nr. 3/1987/126/177, published in *RV* 1988/17.

In a similar vein, Dutch immigration judges gradually came to adopt the position that the fact that widowed or divorced parents remarried after their admittance to the Netherlands was not relevant for determining the quality of the family bond between them and the children they had left behind and should not, in itself, disqualify them from family reunification. Ultimately, the Dutch immigration authorities took over this position. The fact that a parent had established a new family in the Netherlands was no longer sufficient reason, in itself, to assume that the effective family bond with children left behind in the country of origin had been severed.³⁸

Care becomes a definitive criterion in Dutch family migration policy

In the meantime however, the Dutch immigration authorities had been redefining the concept of effective family bonds once again. The emphases shifted from the formal marital status of the parent involved, to the actual factual involvement of that parent in the daily care of his or her children abroad. By the early 1990's, even parents who had always remained married to each other were being refused permission to bring over children they had left behind in their country of origin.³⁹

In 1998, the formulation of the policies in the immigration circular was modified once again. From then on, all parents who did not apply for family reunification immediately upon arriving in the Netherlands but who, for whatever reason, left their children to the care of family members abroad, were assumed to have broken the family bond with those children unless they could prove otherwise. The longer the separation had lasted, the heavier the burden of proof became. This shift in interpretation reflected an implicit assumption that a true parent would not delegate caring responsibilities, but would personally look after his or her children on a day-to-day basis at all times. Since by then most of the cases that came before the courts no longer involved divorced fathers, but women who had come to the Netherlands as single or divorced mothers, most conflicts in effect centred around the question of who was a true mother.⁴⁰

How this conflict was played out in practice can be illustrated by comparing two court decisions that both concerned applications for family reunification made by immigrant mothers who had already left their children behind in the care of their own mother before they left for the Netherlands. In the first case, the woman had left her children with her mother after having remarried with a man with children of his own, who refused to take her children into his home. During the day, this woman stayed at her mother's and looked after her own children, feeding them, taking them to school and, as the Dutch judge later would put it, "generally doing all that a mother who actually lives with her children would do for them". In the evenings, she left her children and returned to her new husband's home to look after his needs and those of his children. When her case came before the Dutch immigration court, the judge ruled that she and her children had in fact shared an effective family bond, even though they did not sleep under the same roof, and she won her case.⁴¹

The second case involved a single mother who left her children with her mother, and moved to a larger city so that she could earn enough money to look after herself and her

³⁸ See for example: Rechtbank Den Haag, seated in Amsterdam, December 12, 2000, published in: *RV* 2000/26.

³⁹ See for example the *Sen* case, which I shall go into later in more detail. Up until 1985 the Ministry of Justice has explicitly denied that children who had been left behind or sent abroad would be denied (re)entry, as long as both parents remained married to each other (minutes of the Werkgroep Rechtsbijstand in Vreemdelingenzaken 1985/2, p. 89).

⁴⁰ This observation is based on an – as yet cursory – survey of Dutch immigration law court judgements passed over the past five years.

⁴¹ Rechtbank Den Haag, seated in Haarlem, June 2nd 1999, AWB 99/296.

family. In the city she moved in with a new partner, but during the weekends she returned to her home town to stay with her mother and the children. In her case, the Dutch judge seriously doubted there had been an effective bond any more between mother and children before the mother left for the Netherlands. In any event, it was not sufficient, in his eyes, to justify reunification.⁴²

Care is explicitly rejected as a criterion in Dutch family law

Strikingly, during this same period Dutch feminist lawyers have been lobbying – without success – to have visiting rights, custody and the right to shared parental authority explicitly linked to demonstrated day-to-day care. While formal equality between men and women has been reached in Dutch family law, substantive inequalities persist within Dutch society. Women still possess less positions of power than men, work less hours and earn less per hour. Feminist lawyers worry that, unless the substantive implications of women's caring responsibilities are somehow accounted for in family law, the growing protection of family life against state interference will benefit fathers more than mothers.⁴³

The Dutch legislature however has ruled that proof of effective care should not be a criterion for entitlement to parental rights.⁴⁴ In this they have followed Dutch court decisions that making parental rights dependent of actual involvement in day-to-day care amounts to discrimination.⁴⁵ Consequently, divorced or separated fathers are now entitled to parental rights irrespective of the amount of financial support that they provide for their children or the extent of their involvement in day-to-day-care. Only under very exceptional circumstances will they be denied visiting rights or the right to shared parental authority.

While feminist lawyers have expressed their disappointment over these developments, human rights lawyers have been positive in their reactions. In their view, fathers and mothers are rightly being treated as mature adults, capable of making their own choices and decisions in the best interests of their children. “It is undesirable to impose stereotypes upon the parents... Furthermore, a child’s needs are not static but dynamic and disparate. In short, a legal response to the concern expressed by (feminist authors – SvW) would necessarily involve an intensified regulation of custody, when what is needed, in the interests of being able to respond to the individual needs of each child, is greater de-regulation.”⁴⁶ At the same time, there has been a growing consensus, within the Netherlands, that it is of great importance for the identity formation of a child that it acquire and maintain some form of contact with, or at the very least information about, its biological parents.⁴⁷

These two related underlying assumptions of current Dutch family law, namely that the bond between a child and its biological parents is of essential significance for its psychological development, and that parents should be given the freedom, as mature adults, to fulfil their responsibilities towards their children as they see fit, do not seem to apply where immigrants are concerned. Where a “clean break” between parent and child is seen as highly problematic within Dutch family law, it still forms a basic underlying assumption of Dutch immigration law. And where policing the actual involvement of parents in the care of their children has been rejected in Dutch family law as an unacceptable invasion of the privacy

⁴² Rechtbank Den Haag, seated in Zwolle, January 15th 1997, AWB 96/8085.

