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Sussex Centre for Migration Research

A Stratified Right to Family Life? Patterns and Rationales behind Differential Access to Family Reunification for Third-Country Nationals Living within the EU

Working Paper No 70

Reinhard Schweitzer
Sussex Centre for Migration Research, University of Sussex
Email: R.Schweitzer@sussex.ac.uk

March 2014

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University of Sussex

Abstract

This study contrasts the normative claim of a fundamental and universal right to family life against the empirical evidence of unequal conditions and effects (both direct and indirect, intended and unintended) of family reunification policies for different groups and categories of third-country national migrants. Building on the concept of civic stratification and by systematically comparing policies in a wide range of Member States, the analysis shows that while specific conditions and requirements for reunification vary considerably in both scale and scope, the underlying logic of stratification as well as the main arguments for unequal treatment are rather uniform across the EU. The results suggest a positive correlation between the restrictiveness of family reunification policies, the overall complexity of immigration statuses, and the likelihood that they lead to instances of unequal treatment and discrimination, thereby institutionalising an unequal right to family-life.

Keywords

Introduction

In recent decades family-related migration has become one of the predominant modes of entry into the European Union (Lahav 1997; Groenendijk 2006; Ruffer 2011; European Commission 2008) – after historically being either neglected or treated as a secondary aspect of cross-border movement in both migration research and policy-making (Kofman 2004). According to recent OECD (2013: 25) data, this form of migration currently represents 45% of all permanent immigration to the European Economic Area. Among third-country nationals (TCNs), family reunification even accounts for two-thirds of all immigration to the EU (Ruffer 2011). Clearly, this trend is a consequence of increasing restrictions imposed on labour migration, rendering marriage one of the last remaining means of legal entry and stay, especially for those lacking specific skills (Kofman et al. 2011). As a result, family migrants from outside the EU, and especially those joining other TCNs already residing in a Member State, face increasing levels of suspicion and rejection among host societies and ever-more restrictive immigration regimes. Although, in principle, their possibility to enter the European Union and reside in one of its Member States is underpinned by the fundamental right to family life,[1] in practice their admission is subject to an increasing number and variety of conditions through which states are trying to manage family-related migration flows. In this context, and for the purpose of this study, family reunification is understood as defined by the European Council: 'the entry into and residence in a Member State by family members of a third-country national residing lawfully in that Member State in order to preserve the family unit'.[2]

Especially since the mid 2000s, family reunification policies in Europe underwent a restrictive turn clearly embodied in ever-more demanding and stringent requirements regarding the socio-cultural integration and economic self-sufficiency of migrant families (Pascouau and Labayle 2011; OECD 2013; Strik et al. 2013). As a direct result, absolute numbers of applications as well as residence permits granted on grounds of family reunification have dropped considerably since then, in some countries such as Germany and the Netherlands by more than half (European Commission 2011; Strik et al. 2013). Underlying this new trend is a general shift in the perception of family migrants as increasingly problematic and unwanted, which today renders the reunification of TCN

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[1] As enshrined in Art. 8 of the European Convention of Human Rights (ECHR), among other international treaties and conventions; a comprehensive overview is given by Lahav (1997).
[2] This definition underpins the EU Council Directive on the right to family reunification of 2003.

families one of the most intensely politicised issues within the sphere of both immigration and integration policy (Kraler 2010; Kofman et al. 2011; Scholten et al. 2012; Strik et al. 2013). Together with asylum seekers, family migrants have become emblematic of a kind of permanent immigration which is perceived as being 'imposed' on the receiving countries and their native societies instead of being 'chosen' according to their short-term labour demands.[3] From a legal-historical perspective it has been argued that it was 'through the assertion of rights to asylum and family reunification that migration has continued and grown, in the face of explicit attempts in the 1970s to bring it to an end' (Morris 2002: 5; see also Joppke 1998). Contemporary government attempts to restrict immigration are thus increasingly targeting those who, in their sole capacity of having close family ties, want to accompany or join workers, refugees or other TCNs legally admitted to reside in the country.

However, the evolving set of rules and regulations that this type of migration is subjected to, appears far from uniform. On the one hand, as a number of recent country-comparative studies has shown, the specific conditions and requirements for family reunification vary considerably between EU Member States (Kraler 2010; Kraler et al. 2011; Pascouau and Labayle 2011; Strik et al. 2012). On the other hand – and this is where the focus of this paper lies – there is a variety of exceptions made for specific kinds of migrants and their families, so that behind the overall trend towards increasing restrictiveness, a complex system of differential rights and opportunities emerges (Morris 2002). While the basic distinction between own-country nationals, EU nationals and TCNs has been analysed extensively (Cholewinski 2002; Groenendijk 2006), far less attention has been paid to differentiations made within the latter. In principle, the legitimacy of these distinctions follows from the sovereign right of receiving states to ultimately control all immigration (including family migration) to their territory 'according to their interests [and] by the definitions they confer' (Lahav 1997: 361). Increasingly, however, some of the instances of unequal treatment regarding access to family reunification are being analysed in the context of what has been described as 'repressive' or 'illiberal liberalism' (Joppke 2007a; Guild et al. 2009) and accused of undermining the principle of family unity (Ruffer 2011).

Departing from here, the present study contrasts the normative claim of a fundamental and universal right to family life against the empirical evidence of unequal conditions and effects – both direct and indirect, intended and unintended – of family reunification policies in Europe for different immigrant groups and categories. Building on the concept of civic stratification (Lockwood 1996; Morris 2002), and by using examples from a range of EU Member States,[4] the paper aims to confirm the following hypothesis: *While the specific national legal frameworks governing family reunification for TCNs vary considerably between EU Member States, the underlying system of stratification (i.e. the differentiation between specific groups and categories of migrants) is far more consistent across Europe.* In order to better understand not only the extent and complexity of this system of stratified rights and obligations, but also the rationales behind it, the empirical part of this research comprises several questions. Firstly, I will analyse which specific groups of TCN migrants are most commonly differentiated within family reunification policies, and through which concrete measures and requirements this differential treatment is put into effect. In a second step, I will ask how these different instances of unequal treatment are justified by state actors, and whether these justifications are based on empirical evidence. Before that, however, the following sections present the theoretical and conceptual framework for this analysis: firstly, by discussing the legal-political foundations of both the horizontal (between states) and the vertical (between migrant categories) dimension of differentiation underlying family reunification practices in Europe; and secondly, by developing an analytical frame for a more systematic analysis of how

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[3] As expressed by Nicholas Sarkozy in the run-up to the 2007 French presidential elections (see Marthaler 2008).
[4] The empirical part of the study covers Austria, the Czech Republic, Denmark, Germany, the Netherlands, Portugal and Spain.

unequal access to this right is being justified. The results suggest that more restrictive family reunification policies building on more complex systems of immigration statuses increase the likelihood of unequal access to the right to family life.