⁴³ See for instance: C. van Wamelen: De eerbiediging van een zorgrelatie. De rol van zorg bij echtscheiding, in: *Nemesis* 1996 nr.3, pp. 76-82.

⁴⁴ Kamerstukken II 1996/97, 23 714, nr. 11, p. 12. See also: E.J. Nicolai. De juridische positie van de niet-verzorgende ouder na echtscheiding, in: *NJB* 10/15 (1998) p. 696.

⁴⁵ Forder 1995 op cit.

⁴⁶ Forder 1995 op cit p. 405.

⁴⁷ Holtrust 1995 op cit.

rights of those involved, Dutch immigration law actually requires immigration authorities to do just that. When it comes to the enjoyment of the freedoms protected by article 8 of the European Convention, fathers may be more equal than mothers; “native” Dutch parents are definitely more equal than immigrant ones.

Towards a more ethnically motivated mode of exclusion

The discrepancies between Dutch family law and Dutch immigration law reflect a broader, more ideological distinction that is presently being drawn between “autochthonous” Dutch and particularly non-western immigrants. While Dutch culture is seen to be exemplified by the liberal and secular norms that currently shape Dutch family law, non-western immigrant cultures and particularly Islamic ones are perceived, again according to a selective caricature, to be religiously inspired, patriarchal, and with no place for the emancipated woman, exponent of modern western liberalism.

In this dichotomous view, Dutch women are no longer assumed to be full-time caregivers. Various social security measures and aspects of Dutch labour law are now designed to encourage women to combine their caring responsibilities with paid labour so as to further promote their economic independence, while fathers are encouraged to participate in child-care. Family relationships have come to be seen more in terms of contractual arrangements between free and equal individuals, and less in terms of the religiously sanctioned hierarchical institution of the 1950’s and 60’s.⁴⁸

Immigrant women however are generally perceived of as submissive and repressed, subjected as they are assumed to be to archaic family norms.⁴⁹ In this respect, it is significant that the status that immigrant women can acquire through marriage has become increasingly less secure. Women no longer enjoy easy access to Dutch nationality via marriage to a Dutchman. Only after three years of living together with their partner in the Netherlands can they qualify for an independent status of their own. While migrant wives are generally assumed to be repressed as a result of cultural norms, Dutch immigration law actually prevents them from enjoying the degree of autonomy available to Dutch women, during the first years of their stay in the Netherlands.⁵⁰

As Dutch men and women have come to be perceived of as each other's equals, both in Dutch family law and in Dutch society in general, the transformative power of marriage has diminished and non-marital relationships have gradually come to be treated on a par with marriage.⁵¹ At the same time, Dutch women have become less dependent of marital relations, thanks largely to modern welfare policies and reformed divorce laws. Since the late 1970's, the stigma that was formerly attached to single Dutch mothers has largely disappeared. Since the 1980's, deliberately unwed mothers have become an accepted and to a certain extent even admired phenomenon.⁵² Particularly those single and divorced mothers who manage to

⁴⁸ G.A. Kooy. *Gezinsleven en recht in naoorlogse Nederland*, in *R.M. Themis* 1997(4) p. 123-129.

⁴⁹ See for example: Renee Romkens. *Over cultuurbarbarij gesproken. Geweld tegen vrouwen en het debat over multiculturaliteit*; and: Sawitri Shuarso. *Over de grens: zwarte, migranten- en vluchtelingenvrouwen in het debat over multiculturaliteit*; both in: Rikki Holtmaat (ed.): *Een verdrag voor alle vrouwen. Verkenningen van de betekenis van het VN-vrouwenverdrag voor de multiculturele samenleving*. The Hague: E-Quality, 2002.

⁵⁰ Concerning the impact of dependent status upon migrant women’s married life see: Els van Blokland and Marjan de Vries. *De afhankelijke verblijfstitel van migrantenvrouwen*. Nijmegen: Wetenschapswinkel Katholieke Universiteit Nijmegen, 1992.

⁵¹ See for example: A.M. van de Wiel. *Samenleven buiten huwelijk. Over het juridisch lot van concubine en concubijn in binnen-en buitenland*. Deventer: Kluwer, 1974.

⁵² Holtrust 1995 op cit.

combine their caring responsibilities with paid employment are seen as vanguards in the struggle towards women's emancipation.⁵³

At the same time however, there has been a growing concern for a specific category of unwed mothers, namely young single mothers among the immigrant communities in the Netherlands. These young women are not seen as emancipated, but, like the Dutch single mothers of the 60's and 70's, as unknowing, irresponsible and, above all, abused. They are deemed incapable of bringing up their children to become responsible citizens and are thus seen as a threat to the moral cohesion of Dutch society.⁵⁴ The assumed increase in the number of single mothers coming to the Netherlands from the Dutch Antilles has for example been quoted as a reason to try and limit the migration from those islands.⁵⁵

Hence, the various dramatic changes that have taken place in Dutch family norms and Dutch family law have affected Dutch family migration policies, but in a very specific way. Formal distinctions on the basis of gender and marital status have become less sharply determined. Both men and women can, in principle, be admitted to the Netherlands on the basis of family reunification, and both non-marital and marital relations are accepted as a ground for entry. But as the parameters of formal gender distinctions and marital status have become modified in Dutch immigration law, gendered assumptions relating to perceived ethnic differences have become more prominent.

By now, in order to gain admittance for both themselves and their children, immigrant mothers must not only find a partner in the Netherlands, they must also adhere to a specific notion of the "genuine mother" that no longer applies to "autochthonous" mothers. And while the bond between a Dutch birth-mother and the child that she has put up for adoption has gained considerable attention and, in the eyes of some, even become idealised at the cost of the mother's privacy,⁵⁶ the bond between an immigrant mother and her child is now assumed to have been severed as soon as the mother entrusts the care of her child to another adult, for whatever reason. In this respect, Dutch immigration law seems to reflect a prejudice towards immigrant mothers that is not far removed from the racist notions described by Deborah R. Grayson regarding black mothers in the United States, namely that black women are "less fit mothers, less caring mothers, and less hurt by separation from their children" than nonblack mothers.⁵⁷

Such attribution of divergent family norms to specific ethnically and/or racially defined persons fits into a long tradition that goes back to the Dutch colonial perception of family relations among Indonesians during the Dutch colonial period,⁵⁸ became evident again in the consternation surrounding the arrival of young men from the Mediterranean⁵⁹ in the 1960's and 70's and now reverberates once more in debates surrounding the "import" of partners and/or adolescent children from Turkey or Morocco.⁶⁰ But it wasn't until after

⁵³ Volkskrant March 5th 2003

⁵⁴ See for example an editorial piece published in the leading Dutch daily, the *NRC*, on September 10th, 1999.

⁵⁵ Directie Coördinatie Integratiebeleid Minderheden: *Nota migratie Antilliaanse jongeren*, 1998, p. 5.

⁵⁶ Nora 56-57; Cf Katherine O'Donovan: "Real" Mothers for Abandoned Children, in: *Law and Society Review*, vol. 36 no.2 (2002) p. 347-378.

⁵⁷ Deborah R. Grayson: *Mediating Intimacy: Black Mothers and the Law*, in: Lauren Berlant (ed): *Intimacy*, Chicago and London: University Press of Chicago, 2000, p. 302. It is interesting to note that similar prejudices prevailed regarding the qualities of Indonesian women as mothers, during the Dutch colonial period. See: Ann Stoler. *Sexual Affronts and Racial Frontiers: European Identities and the Cultural Politics of Exclusion in Colonial Southeast Asia*, in *Comparative Studies in Society and History* 34, 1992, p. 527.

⁵⁸ See for example: Ann Laura Stoler. *Race and the Education of Desire*. London: Duke University Press, 1995.

⁵⁹ Geertje Mak. Seksueel vreemdelingenverkeer. In: *Gaan en Staen. Jaarboek voor vrouwengeschiedenis* 21, Amsterdam: Stichting Beheer IISG, 2001, p. 101-122. See also: De Hart 1995 op cit.

⁶⁰ Sarah van Walsum. Vrouwen emanciperen door het weren van mannen? In *Nemesis* 2002 nr. 6, p. 169-172.

protecting the integrity of the Dutch male-headed family unit had ceased to be the dominant concern of family migration policies that immigration rules would actually cut *through* transnational families, by making distinctions on the basis of gendered assumptions concerning ethnically determined behaviour, rather than drawing a line *between* transnational families, on the basis of formal status as it was previously determined through a gendered system of family and nationality law.

International Human Rights law

While family norms, in any society, structure hierarchies of power and material inequality, they also provide a framework for deploying adult identity. Realizing one's place as an adult member within family structures is a key element of human dignity, and people (for example slaves) who have been denied this possibility have been described by social historians as "socially dead".⁶¹

One of the key elements of an adult's place within a family structure is the responsibility he or she bears for the care and upbringing of children.⁶² The freedom to decide whether or not to have children and, if one decides to have them, the freedom to decide how to care for and raise them, form important aspects of this key element. In any period, in any culture, young women have struggled both against parents and husbands in order to gain more autonomy in these two respects. This struggle however is of a different order than the one migrants must currently wage against the Dutch state in order to be able to realize their responsibility as parents, and hence as adult individuals, at all.

For many migrant mothers, the refusal to allow family reunification on the grounds that the effective bond with the child they left behind has been broken is incomprehensible and unacceptable. The assumptions, expressed in Dutch immigration law, as to how a true mother should meet her responsibilities, doesn't stroke with the reality of their lives and the way they experience their moral obligations as mothers. As I explained at the start of this paper, for single and divorced mothers migrating to the Netherlands from third world countries, taking proper care of their children involves enlisting the help of friends and relatives in providing day-to-day care. They therefore cannot accept that, having done this, they should have disqualified themselves as mothers in the eyes of the Dutch immigration authorities. It is therefore not surprising that many of them fight negative decisions in court. As we saw in the case of the Moroccan mother, some have even gone as far as the European Court of Human Rights, appealing to article 8 of the European Convention of Human Rights. This despite the fact that, where first admissions are at issue, this court has until very recently proven quite reluctant to judge national immigration measures to be in violation of this article.