Family reunification in Europe: between liberal human rights norms and restrictive immigration policy practice

> If international instruments delimit national authority to control borders, then how can we explain the failure to extend universal rights in the form of family reunification to migrants? (Lahav 1997: 352).

It is generally accepted that family reunification can be seen, 'on the one hand, as a humanitarian or human rights issue, and, on the other, as an immigration matter which might place a strain on the labour market and social facilities' of receiving countries (Brinkmann 2001, cited in Cholewinski 2002: 271). As a result, the underlying normative claim of a fundamental and universal right to family life faces two major challenges when translated into the legal-political practice of family reunification policies for TCNs, which many countries have only quite recently incorporated into their immigration regimes.[5] On the one hand, the precise conditions and requirements for reunification tend to vary between different Member States according to their specific legal and institutional frameworks shaped by distinct immigration histories, labour market needs and perceptions of current immigration. On the other hand, and more importantly, different groups of persons are affected unequally by these conditions. While some of the unequal effects of this system of differential rights and obligations directly follow from either EU legislation or international treaties and conventions, others clearly reflect domestic interests and perfectly fit in with increasingly selective national immigration regimes (Lahav 1997). Still others may simply be unintended consequences of supposedly neutral legal provisions. Against this background, Cholewinski (2002: 273) argues that 'the introduction of the right to family reunification for third-country nationals is in danger of being effectively rendered redundant by the conditions imposed upon this right'. For him, the current policy practice in the field of family reunification once more illustrates how 'the notion of rights in the sensitive field of immigration is effectively reversed and regarded as belonging more to states than individuals' (2002: 288). As will be shown, some of the inequalities resulting from these selective practices and conditions prove difficult to justify from the perspective of liberal-democratic states.

The universal right to family life, its EU-wide consolidation and selective domestic application through family reunification policies

The issue of family reunification among third-country nationals can be closely related to Soysal's (1994) much-disputed conception of a post-national model of citizenship based on the notion of universal personhood rather than national belonging. It derives its legitimacy from a transnational discourse of human rights entailing certain obligations for states towards not only their own nationals, but also aliens who legally reside within their borders. As such, the right to live together with one's family may, under certain conditions, override national interests in restricting any further immigration of TCN family members (Kofman 2005). Besides being regarded as a basic human right, the preservation of migrant families was traditionally regarded as beneficial not only for the migrants themselves but also for the wider societies which they became part of (Cholewinski 2002). In practice, however, no international agreement establishes family reunification as a fundamental and unconditional right[6] (Lahav 1997), nor does any individual state grant 'the automatic right for

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[5] While some European countries such as France started to introduce family reunification policies soon after WW11, others first introduced specific provisions as late as the 1980s (DK) and 1990s (AT, D) (see Kraler 2010).

[6] For example, Art. 8 ECHR explicitly allows any state interference with the right to respect for private and family life '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

families of non-citizens to join them' (Kofman 2004: 253). It is important to distinguish, therefore, between the underlying human right to family life and the individual application of this right in the form of family reunification. In the words of Lahav (1997: 360), '[t]he former is understood to be a principle, while the latter is considered a means of implementation of such a principle'.

Any claim for family reunification derives its legal force either from the principle of freedom of movement[7] or from that of the unity of the family, regarded as the most basic component of society (Perruchoud 1989; Lahav 1997; Cholewinski 2002). While both principles are recognised under international and EU law, 'their modalities of implementation with regard to family reunification are left to the competence of individual States' (Perruchoud 1989: 512). This arrangement makes national governments the principal actors in the field of family reunification. While in some cases, decisions by the European Court of Human Rights have led to national legislations on family reunification being changed or revoked,[8] it has been repeatedly maintained that Art. 8 ECHR does not necessarily entail 'a right to family life for foreigners residing outside of their country of origin' (Kraler et al. 2013: 55). Only under very specific circumstances does its application create legal obligations for host states to allow the entry or stay of certain family members. According to Lahav (1997: 354), the strong and far-reaching competences that national governments still retain in this field, 'stem not only from the predominance of the sovereignty principle but also from legal ambiguity and from conditionality on states, which have varying territorial jurisdictions, definitions, and interests'.

With a view to harmonise policies between the Member States, the European Commission proposed a directive in December 1999 establishing common rules of law regarding family reunification, the final version of which was adopted by the Council in 2003.[9] According to Art. 1 of this directive, its purpose is 'to determine the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member States'. However, the existence of an actual *right to family reunification* has been called into question by Member States throughout the negotiations[10] (Cholewinski 2002) and the evolution of the directive clearly reflected the general shift in the perception of family reunification from a necessary and useful instrument of integration to a highly politicised tool to control and potentially restrict unwanted immigration (Ruffer 2011). As such, it rather strengthened the Member States' right to control their territorial and symbolic borders, while weakening the right of migrants to be joined by their family. Accordingly, the resulting legal framework is ambiguous. On the one hand, the preamble recognises 'the obligation to protect the family and respect family life enshrined in many instruments of international law',[11] as well as the principle of non-discrimination and the value of family unity for both the migrants and the receiving society.[12] On the other hand, it reserves a powerful role for national governments in setting the specific rules and conditions for family reunification. For example, the exact definition of which family members beyond the 'nuclear family' are entitled to reunification is largely left to national law[13] (Lahav 1997; Brinkmann 2002).

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or morals, or for the protection of the rights and freedoms of others'.

[7] In the European context, this applies especially to EU nationals, whose free movement rights are enshrined in Art. 45 of the Treaty on the Functioning of the European Union.

[8] A number of examples are given by Ruffer (2011).

[9] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L251, 3/10/2003.

[10] In a note (doc. 7675/00) on the first Commission proposal, the presidency identified this issue as one of the main questions on which Member States' positions most fundamentally diverged.

[11] Recital 2 of the preamble, *Family Reunification Directive*.

[12] Recital 4 of the preamble recognises that '[f]amily reunification is a necessary way of making family life possible. It helps to create sociocultural stability facilitating the integration of third country nationals in the Member State, which also serves to promote economic and social cohesion, a fundamental Community objective stated in the Treaty'.

[13] The preamble declares that beyond the narrow definition of the nuclear family (including the spouse and minor children), to which 'family reunification should apply in any case' (9), 'it is for the Member States to decide whether they wish to authorise family reunification' (para 10).