The European Court of Human Rights jurisprudence on the Dutch policy regarding the admission of children

Although the European Commission had deemed a case concerning the admission of a child to the Netherlands admissible as early as 1984,⁶³ the European Court didn't actually pass

⁶¹ The term was coined by Orlando Patterson: *Slavery and Social Death, A Comparative Study*. Cambridge MA: Harvard University Press, 1982. It is also used by Barbara Omolade: *The Unbroken Circle: A Historical Study of Black Single Mothers and Their Families*. In: Martha Albersson Fineman and Nancy Sweet Thamadsen. *At the Boundaries of Law: Feminism and legal Theory*. New York/London: Routledge, 1991.

⁶² See for example: H.G. Gutman, *The Black Family in Slavery and Freedom, 1750-1925*, New York 1976; M. L. Shanley, *Making Babies, Making Families*, Boston 2001.

⁶³ European Commission, December 3rd 1984, *Tapsinan versus Nederland*, nr. 11026/84, published in: *RV* 1985/106.

judgement on such a case until 1996 in the case of *Ahmut vs the Netherlands*.⁶⁴ This case concerned the admission of the nine year old Soufiane Ahmut to the Netherlands in order to join his father there. Like many men before him, Soufiane's father too had left his children behind when he left Morocco in 1986, after having divorced his first wife. Again, like many men before him, he remarried in the Netherlands and acquired status on the basis of that marriage. In 1987, Soufiane's mother died in a car accident and those children who were still living at home were brought under in the paternal grandmother's home. Three years later Mr. Ahmut, who by then had acquired Dutch citizenship, requested to have his youngest son, Soufiane, admitted for family reunification, since his mother had grown to old to be able to look after him any more.

As usual, the Dutch immigration authorities refused admission on the grounds that the effective family bond had been severed. The father lost his case before the Dutch courts and proceeded on to Stratsbourg where the European Commission judged his case admissible. The European Court however took a very reticent position. Considering that the father had made the deliberate choice to leave his children behind, that the father could, in theory, return to Morocco to join his son there and that Soufiane could be looked after in Morocco (his father had, for the time being, placed him in a boarding school), the European Court ruled that "In the circumstances the Netherlands Government cannot be said to have failed to strike a fair balance between the applicants' interests on the one hand and its own interest in controlling immigration on the other."

Significantly, however, four of the nine judges presiding over the Ahmut case explicitly rejected this reasoning in three separate dissenting opinions, the most extensive of which was written by the Dutch judge, Martens. His dissent rested upon the following arguments. Once a state has allowed an immigrant to settle within its territory, that State is, in his view, in principle bound to respect the choices made by that immigrant concerning family life. Accordingly, one should as a rule admit members of the family he or she has left behind. In Marten's view this is particularly the case where reunification with young children is at stake.

Regarding the specific merits of the Ahmut case, Martens argued that the Dutch government should have taken Mr. Ahmut's settled status and his recently acquired Dutch nationality into account. Moreover, he dismissed the fact that Souffiane could be properly looked after in Morocco as insignificant: "... whether or not Souffiane might possibly be brought up by his grandmother, his uncles, his brothers or sister, is all, in principle, immaterial as long as Souffiane's father is ready, willing and able to do so."

Following the Ahmut case, several more complaints concerning the Dutch "effective bond criterion" were submitted in Stratsburg. Most of these cases were judged inadmissible on the basis of the same arguments that were put forward in the Ahmut decision. On November 7th 2000, however, a case was judged admissible: the case of *Sen vs. the Netherlands*.⁶⁵

The Sen case: An ambiguous judgement

This case too centred around the admission of a young child, in this case the nine-year-old Turkish girl, Sinem Sen. In 1977, Sinem's father had come to the Netherlands, at the age of twelve, to join his father. In 1982 he returned briefly to Turkey to get married there. Following the wedding, he returned to the Netherlands, leaving his bride behind. She followed him in 1986, but left their three-year-old daughter Sinem behind with family. Six

⁶⁴ European Court of Human Rights, November 28 1996, published in: *RV* 1996/24.

⁶⁵ Case nr. 31465/96. Final decision: European Court of Human Rights, *Sen vs the Netherlands*, December 21st, 2001, published in: *RV* 2001/24.

years later, Sinem's parents decided to have her come over and join them. In Oktober 1992 they applied for admission.

Their application was refused on the grounds that the effective family bond had been broken. By the time the Dutch Council of State had turned down Sinem's appeal, two more children had been born, one in November 1990 and the second in December 1994. Both of the younger children lived with Sinem's parents in the Netherlands.

On December 21 2001 the European Court for Human Rights unanimously determined that in the case of Sinem Sen, article 8 of the European Convention of Human Rights had been violated. Yet despite this unanimity, or perhaps in order to achieve it, the European Court took a rather unclear stance regarding its previous jurisprudence as expressed in the Ahmut case and in similar judgements that had preceded Ahmut.⁶⁶ In paragraph 36, the European Court explicitly refers to its earlier jurisprudence and repeats its previously applied criteria. In paragraph 40 the European Court explains that the facts of the Sen case diverge from those in Ahmut on one essential point, namely that of the presence of two children born and bred in the Netherlands. In the eyes of the European Court, this circumstance forms a major obstacle to reunification in Turkey.

In his consenting opinion, judge Türmen indicates that the presence of the two younger children in the Netherlands was in fact the decisive factor in this case. He expresses his disappointment that the European Court wasn't prepared to take a more principled stand against the Dutch decision which, in his words, "testifies to a restrictive spirit that is at odds with the meaning of the European Convention and with human rights in general."