Overall, evaluations of the impact of the directive and its relationship to Art. 8 ECHR have been mixed. Groenendijk (2006: 219) argues that while '[g]enerally, the Directive provides a much higher standard than Article 8 ECHR […], some provisions in the Directive appear to allow Member States to go below the minimum level of Article 8'. Similarly, in its first report on the application of the directive, the European Commission (2008: 14) critically concluded that its impact in terms of harmonisation has remained limited, and that a number of Member States have applied some of its optional provisions regarding the requirements for reunification 'in a too broad or excessive way'.[14] On the one hand, several recent country-comparative studies demonstrate that, nearly ten years after the adoption of the *Family Reunification Directive,* the Member States still differ greatly in how they handle applications domestically (Kraler et al. 2011; Pascouau and Labayle 2011; Strik et al. 2012). On the other hand, recent policy developments in the Netherlands demonstrate that the directive also has the potential to prevent particularly harsh policy measures from being introduced (Groenendijk 2006). The fact that the directive failed to bring about 'uniform protection for family reunification, but has, instead, been used to introduce new restrictions', as Ruffer (2011: 947) argues, might be most apparent from the migrants' own perspective. As will be shown in the empirical part of this study, some of these new restrictions have unequal effects on different groups and categories of migrants, rendering their application even more problematic as regards non-discrimination and equality before the law. It is therefore important to note that, by specifying and limiting the conditions which participating states[15] may require applicants for family reunification to meet, the directive also forms part of the legal framework within which this complex system of stratified rights has evolved. Cholewinski (2002: 279) critically states that 'the standards to be applied in limiting the discretionary powers of Member States fall considerably short of realizing equal treatment [of third-country nationals] with EU citizens'. The same, however, applies to distinctions made between different groups and categories of TCNs, regardless of whether they are based on nationality, 'race', religion, skill-level or socio-economic status, and whether they are explicitly or implicitly derived from national or EU legislation.

Civic stratification vs. non-discrimination through family reunification policies

For Kofman et al. (2011: 25), 'one of the most striking results of policymaking on family-related migration at the European level is an increasing fragmentation and differentiation of the right to family reunification'. This observation draws on the concept of *civic stratification,* which was first used by Lockwood (1996: 547) in order to describe the 'more or less well defined categories of 'citizens' identified through their different capacities to exercise various rights' and defined as 'ways in which the structuring of life chances and social identities is the direct or indirect result of the institutionalization of citizenship under conditions of social and economic inequality' (1996: 532). The concept was later amended by Morris (2003: 79) to specifically focus on non-citizens, arguing that 'it is the increasing diversity of "outsider" status that is most in need of analysis'. According to her definition, civic stratification describes 'a system of inequality based on the relationship between different categories of individuals and the state, and the rights thereby granted and denied' (Morris 2003: 79). Here, it is used to specifically analyse distinctions made between different groups and categories of family migrants or their TCN sponsors applying for reunification – i.e. the institutionalisation of an unequal right to family life through national family reunification policies.

This specific system of stratified rights and obligations reflects the great variety of ways in which family migrants are being categorised and differentiated. First of all, there are different forms

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[14] In particular those regarding the possibility to introduce a waiting period, income requirement, as well as integration measures.

[15] The directive covers all EU Member States except the UK, Ireland and Denmark. While the last of these completely opted out of Chapter IV of the Treaty, the first two reserved a right to opt-in on a case-by-case basis (Moeslund and Strasser 2008).

of family-related migration, often associated with different sets of 'problems', i.e. implications for receiving states and communities. Kofman (2004) argues that *family reunification* in its strict sense (i.e. the process of being joint by immediate family members in the country of residence) should be distinguished from *family formation* or *marriage migration* (i.e. the migration of one partner with the intention to enter into a marriage) on the one hand, and *family migration* (i.e. the joint migration of an existing family) on the other. However, according to the *Family Reunification Directive,* no distinction should be made on the basis of 'whether the family relationship arose before or after the resident's entry'.[16] Apart from this chronological aspect, access to family reunification is frequently stratified along the lines of nationality, age, gender, 'race' or ethnicity, immigration status and length of (legal) stay, as well as skill-level or socio-economic status; some of these dimensions will be analysed in more detail presently. What all these individual or group characteristics have in common is that they depend on some sort of definition by the receiving state in question. Having in mind that 'any definition is never adopted in *abstracto,* but is closely related to a goal to be reached' (Perruchoud 1989: 515), the question is, what are governments' goals behind specific instances of differential treatment?

Comparing the family reunification policies of six European countries, Strik et al. (2013: 108) recognise a 'tendency to minimize the application of certain granted rights' as one of the causes for the increasing fragmentation of statuses. This must be seen in relation to both the current political context of widespread anti-immigrant sentiments and the fact that by specifying the conditions under which access to reunification is granted, states can influence the level and composition of family-related immigration to their territory (Kofman 2004).[17] Several authors have therefore related civic stratification to the managerial logic behind current migration policies, which aim to maximise the benefit gained from economic globalisation by selecting migrants based on their perceived economic merit and utility (Lahav 1997; Kofman 2005; Kraler 2010). It is to that end, Kofman (2005: 455) argues, that receiving states tend to apply 'the same economic and political calculus and rationality to all forms of migration, including those derived from normative principles' such as the right to family life. In addition, and like any other form of immigration regulation, family reunification policies are increasingly underpinned by concerns related to national security, public welfare, as well as labour market and other economic constraints (Lahav 1997; Cholewinski 2002), all of which seem to make some kind of selection, i.e. unequal treatment, necessary.

Similar, although less visible, effects have been attributed to processes of self-selection and indirect discrimination identified in this context. On the one hand, ever-more demanding requirements tend to automatically deter certain applicants who – due to a lack of financial, social or cultural capital – fear they will never be able to fulfil them (Strik et al. 2013). On the other hand, as argued by Wiesbrock (2009: 312), '[i]ndirect discrimination occurs where an apparently neutral provision, criterion or practice puts persons of a [specific] racial or ethnic origin at a particular disadvantage compared to other persons'.[18] Other instances of indirect discrimination may result from the at least temporarily dependent nature of family migrants' legal status and the definition of their rights in relation to those of the sponsor, which means that 'if the sponsor has lesser rights, so has the secondary migrant' (Kraler 2010: 47).

Apparently, many of the distinctions made in this particular context severely challenge the principle of non-discrimination as recognised by the *Family Reunification Directive,* which requires states to give effect to its provisions 'without discrimination on the basis of sex, race, colour, ethnic

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[16] Article 2(d), *Family Reunification Directive.*

[17] This is true in absolute terms as well as relative to other potential receiving countries in the region.

[18] Morris (2003: 87) accordingly distinguishes between formal and informal stratification of the right to family life – the former directly stemming from 'the conditions of entitlement', the latter reflecting 'it's delivery in practice'.

or social origin, genetic characteristics, language, religion or beliefs, political or other opinions, membership of a national minority, fortune, birth, disabilities, age or sexual orientation'.[19] Notably, nationality as a potential basis for discrimination is omitted from this list of limitations. An explanation for this can be found in the *EU Racial Equality Directive*, adopted in 2000[20] in order to 'lay down a framework for combating discrimination on the grounds of racial or ethnic origin'.[21] By doing so it explicitly exempts from its provisions all immigration-related measures to be taken by Member States,[22] thereby creating and legitimating a deficit of protection against discrimination not only on grounds of nationality, but also, indirectly, on the basis of race and ethnic origin (Jesse 2009). In the realm of family reunification policies, the recent proliferation of specific requirements regarding the minimum age, level of integration or language proficiency of the foreign spouse has been shown to create such 'racialised' patterns of civic stratification, which often correlate with cultural differences (Morris 2003; Wiesbrock 2009; Urbanek 2012,). In some cases, these can amount to what Kofman (2005: 461) calls 'the new or differentialist racism which postulates the inability of certain groups to fit in or adapt to a society as a result of their inherent cultural traits'. For Joppke (2007b: 271), this kind of differential treatment 'brings back a mode of immigrant selection that in principle has been discarded in the liberal state: that of "selecting by origin"'. In historical perspective, Besselink (2006) even argues that the complex system of differentiation between non-citizens of different backgrounds, to some extent resembles the various statuses which existed within empires. In stark contrast to empires, however, today's liberal-democratic states are (increasingly) obliged to justify the differentiations they deliberately make between different groups or categories of people affected by their legislation.

Modes of Justification for unequal treatment within family reunification policies

In the face of the inherent contradiction between the right of non-national individuals to live with their family and the right of states to control and regulate the entry of foreigners to their territory, liberalism takes an ambiguous stance. While supporting the principle of a right to family reunification, it allows for (necessary) limitations to this right, given that they are based on '*objective criteria* such as proof of economic sufficiency, health and lack of a criminal record' (Ruffer 2011: 936, emphasis added). In practice, however, any limitation, irrespective of what it is based on, introduces some form of differentiation between those fulfilling the related requirements and those who do not, thereby challenging another liberal-democratic principle: that of equal treatment. From this perspective, Bauböck (1994: 203) argues that any 'distinctions of rights and status [...] between citizens and foreigners lack democratic justification'[23] and recent developments in legislations and jurisdictions of several European states clearly indicate that 'the legitimacy of a differential judicial treatment of immigrants is strongly questioned today' (Michalowski 2009: 275). At least to some extent, the same can be expected to apply to comparable distinctions made between different categories of non-citizens, since they, too, challenge the principles of inclusion, equality and non-discrimination, and thus at least have to be democratically justified where they occur.

In order to more systematically analyse this aspect within family reunification policies across Europe, a framework underpinned by Habermas' (1993) differentiation between pragmatic, ethical

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[19] Recital 5 of the preamble, *Family Reunification Directive.*

[20] Council Directive 2000/3/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19/7/2000.

[21] Article 1, *Racial Equality Directive.*

[22] Article 3(2) states that the directive 'does not cover difference of treatment based on nationality' and is 'without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals'.

[23] According to Baubock, neither the argument that (at least some) immigrants deliberately chose their alien status by leaving their own country of nationality, nor that the well-functioning of democracy requires a strictly bounded polity, and thus the exclusion of all 'others', can fully override the principles of inclusion and equality (1994: 203).

and *moral* modes of justification will be used. According to this conceptualisation, **pragmatic justification** refers to arguments that focus on the *purposive*: in order to be valid, they have to rest upon 'observations, investigations, comparisons, and assessments undertaken on the basis of empirical data with a view to efficiency or with the aid of other decision rules' (1993: 3), and serve to relate this empirical knowledge to predefined 'hypothetical goal determinations' (1993: 11). In contrast to that, arguments that draw on **ethical justification** focus on the *good.* Habermas describes them as 'value decisions', derived from more ambiguous (at best presumably neutral) ideas and conceptions of the correct conduct of life, which however remain embedded in a specific 'life-historical context' (1993: 12). His third category refers to instances of **moral justification**, which concentrate on the *just.* They can be derived from humanitarian or other norms representing a common or general interest and emphasising aspects of universal justice – thereby trying to regulate conflicts of interest 'in an impartial manner, that is, from the moral point of view' (1993: 5).

In the realm of family reunification, as will be shown in more detail presently, most arguments used to justify unequal treatment refer either to (at least seemingly) objective reasons for positive selection, or – and increasingly – to perceived problems associated with certain types of family migrants. Among them, arguments which aim at selecting applicants based on measurable characteristics such as their income, specific skills and level of education, seem to clearly fall under the first category (pragmatic justification). At the same time, however, many of these selection mechanisms are underpinned by certain values and norms related to Western conceptions and expectations of the 'correct' or 'normal' life and behaviour (Strik et al. 2013) and target specific groups based on their ethnic or cultural characteristics (Ruffer 2011), therefore rather corresponding to the second type (ethical justification). Lastly, instances of unequal treatment which directly or indirectly stem from moral principles or humanitarian obligations represent the third category (moral justification). These include the granting of more favourable conditions to recognised refugees or other particularly vulnerable groups, as well as to persons suffering from exceptional hardship.

From this account it has become clear that the legal nature of family reunification exhibits many of the fundamental contradictions between humanitarian principles and state interests, which inevitably characterise the realm of immigration. While the evolving transnational discourse of rights described and endorsed by Soysal (1994) has reinforced this antagonism, it stopped short of putting an end, or even precise limits, to state sovereignty. In the absence of such external limitations, nation states increasingly try to manage these contradictory forces internally by introducing 'a rather complex set of refinements and distinctions which variously shape the prospects of different categories of migrants' (Morris 2003: 77). In this context, there can be no absolute right to family reunification. Instead, access to and protection of this right not only differs horizontally between states, but also vertically between different strata or categories of people. The right itself is thus effectively rendered not only highly conditional, but also highly stratified (Bonizzoni 2011). However, the view expressed by Kofman et al. (2011: 25), whereby this trend of increasing fragmentation and differentiation contradicts 'the general harmonising impetus of EU legislation', is put into question here. Instead, it is argued that while clearly differing in degree, the structure and logic underlying national frameworks of differential rights and obligations seem rather uniform across the EU. In the following, this hypothesis will be tested by comparing empirical evidence from a range of existing country studies and comparative reports.

Family reunification as a (common) selective policy practice: comparing cases of unequal treatment across the EU

In order to highlight and systematically analyse common patterns and rationales behind different instances of unequal treatment within policies governing family reunification for TCNs across Europe, the following set of interrelated research questions will be approached from a country-comparative perspective, based on the above conceptual and analytical framework:[24]

1. **Who** is treated unequally (on the basis of which characteristics)?
2. **How** are they treated unequally (through which measures, conditions or requirements)?
3. **Why** are they treated unequally (based on which justifications)?
4. To what extent are these differentiations **evidence-based**?