I am not convinced however that Judge Türmen's interpretation does justice to the Court's decision in this case. For in the remaining paragraphs of this decision, the Court takes over surprisingly many of Marten's points of criticism regarding the previous judgement in Ahmut. Particularly striking is that the Court emphatically states that the initial decision, taken by Sinem's parents, to leave her behind cannot be taken to be final. Nor does the Court take the position that it had previously taken in the Ahmut case, that a state will not have violated article 8 of the European Convention as long as the status quo in family relations is maintained. On the contrary, with explicit reference to the jurisprudence that has been built up in the field of family law, the Court points out that family life is dynamic and that the obligations of a State involve allowing for or even facilitating the normal development of family ties.⁶⁷ Thus in paragraph 32 the European Court poses the question whether or not the Dutch State had a positive obligation to admit Sinem so that she and her parents could maintain *and develop* family life together within its territory. In paragraph 40 the European Court points out that there was a pressing need, given Sinem's young age, to *enable* her *integration* within the family unit of her parents and that her admission was the most appropriate option towards *developing* family life (my emphases).

With this explicit reference to legal doctrine that has been developed within family law, the European Court has brought into profile the diverging family norms that characterise Dutch immigration policies and Dutch family law. In the eyes of the European Court, the right to respect for family life applies to all parents and their children, in the same way, regardless of nationality. In other words, the exclusionary implications of national immigration rules have been overruled by the universalising principles of human rights. Read this way, the Sen case seems to confirm the optimistic expectations of those who expect that universal human rights will, in good time, come to mitigate the exclusionary effects of restrictive national immigration policies. But is this optimism truly justified and, more specifically, can such conclusions even hold for people who are excluded not only on the

⁶⁶ Notably: European Court of Human Rights, 19 februari 1996, *Gül vs. Zwitserland*, published in: *RV* 1996/23

⁶⁷ Cf European Court of Human Rights, June 13 1979, *Marckx v. Belgium*, series A vol. 31.

basis of nationality but also via gender and race relations? That is, can even single and divorced third world mothers mobilise the universal principles of human rights to gain admission for their children?

The principle of the margin of appreciation

In order to gain some insight into the actual effect of the European Convention of Human Rights upon national immigration policies, it is necessary to take a closer look at the workings of the European Court. From the start, the European Court has been conscious of the fact that it must account for the differences in culture and tradition between the various states over which its jurisdiction prevails. When the Court deems itself unable to gauge the practical consequences of certain choices that must be made concerning social or economic relations within one or more of the member-states, it tends to be quite reticent in its decisions. Otherwise, is the reasoning, it would interfere too much in the sovereign right of the member states to make essential choices regarding social and economic issues via processes of democratic decision-making.⁶⁸

On the other hand, the European Convention also assumes a minimum standard of human rights and fundamental freedoms, to which the member states have committed themselves (article 53 ECHR). This minimum standard does limit the range of choices that can be made via the national democratic decision-making process. The legal term of the margin of appreciation refers to the space which the European Court can allow the member-states in exercising their sovereign rights, without having them violate the minimum standards guaranteed by the European Convention. The flip side to this margin of appreciation is the freedom that the European Court has to sanction concrete actions taken by the member-states.

In effect, it is quite a sensitive sort of balancing act that the European Court must perform. Since the European Court does not possess any means of its own with which it can ensure execution of its judgements, it is entirely dependent of the moral weight of its decisions. The Court only has effect to the extent that its judgements are actively given effect within national legal orders. If the Court goes too far in sanctioning government actions that, within the member state involved, enjoy a high level of political support, then there is considerable risk that the Court's judgement will be ignored or set aside. Should this happen too often, then the authority of the Court will be undermined. On the other hand, should the Court be too timid in its judgements, then people may become cynical and lose faith in the Court as a defence against violation of human rights. Such a reaction too, would be fatal for its authority.⁶⁹

Given this sensitive balance that the European Court must see to maintain, it is not surprising that it initially granted the Netherlands a very wide margin of appreciation in the Ahmut case. Immigration law does, after all, lie close to the heart of national sovereignty. And as nation-states have had to adapt to the growing pressures of political and economic internationalisation, the significance of policed borders for affirming national sovereignty has not decreased, but increased:

“... Nation-states are now simply one class of powers and political agencies in a complex system of power from world to local levels, but they have a centrality because of their relationship to territory and population.

Populations remain territorial and subject to the citizenship of a national state. States remain ‘sovereign’, not in the sense that they are all-powerful or omnicompetent

⁶⁸ L.C.M. Meijers, ‘Rechtsvormende taak van de rechter bij implementatie van Straatsburgse rechtspraak’, *NJCM-Bulletin*, 1996 (1) p. 123.

⁶⁹ J.G.C. Schokkenbroek, ‘De margin of appreciation-doctrine in de jurisprudentie van het EHRM’, in: A.W. Heringa e.a. (red.), *40 jaar EVRM*, Leiden 1990 p. 54-57.

within their territories, but because they police the borders of a territory and, to the degree that they are credibly democratic, they are representative of the citizens within those borders.”⁷⁰

Certainly among the States party to the European Convention, the issue of immigration policy has continued to stand high on the political agenda, the general consensus leaning towards more, rather than less restrictive measures. In the current political climate, an assertion by the European Court that the universal right to respect for family life should prevail over national immigration policies is not likely to fall on willing ears.⁷¹