Seven European countries (Austria, the Czech Republic, Denmark, Germany, the Netherlands, Portugal and Spain) are included in the analysis. They were selected to reflect – as far as possible given limitations of time and space – not only the great geographical and economic diversity among EU Member States, but also their very diverse immigration histories, overall policy frameworks and perceptions of current immigration from third countries. Although family reunification accounts for significant shares of overall immigration to all these countries, only in some of them (especially Germany and the Netherlands) has it been analysed extensively, while others have received much less attention due to their small size (Austria) or comparatively low levels of politicisation of family migration (Spain, Portugal, Czech Republic). While policy frameworks progressively implemented in the Netherlands, Austria, and especially Denmark are among the most restrictive within Europe,[25] the conditions for reunification have remained comparatively favourable in Spain and Portugal, which is clearly reflected in the Migrant Integration Policy Index – MIPEX (Huddleston et al. 2011).[26] The general decrease in overall numbers of admitted family migrants over the last years can in some cases be related to specific restrictions (as in Germany, Austria and the Netherlands), in others to economic downturn (as in Portugal and Spain), as pointed out by Strik et al. (2013). From the migrants' perspective, the latter points towards a decline of demand for family reunification, the former signifies a curtailment of supply, often involving a curtailment of rights for certain groups of people. In the face of these significant differences, however, the task is to highlight some of the similarities these countries share in selectively granting access to family reunification for TCNs, which in turn allows us to uncover the rather consistent logic underlying different national systems of stratified rights and obligations.

Who is treated unequally, and through which measures and requirements?

Most instances of unequal access to family reunification stem directly from distinctions made when establishing specific conditions and requirements, including measures of obligatory civic integration, income or other financial requirements, as well as minimum age limits and waiting periods. In other cases, they are the indirect result of presumably neutral measures, which however affect specific groups of migrants more than others. Together, they amount to a system of stratification along many different lines. Most notably, distinctions are based on (a) the nationality, origin or 'race', (b) length of legal residence, (c) specific immigration status, and/or (d) socio-economic class or skill-level of either the applicant or his or her sponsor. I examine each of these in

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[24] For reasons of space and to avoid unnecessary reiterations, the first two questions are treated jointly.

[25] While the former have transposed every possible restriction allowed under the *Family Reunification Directive*, Denmark is the only country under study not bound by its provisions.

[26] According to data from 2010, Portugal obtained the highest scores in the category 'family reunion' among 31 countries covered by MIPEX III, while Denmark occupies the penultimate position (only followed by Ireland).

turn.

Unequal treatment based on (a specific) nationality, 'race' or origin

As one form of civic stratification which directly stems from EU legislation, Bonizzoni (2011) identifies the common visa requirements for the Schengen area on the one hand, and the list of nationalities carefully selected for visa-free entry on the other.[27] In the case of **Spain**, it is particularly evident that family migrants holding nationalities not requiring a Schengen visa – such as Argentinians and, until a visa requirement was introduced in 2007, also Bolivians – often circumvent specific restrictions on reunification by entering as tourists and later regularising their stay in the country through the regular quotas for TCN workers (Araujo 2010). Another common line of stratification based on national belonging specifically relates to Turkish nationals, who are in a favourable position safeguarded by the Association Agreement concluded between Turkey and the EU in 1980 (see Strik et al. 2013). In **Austria** for example, Turkish family members joining Turkish sponsors are exempt from the minimum age and income requirement, as well as the obligation to pass otherwise mandatory pre- and post-entry language tests (Kraler et al. 2013).

Beyond this common pattern, unequal access to family reunification directly or indirectly follows from other forms of preferential treatment of certain nationalities by individual Member States, usually reflecting colonial or other historical ties. In **Spain**, for example, immigrants from parts of Latin America, the Philippines and Equatorial Guinea can become citizens after only two years of legal residence, allowing them to reunify with their relatives under much more favourable conditions than other TCNs (Araujo 2010), while in the **Netherlands** family migrants from Surinam are exempt from the otherwise obligatory civic integration test if they received prior education in Dutch (Bonjour 2008). In all four countries under study which implemented pre-entry language tests (**AT, D, DK, NL**), citizens of majority-white, wealthy countries like Australia, Canada, the US, New Zealand, South Korea and Japan are generally excluded from taking these tests.[28] In other cases, such as the **Czech Republic** and **Spain**, TCNs coming from these economically advanced and mostly 'Western' societies have been noted to receive favourable treatment at the level of routine application procedures (Szczepanikova 2008; Araujo 2010).

At the other end of the spectrum, obligatory integration requirements have often been shown to specifically target those segments of immigrants regarded as most unwanted, thereby becoming instruments of immigration selection (Bonjour 2010; Goodman 2010). In the **Dutch** case, the official evaluation of the pre-entry language tests introduced in 2006 shows that after their introduction the number of applicants sharply dropped from between 1,500 and 2,000 per month to less than 1,000, 'with the strongest effect on Turks and Moroccans' (Michalowski 2009: 268). In addition, certain information and documents provided by nationals of so-called 'problem countries', including Ghana, India, Nigeria and Pakistan, need to be officially verified before their applications are accepted by the Dutch authorities (Bonjour 2008). In **Denmark**, Moeslund and Strasser (2008: 19) identified instances of indirect discrimination against certain nationalities (mostly Turks and Moroccans) in the form of significantly longer processing times. Similarly, Araujo (2010: 29) indicated for the case of **Spain**, that in some countries of origin, particularly Ecuador and Morocco, the issuing of visas for family migrants is frequently delayed by the respective consular officers,

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[27] Instead of focusing on the rather obvious distinction between sponsors holding the nationality of the Member State where they reside, nationals of other EU states, and third-country nationals, my study exclusively deals with distinctions made within the latter group.

[28] In **Germany**, for example, while the reunification with a foreign spouse is generally contingent upon him or her demonstrating basic knowledge of German before entry, those foreigners allowed to enter Germany without a visa are exempted from this formal requirement (Wiesbrock 2009: 305).

which even leads her to suspect 'some kind of "order" from the Ministry of Foreign Affairs'. In addition, certain minimum-age regulations for marriages between a resident TCN and a foreign spouse, like the **Danish** *24-year rule*, often specifically target those least wanted, i.e. poorly educated immigrants from Islamic countries (Wiesbrock 2009). In the **Czech Republic**, where the age limit is set at 20, an increasing number of cases were reported where family migrants (especially men) from Arab countries were subject to exceptional forms of scrutiny and suspicion (Szczepanikova 2008). When looking beyond distinctions between own nationals, EU nationals and TCNs, the only country where no instance of systematic unequal treatment based on different national or 'racial' origin was found is **Portugal** – while all other country studies reveal a similar underlying logic.

Unequal treatment based on the length of (legal) residence of the sponsor

In the case of any non-national, the most basic requirement for reunification with family members is a legal residence status in the country concerned (Lahav 1997). Beyond that, some receiving countries require the residence of the sponsor prior to their application to be of a specific minimum duration and/or consolidated through a specific (long-term) immigration status. While Bauböck (1994: 217) maintains that 'the facts of societal membership depend on the time of residence more than on legal status', Hammar (1994: 190) suggests that 'long periods of domicile in a country should entitle non-citizens to a status improvement'. Both arguments are based on the idea that a more secure immigration status offers stronger protection of the rights which are *naturally* gained through long-term residence. In this context, the European Council (1999) at its meeting in Tampere not only acknowledged 'the need for approximation of national legislations on the conditions for admission and residence of third country nationals', but also stressed that the set of uniform rights granted to long-term resident TCNs should be 'as near as possible to those enjoyed by EU citizens'. The newly created common European long-term residence status,[29] however, does not strengthen or specifically protect the right of such TCNs to be joined by family members residing outside the EU. Instead, this right remains subject to national legislations under the *Family Reunification Directive*, leaving it to the Member States to decide whether, and to what extent, long-term or permanent residents are treated more favourably.

German legislation requires the sponsor to hold permanent residence, while temporary residence holders are only allowed 'if there is a reasonable prospect of obtaining permanent residence', thereby applying an optional clause of the *Family Reunification Directive* (see Strik et al. 2013: 10). In addition, in case of a marriage concluded after the sponsor first entered Germany (i.e. in cases of *family formation*), temporary permit holders can only be joined by their spouse after a waiting period of two years. In **Austria**, the only country where family reunification generally underlies an annual quota set by the government, only some very specific categories of temporary migrants are entitled to family reunification, while most others remain excluded (Kraler et al. 2013: 14). **The Netherlands** require sponsors to prove one year of prior legal residence and the possession of a permit for a non-temporary goal (Strik et al. 2013), while only permanent residents can reunify with their elderly parents (Bonjour 2008). Similarly, applicants in **Spain** must have worked for one year and be authorised to reside (and work) in the country for another year. In the case of **Denmark**, the requirement of prior residence is extended to measure the overall *attachment* to Denmark, including not only the time of residence in the country, but also interpersonal ties, completed education, connection to the local labour market and language proficiency (Moeslund and Strasser 2008). The distinction is less strict in the **Czech Republic**, where TCNs holding a

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[29] As laid down in Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L16, 23/1/2004.

temporary resident permit are equally eligible; however, while reunified family members of permanent residents are entitled to work immediately, those of temporary foreign residents need to apply for a work permit (Szczepanikova 2008). Again, the exception to the rule is **Portugal**, where, since an amendment in 2007, no minimum time of legal residence is required before applying for reunification and any type of residence permit (including study permits) enables the sponsor to apply (Oliveira et al. 2013). For the first two years, however, the duration of the permit granted to family members corresponds to that held by their sponsor.

Unequal treatment based on a specific immigration status of the sponsor

This form of differentiation most obviously applies to refugees and/or persons under subsidiary protection, who are usually exempt from many of the requirements for family reunification.[30] For example, while family reunification in **Austria** can in principle be rejected based on the expectation that the family member(s) may put a financial burden on the welfare state, the Austrian Administrative Court ruled in 2009 that this cannot be the sole ground for rejection in the case of refugees (Kraler et al. 2013). For persons under subsidiary protection, on the contrary, a general one-year waiting period applies (Strik et al. 2013: 18). Such a distinction is explicitly allowed under the *Family Reunification Directive* and is applied in most Member States, with the notable exception of the **Czech Republic** and **Portugal**, where a more favourable set of rights covers convention refugees *and* persons under subsidiary protection in a very similar way (Szczepanikova 2008; Oliveira et al. 2013). In **Denmark**, on the other hand, even applicants who are *seeking* asylum have to be exempt from some of the comparatively demanding requirements regarding minimum age, attachment, income or housing, in order to comply with humanitarian standards (Moeslund and Strasser 2008). In other cases, such as **Germany** and the **Netherlands**, more favourable conditions only apply if an application for reunification is filed within three months after being granted refugee status and/or the family relationship can be proved to have existed before leaving the country of origin (Triebl and Klindworth 2012; Strik et al. 2013).

Other forms of status-based unequal treatment affect sponsors who themselves entered via family reunification, or whose immigration status limits their access to the host country's labour market. For example, the **Austrian** Constitutional Court ruled in 2005 that because of the specific nature of certain residence titles with restricted access to employment, their holders are not entitled to apply for family reunification (Kraler et al. 2013); while in **Spain** all applicants for family reunification need to hold residence and work permits independent from their sponsor before bringing their own foreign relatives, in order to limit *chain reunification* (Araujo 2010).

Unequal treatment based on the sponsor's socio-economic status or skill level

Lahav (1997: 362) indicated that '[s]killed personnel are generally more apt to be granted the right to be accompanied by immediate family members, whereas unskilled workers, asylum seekers, students, trainees, and domestic workers face more restrictions in being joined by family members'. At the European level, this fundamental distinction is enshrined in the so-called *Blue Card Directive,*[31] regulating the conditions of entry and the rights of residence in the Member States for highly qualified non-EU nationals *and* their family members. According to its preamble, '[f]avourable conditions for family reunification and for access to work for spouses should be a fundamental element of this Directive which aims to attract highly qualified third-country

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[30] While the core legal instruments relating to refugee protection did not specifically provide for family reunification (see Lahav 1997), such derogation rules are explicitly laid down in Art. 12 of the *Family Reunification Directive*.

[31] Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ L155, 18/6/2009.

workers'.[32] Accordingly, such workers and their family members are to be exempt from many of the requirements otherwise applied or suggested by the *Family Reunification Directive*; among them the requirement of having reasonable prospects of obtaining permanent residence or proving a minimum period of prior legal residence, as well as the obligation for foreign spouses to pass a pre-entry integration test or to wait for a certain period of time before enjoying full access to the host country's labour market.[33]

At the national level, specific income and other financial requirements most clearly represent measures of socio-economic selection, since they pose a far greater barrier for poorer migrants and their families than wealthier ones. Therefore, any rules relating to *adequate resources* have been argued to be incompatible with the idea of a *right* to family reunification, since 'it is important to avoid limiting the right to family reunification to a privileged few' (Cholewinski 2002: 283). In the **Netherlands** for example, Bonjour (2008: 20) notes that the mere administrative fees for the allocation of residence permits 'are so high that they may be considered a condition for admission in themselves', while the increase in 2004 of the income level for sponsors to 120% of the statutory minimum wage was found to be in violation of the *Family Reunification Directive* (Groenendijk 2006). Even without such requirement, however, the overall required income for migrant families to live together can amount to over 130% of the disposable net earnings of the poorest 20% among them, as Kraler et al. (2013) show for the case of **Austria**. In addition, and most evident in the **Spanish** case, it has been shown that migrants working in specific (low-skilled) segments of the economy, and domestic workers in particular, are effected disproportionately by the requirement to prove stable incomes, due to the often informal character of this kind of employment (Araujo 2010). Once again, **Portugal** figures as a notable exception: By lowering the income requirement for immigrant families negatively affected by the economic crisis, Portugal was the only one among the nine countries studied by Pascouau and Labayle (2011: 87) 'to have taken into account the effects of the crisis and adapted rules on family reunification accordingly'.