On the other hand, the European Court has been anything but timid in championing the right to respect for family life in the context of family and child protection law. In the case of *Kroon vs. The Netherlands*,⁷² for example, the European Court set aside the Dutch law of succession so that the child of an adulterous relationship could be recognised by its father. Remarkably, the Court didn't even bother to motivate why, in this case, it was justified in bypassing the Dutch legislature. Although they may have agreed on the substantive issues in this case, some authors – to my mind rightly – have criticised the European Court for having shown so little concern for processes of democratic legitimisation.⁷³

Yet despite the European Court's decidedly radical approach to family law, its jurisprudence in this field has on the whole been enthusiastically received within the Dutch legal order – with the exception of objections raised in the margins by some feminist lawyers. The European Court's decisions have been eagerly followed by most of the national courts and have even led to significant legislative reforms that have brought about substantive changes in Dutch family law. On the whole, these changes went as far as, if not farther than, the substantive changes recommended by the European Court. In fact the decisions of the European Court seem to have acted as a catalyst in transforming normative changes that had taken place in dominant (i.e. white, middle class and male) sectors of Dutch society into legislative reforms. This explains, to my mind, how the European Court could get away with taking such a strong initiative in the field of family law, and leaving the Dutch state with a very narrow margin of appreciation indeed.⁷⁴

New hope for migrant mothers?

The difference between the level of protection that the European Court was prepared to afford family life in family law and that which it was willing to grant it in immigration law did not go unnoticed among legal academics and practitioners.⁷⁵ I suspect this discrepancy also helped fuel the doubts of those who wrote dissenting opinions against the *Ahmut* decision. And judging from the explicit references that were made, in *Sen*, to the European Court's family law jurisprudence, it must have played a role in that judgement's move away from the initial course set out in *Ahmut*.

⁷⁰ P. Hirst en G. Thompson, *Globalization in Question. The International Economy and the Possibilities of Governance*, Cambridge VK 1999, p. 275.

⁷¹ An initially liberal proposal regarding family reunification that was put forward by the European Commission has, for example, been heavily amended in favour of more restrictive policies, by the members states represented in the European Council.

⁷² European Court of Human Rights, October 27 1994, Series A vol 297-C.

⁷³ T. Loenen, 'Het Europees Hof voor de rechten van de mens als toetsers of steller van de wet? Enkele beschouwingen naar aanleiding van de zaak *Kroon*', in *NJCM-Bulletin* 1996 (1) p. 75-82.

⁷⁴ For more concerning the reception of *Kroon* within Dutch family law, see: C. Forder, 'Biologische en maatschappelijke werkelijkheid gaat voor in het afstammingsrecht (noot bij *Kroon*)', *NJCM-bulletin* 2000 (1) p. 279-280; and De Boer's note following a judgement of the Dutch supreme court: HR 4 november 1994, *NJ* 1995, 249.

⁷⁵ J. van der Velde. Positieve verplichtingen, *EVRM R&C*, 33rd revision, March 2002, p. 1-21.

However, embarrassing as the gulf between the two forms of jurisprudence may have been, closing the gap was none the less risky. Given the current political climate, the Dutch government was not likely to greet this incursion into its sovereign right to control its borders in quite the same co-operative way in which it had taken on the European Court's family law jurisprudence. Nor did it do so. In reaction to questions posed in the Dutch parliament concerning the implications of the Sen case for Dutch family migration policy, the Dutch government replied that the Sen case involved a very particular set of circumstances and hence was of no general significance for Dutch policy.⁷⁶ In court cases, too, the government has maintained its position that the Sen case was specific in two respects. Firstly, it involved a family with two children born and bred in the Netherlands. Secondly, this case didn't involve a single or divorced parent who had come to the Netherlands, remarried, and subsequently let a child come over, but a married couple who had come to the Netherlands to settle there as a family.⁷⁷

Up until now however, the Dutch immigration courts have not been impressed by the Dutch government's interpretation of the Sen judgement. In their eyes, neither the relationship between Sinem's parents nor the presence of her two siblings in the Netherlands were decisive, but the fact that Sinem's parents had invested heavily in a future in the Netherlands. Under those circumstances, it had been unreasonable to force them to choose between giving up that future, or renouncing the company of their oldest child. Consequently, in recent court cases, women like Joyce have managed to win their cases in court by appealing to the Sen decision, despite the fact that they came to the Netherlands as single or divorced mothers, and even if they had no children born and raised there.⁷⁸

So we see that single and divorced migrant mothers have indeed succeeded in challenging restrictive national family migration policies by appealing to international human rights law. This is a remarkable achievement, for it is by no means self-evident that international human rights law should neutralize the ethnic and gender biases of Dutch immigration policies. Judges applying international human rights law are after all no less human than those they have to judge over. They too are children of their times, susceptible to dominant notions regarding ethnic differences and/or gender relations. It is for instance no accident that the European Court first departed from its initially cautious approach on the issue of family reunification in a case involving a couple rather than in one involving a single or divorced mother, even though such cases are far more common.

In an earlier case the European Court had in fact decided that a mother who had left her son behind in Surinam upon moving to the Netherlands, was inadmissible in her complaint. Implicitly, the Court suggested that this mother had abandoned her child and therefore did not deserve to have him admitted to the Netherlands to rejoin her. Thus the Court remarked that "it does not appear, nor has it been alleged, that her decision to act thus (i.e. move to the Netherlands, leaving her son behind) was anything other than deliberate" and that "the fact of the applicants living apart from June 1985 until October 1993 was apparently the result of Ms. Knel's initial conscious decision to settle in the Netherlands with her (new

⁷⁶ Letter, dated July 8th 2002, from the Dutch Minister of Foreign Affairs addressed to the Chairman of the Permanent Committee on Foreign Affairs of the Dutch parliament (second chamber), concerning the Sen case (DJZ/IR-211/02).