On the contrary, the given socio-economic inequalities are further aggravated in other countries by a range of exceptions granted to those highly-skilled, i.e. socio-economically better off. In **Denmark,** sponsors who are employed in a specific segment covered under the *Job Card Scheme* (i.e. either highly-skilled or affected by specific shortages) are exempt from the standard obligation to provide a bank guarantee of over 7,000€ to cover potential future costs (*collateral requirement*), as well as from the *24-year rule* and the *attachment requirement* (Moeslund and Strasser 2008). Likewise, foreign family members of TCN workers who enter the **Czech Republic** under the so-called *Selection of Qualified Foreign Workers Programme* launched in 2003 as a pilot project, are entitled to obtain permanent residence immediately after joining them (Szczepanikova 2008); while in **Austria**, since 2011, highly skilled labour migrants and their family members are exempted from the general quota system regulating access to reunification (Kraler et al. 2013).

Yet another issue of fairness arises from mandatory integration and language tests, 'where migrants with little education or low income are required to pass the same test and to have the same level of knowledge as highly educated or wealthy migrants' (Guild et al. 2009: 8). Again, this rather indirect (although not fully unintended) selection effect is reinforced instead of attenuated by the fact that in all countries demanding pre-entry tests, the spouses of highly-skilled workers are generally exempt from these measures. While to some extent, such exceptions became necessary through the transposition of the *Blue Card Directive*, they also clearly correspond to the countries' national interests and current labour market needs. In fact, **German** law goes a step further in also

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[32] Recital 23 of the preamble, Blue Card Directive.
[33] As laid down in Art. 15 of the Blue Card Directive.

exempting this group of family migrants from integration courses after entry, if their residence is expected to be only temporary (Triebl and Klindworth 2012: 23). In **Austria**, Kraler et al. (2013: 35) note that while family members generally have to prove basic language proficiency, those of highly-skilled workers 'are considered to have completed the requirement by virtue of their residence title'.

For Michalowski (2009: 273), 'the extension of language tests to family migrants as a way of introducing a screening for skills among this group, […] can be interpreted as an attempt to reduce state investment into immigrant integration'. However, in their endeavour to more effectively manage family-related immigration to their territories, reducing costs is unlikely to be the only objective that drives different states to employ what has been shown to be a highly complex, flexible and (at least potentially) unequal set of measures and conditions. While the resultant national systems of civic stratification clearly create some common patterns of inclusion and exclusion, they can also be expected to be underpinned by shared interests, perceptions and norms – i.e. to follow similar logics of justification.

Why are they treated unequally?

To determine the exact conditions of legitimate governance has been said to represent 'the core question for normative political theory' (Bauböck 1994: 199). As a general guideline, Bauböck himself suggests that any political rule 'must be of a kind that those who are subject to it could rationally consent to being ruled in this way' (1994: 199). This clearly points towards a normative demand for public policies to follow rational, objective and comprehensive criteria. As such, policies governing family reunification – and more specifically, instances of unequal treatment stemming from these policies – should be measured in those terms. As a first step towards that end, the broad rationales and specific arguments behind various forms of differential treatment can be divided into three categories, following the earlier-noted conceptual frame underpinned by Habermas' distinction between (a) *pragmatic*, (b) *ethical* and (c) *moral* modes of justification.

Pragmatic justification

The exemption of certain nationalities from the obligation to pass pre-entry integration tests has been criticised for having 'no relation to the potential or actual integration of the persons exempt but [being] clearly related primarily to considerations of immigration control' (Guild et al. 2009: 10). Under the current paradigm of migration management, immigration control has increasingly shifted towards immigrant selection. Clearly, the exemptions granted by the **Austrian**, **German**, **Danish** and **Dutch** legislations to those highly-skilled or specifically needed by their national economies, correspond to this trend. Besselink (2009: 253) therefore suggests that the real reason for the exclusion of certain (Western) nationalities from otherwise obligatory integration measures, 'is in the end a more down-to-earth social and political pragmatism, based on the acknowledgement that there are serious problems which do focus on certain groups'.[34] Compared to them, those exempt from the measures 'simply do not create any major problems in a *socio-economic* sense' (Besselink 2009: 251, emphasis added). While this might be statistically true, it seems more difficult to sustain (and empirically prove) this distinction in terms of actual integration outcomes. It is highly questionable whether the integration of Australian, South Korean or Japanese family

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[34] In the case of the Netherlands, according to him, these are mainly 'Turkish and Moroccan brides imported by second-generation [immigrants holding Dutch nationality]; culturally and socially isolated Turkish and Moroccan mothers with children; a well-defined group of unemployed young men coming from the Netherlands Antilles island of Curacao to find their luck in the Netherlands, who end up in criminal circles here; those who enjoy social and unemployment benefits; and those who have difficulty accessing the labour market' (Besselink 2006: 18).

members, or those of highly-skilled TCN workers in general, can be expected to always be unproblematic, even without them speaking the local language nor having any knowledge of the native society and predominant way of life in the country of settlement. Accordingly, as in the **German** case, these exceptions based on nationality have also been justified by referring to 'the traditionally close economic ties that exist between Germany and the countries concerned' (Triebl and Klindworth 2012: 23), while in **Denmark** they were officially explained by the country's 'interest to ensure that a qualified worker remains living in Denmark' (www.nyidanmark.dk, cited in Moeslung and Strasser 2008: 16). Similarly, **Austrian** politicians frequently point towards the general assumption of more self-sufficiency[35] and similar cultural backgrounds among those groups (Kraler et al. 2013), while their **Dutch** counterparts expect pre-entry tests to 'stimulate young persons of Turkish and Moroccan origin to look for a spouse already living in the Netherlands' (Guild et al. 2009: 10).

Generally speaking, those exempt from integration measures (and fulfilling the income requirements) are simply not perceived as a threat to the national welfare state, and neither to the (at least imagined) cultural identity of the host country, which would suggest that holding a certain nationality, working in specific sectors of the economy or earning above a certain amount of money, directly correlates to cultural characteristics, religious beliefs, openness for liberal values and individual volition to integrate. In making such connections, however, most of the above arguments draw on some kind of real, objective problems, clearly focus on a certain goal or purpose, and are based on what Habermas (1993) calls *technical or strategic recommendations*. According to him, however, such recommendations 'ultimately derive their validity from the empirical knowledge on which they rest' (1993: 11). The decisive question must thus be whether the set of distinctions that these arguments help to uphold are supported by scientific evidence. Only then can they be said to fall under the first category of *pragmatic* justifications.