⁷⁷ See the arguments presented by the Dutch State in: *Rechtbank Den Haag*, seated in Zwolle, May 22nd 2002, AWB 01/67498.

⁷⁸ *Rechtbank Den Haag*, seated in Zwolle, May 22nd 2002, AWB 01/67498; *Rechtbank Den Haag*, seated in Zwolle, May 23rd 2002, published in *Jurisprudentiebulletin* 9(19) nr. 536; *Rechtbank Den Haag*, seated in Arnhem, Oktober 8th 2002, AWB 02/26237.

SvW) husband rather than remain in Surinam with her son".⁷⁹ In the light of this decision, it is nothing short of remarkable that single and divorced migrant mothers have, after all, managed to deploy article 8 of the European Convention to their advantage.

A continuing story

However much I like a happy ending, I'm forced to admit the story doesn't end here. Although national processes of decision-making must conform to international human rights treaties and conventions, the relationship between national and international law is by no means straightforward. It is a complex and dynamic process in which there is no clear-cut hierarchy.⁸⁰ While the European Court for instance must perform a sensitive balancing act in determining the right margin of appreciation, the Dutch government for its part must beware of moral challenges to its legitimacy, couched in the language of human rights.⁸¹ The legitimacy of the Dutch legal order is, after all, grounded on principles set down in documents such as the European Convention of Human Rights. That is why the Dutch became party to this Convention in the first place. Since the early 1980's, this Convention has come to play a significant role within Dutch legal practice. This is particularly true of article 8 of the Convention, the right to respect for family life. Having allowed this article to play such a major role in the restructuring of family law in the Netherlands, the Dutch government can not very easily ignore its significance in the field of immigration law.

It is then interesting to note that, in its most recent suggestions for policy changes, the Dutch government has proposed restricting the admittance of children older than 12 years, on the grounds that only younger children are sure to be able to integrate successfully into Dutch society.⁸² In fact, following the Sen decision the Dutch government has already modified the "effective family bond criterion", such as to bring it more into the scope of integration policies, thus deflecting attention from the issue of family life. Under the present rules, children can be admitted up until five years after a parent's departure from the country of origin. Once that period has elapsed, the child is no longer assumed to be able to adapt easily to a new life in the Netherlands. Reunification is seen to be neither in the interest of the child, nor in that of Dutch society as a whole, and is only permitted under very exceptional circumstances.⁸³ As gendered marital norms give way to gendered determinants of ethnicity in marking the gates of the Dutch nation, legal focus seems to be shifting from family life to social cohesion, placing appeals to article 8 of the European Convention within a new, and for migrant parents possibly less advantageous, political perspective.

If and how the present Dutch cabinet (which is still in the process of being formed) will pursue this course, I don't know. Equally uncertain is how the Council of State, which was recently reinstated as highest immigration law court, will interpret the Sen case and the policy changes that have followed it. Up until now, this court has been reluctant to negatively sanction the Dutch government's decisions in asylum cases.⁸⁴ There is good reason, then, to assume that it will grant the government a wide margin of appreciation in family reunification cases as well. And if so, how will the European Court react? Will it continue to bring its

⁷⁹ European Court of Human Rights, September 5th 2000, *Knel en Veira vs the Netherlands*, nr. 39003/97, published in *RV* 2000/21.

⁸⁰ C.f. Elies Steyger. *Besturen in het Europese recht. Over de invloed van het communautaire recht op de nationale bestuursrechtelijke tradities*. Den Haag: SDU Uitgevers, 2002.

⁸¹ C.f. Seyla Benhabib. Citizens, Residents, and Aliens in a Changing World. Political membership in the global era, in *Social Research*, 66, fall 1999, p. 709-745.

⁸² Strategisch akkoord voor het kabinet CDA, LPF en VVD, Tweede Kamer 2001-2002, 28375, nr. 5.

⁸³ Vreemdelingencirculaire (Vw 2000), Chapter B2/6.4.

⁸⁴ Thomas Spijkerboer. *Het hoger beroep in vreemdelingenzaken*. Den Haag: SDU Uitgevers, 2002.

immigration law judgements closer to the spirit of its family law jurisprudence, or will it return to the more cautious course it had initially set out in *Ahmut*? Will the Joyces of the future be able to mobilize article 8 of the European Convention so that their children can join them in the Netherlands? There is no easy answer to that question.

Conclusion: migrant mothers, agency and international human rights law

As I stated at the beginning of this paper, despite international human rights law's universalistic pretensions, it is by no means evident that human rights law is universally accessible as a remedy. International human rights are, after all, the crown jewels of western liberalism, its major claim to moral superiority, and are jealously guarded as such. They are Euro-centric in design and with their emphases on the autonomous individual, strongly male-oriented. Attempts by Third world countries to influence this particular form of legal discourse have resulted in little more than the condescending concession that their priorities may be included in the form of "new generation" or "second class" human rights. Attempts on the part of Third World women to enter the debate have been silenced with the admonition that they mustn't jeopardize the precarious gains of their male politicians by troubling the issues of social and cultural rights. Western feminists have seized upon the conflicting loyalties of Third world women as proof positive that women's emancipation is incompatible with non-western culture. They have in effect denied third world women the space to enter the international human rights debate on their own terms, by co-opting them into their own politics.⁸⁵ To the extent that Third world women's issues have been expressed in terms of human rights, this has often gone hand in hand with portrayal of Third world women as victims. Although this strategy has led to important gains, it has also resulted in the introduction of state measures that, in the name of protection, have done much to infantilise Third world women and further reduce their agency.⁸⁶

In a more general sense, feminist scholars have warned against a naïve faith in the emancipatory potential of the law, pointing out that in all societies, including those of the west, gendered power relationships are reproduced in and by legal relationships. "Regardless of what standards are applied, the positions feminists adopt, the normative goals they seek to pursue are, inevitably, products (albeit mediated) of the discursive and social practices they seek to critique. How do they ensure that their efforts to produce knowledge which enhances understanding and furthers their normative ideals are not acts of collaboration?"⁸⁷

On the other hand, the law, and hence also human rights law, is not monolithic, but fragmented and fraught with contradictions and logical flaws. In serving conflicting interests, it can also facilitate surprising coalitions. It is, after all, nothing more and nothing less than the result of dynamic processes of human interaction. The question that I have addressed in this paper is to what extent migrant women have been able to take active part in these processes in order to mobilize the law so as to increase the scope of their agency in realizing one of the most vital aspects of their identity as mature adults: that of a parent responsible for the welfare and future of her child.

Because international human rights law is a process, migrant women's engagement with it must be placed within an historical perspective. In the period that I have described, beginning in the late 1960's and ending in the present, entry to the Dutch nation was initially

⁸⁵ Sarah van Walsum. *The Politics of Culture. Orientalism in Court*, in *Orientations* 3, 1995.

⁸⁶ Ratna Kapur. *The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics*, in *Harvard Human Rights Journal*, 15 (Spring 2002).

⁸⁷ Joanne Conaghan. *Reassessing the Feminist Theoretical Project in Law*, in *Journal of Law and Society*, vol. 27(3), September 2000, p. 380.

regulated through gendered family norms. National identity was primarily attributed to men. Women and children were subsumed under the national identity of husband or father. As the women's movement booked success in getting individual women's rights recognized, marital status lost much of its significance for transforming women into respected citizens. Women could become mature adults and responsible parents on their own merits, without having to subject themselves to the authority of a husband.

But while Dutch women gained an autonomous claim to citizenship, that of migrant women became less secure. While little or no new access was granted them to legal residence via paid labour, their access via marriage became conditional, rendering them more dependent of their Dutch spouses. While Dutch women's growing autonomy came to be celebrated as emblematic of Dutch culture, migrant women came to be seen as foreign to that process, and to Dutch culture as a whole. Only those migrant mothers who adhered to the specific norm that distinguished them from the emancipated Dutch mother, namely that of a dependent and subjected spouse devoted to full-time unpaid care, could succeed in having their children legally admitted. Culture, along with marital status, came to be the measure of her worth as a mother, but in a contradictory fashion. Before she could be deemed fit to raise her children within Dutch society, she first had to confirm her alienation from that society!⁸⁸

That migrant women have, in the end, succeeded in challenging Dutch family migration policies by appealing to the right to respect for family life has, ironically, not been due to the universalising power of human rights law per se, but to the specific successes that Dutch men had previously booked in applying this same right in claiming custody, shared parental authority and visiting rights, irregardless of their marital relationship to the mother of their child, and irregardless of the extent of their involvement in the care for their child. Once the European Court had placed family life in the context of immigration law on the same plane as family life in the context of family law, it became very difficult for Dutch immigration law judges to deny migrant mothers a level of protection equal to that which their family law colleagues were giving Dutch men. To do so would mean to question the validity of current assumptions regarding family relations that are central to the dominant liberal perception of Dutch national identity.

The fact that single and divorced migrant mothers have, as it were, joined forces with single and divorced Dutch fathers, raises some interesting issues. Just how universally valid, for example, is the feminist critique of current jurisprudence surrounding article 8 of the European Convention? Is a radically liberal approach to respect for family life detrimental to the interests of all mothers, or only to the interests of some mothers? On the other hand, by appealing to the abstract liberal norms that currently dominate Dutch family law, migrant parents challenge current assumptions that "autochthonous" family relations are essentially different from "allochthonous" ones. While women may too easily assume that the material interests of mothers as care-givers are universal, the perceived normative differences between ethnically marked groups of women may be less relevant than is often suggested.

The strategic potential of such disruptions may well be of only fleeting duration. Already, the terms of Dutch family migration policy have shifted, placing less emphases on the moral ties that bind transnational family members to each other and more on the (presumed lack of) normative ties between foreign family members and the Dutch nation. None the less, single and divorced migrant mothers have succeeded for a moment – however brief – in playing the rules of international human rights law to enlarge the scope of their agency, as mature human beings, and to reassert themselves in their responsibilities as

⁸⁸ Cf. Sarah van Walsum. Family Norms and Citizenship in The Netherlands. In: Christiane Harzig, Danielle Juteau and Irina Schmitt (eds) *The social construction of diversity, Recasting the Master Narrative of Industrial Nations*, New York : Berghahn Books (forthcoming: 2003).

parents. They have managed to do this despite the fact that these rules have not been of their making, nor been applied with them in mind. That they have succeeded is as much a proof of their inventiveness and improvisational talent, as are the tactics that they have deployed in their countries of origin in order to meet their responsibilities towards their children, even under material circumstances that do not permit them to provide care directly.