Having said that, what seems to serve as the most basic value underlying all these judgements is a combination of migrant families' expected contribution to and overall utility for the host country's economy on the one hand, and their anticipated integration needs (or willingness to integrate) on the other. Both, however, are extremely difficult, if at all possible, to determine *a priori*, i.e. in the realm of immigration regulation. With regard to such highly complex decisions, Habermas argues that 'once the values themselves become problematic, the question [of justification] points beyond the horizon of purposive rationality' (1993: 3). Within the realm of family reunification policies, this is the point where considerations other than those focusing on the *purposive* become predominant, particularly those centred on what is supposed to be *good* (from an ethno-national point of view) or required in order to be *just* (by liberal constitutions and international human rights treaties).

Ethical justification

For Strik et al. (2013: 50), family reunification policies always 'participate in the politics of belonging, and gender and family norms play a crucial role in this production of collective identities, i.e. in defining who "we" are and what distinguishes "us" from "the others"'. In the current European context, Muslims – or immigrants from predominantly Muslim countries – have clearly become the most common representation of 'the other'. Kraler et al. (2013: 41) note that the obligatory character of the **Austrian** *Integration Agreement* was justified 'as a tool to empower Muslim women, who were represented as oppressed victims of a patriarchal (Muslim) cultural

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[35] For instance, by justifying elevated income requirements as 'a legitimate means to enforce immigrants' economic autonomy and as an instrument to minimise economic burdens for the state' (Moeslung and Strasser 2009: 39).

context in public debate', while the **Danish** *24-year rule* has been shown to be 'clearly targeted at TCNs from Islamic countries and is claimed to protect people from entering into forced or arranged marriages' (Wiesbrock 2009: 301). Such automatic connection between cultural belonging and the capacity of individuals and groups to successfully integrate seems to be a rather common feature of family reunification policies across Europe.[36] At the same time, the basic liberal (or *civic*) values which family migrants are increasingly required to subscribe to, are 'presented with a certain view of national identity re-inscribing these liberal values within a national framework' (Kofman 2005: 461). In all the countries under study, problems related to spousal abuse and forced marriages, or the need to empower women coming from rural areas and patriarchal family structures are among the specific concerns commonly related to family migrants, and particularly to those with an Islamic background (see also Scholten et al. 2012). In this context, Ruffer (2011) argues that although it is necessary to protect women from spousal abuse, doing so in the realm of immigration regulation becomes questionable. For her, such practices demonstrate 'the dominant culture's interest in ensuring that concepts such as "family" remain within familiar Western boundaries' (2011: 939). In a similar vein, Araujo's (2010: 34) analysis of **Spanish** family reunification policy shows that '[a]lthough the State defends [the] family, it establishes which family deserves protection'. Thus, any argument for the exclusion of a particular group of generalised 'others', which is underpinned by certain values or norms related to Western conceptions and expectations of the 'correct' or 'normal' family life, can be regarded as an instance of *ethical* justification. From the perspective of liberal democracy, these only seem to be legitimate if the underlying connection between that group and a specific problem following from their 'otherness' (e.g. from particular cultural characteristics) can be empirically proved to be significant enough.

Moral justification

The final category entails justifications for instances of unequal treatment which stem from exemptions made on moral or humanitarian grounds. While *pragmatic* arguments are led by the preferences and goals a government holds on the basis of the available empirical evidence, and *ethical* justifications have to be compatible (again from a government's perspective) only to their own nationals' perceptions and interests, a *moral* outlook, according to Habermas (1993: 6), has to 'examine our maxims as to their compatibility with the maxims of others'. Here, notions of fairness and (universal) justice come to the fore which clearly reach beyond the own indigenous citizenry. In the realm of family reunification, such arguments directly relate to the underlying *right to family unity* rather than to its practical implementation through policies. Accordingly, at least in the European context, variations between countries are marginal both in regard to specific exemptions made and the underlying arguments put forward in order to justify them. One reason for this is that they derive their validity from treaties and conventions which are equally binding for all countries under study and which leave much less leeway for national legislation than the *Family Reunification Directive*; which however does not mean that they have no rational basis. The core argument behind the comparatively favourable treatment of refugees, for instance, is that in contrast to most other applicants for family reunification, they can prove that they are unable to establish their family life in the country of origin (Triebl and Klindworth 2012). Similar exemptions are required to guarantee specific sets of rights granted to particularly vulnerable groups, such as women or children. Finally, all countries under study have similar mechanisms in place to account for circumstances regarded as exceptional hardship – often resulting from specific rules and regulations on family reunification. In order to be able to compare the application and effects of these exceptions, more in-depth research would be necessary.

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[36] Similar links have also been explicitly noted in the cases of **Spain** (Araujo 2010), **Denmark** (Moeslund and Strasser 2008) and the **Netherlands** (Bonjour 2008).

Differential treatment as evidence-based policy?

Strik et al. (2013: 50) argue that, in principle, all these justifications 'can work both ways: towards more liberal or more restrictive policies'. The conceptualisation applied here, however, reveals a more differentiated picture. On the one hand, *pragmatic* and *moral* arguments are predominantly employed in order to justify more favourable treatment of certain groups or categories of migrants – in the first case, those specifically wanted or needed (for mostly economic reasons); in the latter, those most in need (from a humanitarian perspective). On the other hand, arguments underpinned by *ethical* considerations more often justify additional restrictions specifically imposed on those groups not wanted by any particular state. The decisive question of whether the underlying arguments and justifications can be supported by scientific evidence, however, clearly transcends this distinction. Unfortunately, Strik et al. (2013) recognise a growing trend in Europe towards family reunification policies being introduced or amended without the necessary debate and prior research, and often leading to contradictory policy outcomes. Analysing policy development in the **Czech Republic**, Szczepanikova (2008: 25) concludes that she 'was astonished by the lack of knowledge and understanding on the part of the MPs who were discussing this important piece of legislation in the committees' and that, for example, politicians claimed widespread practices of sham marriage without 'being able to support these claims by statistics' (2008: 26). In other cases, simple reference to other EU countries 'seemed to exert sufficiently convincing power even without an analysis of the actual situation' (2008: 26). Similarly, specific restrictions such as the **Danish** *24-year rule* officially aim at protecting women from violent marriage although no direct correlation between family-related migration and a violent marriage is documented (Moeslund and Strasser 2008), while in the **Netherlands**, as noted by Michalowski (2009: 269), even 'some of the conclusions drawn by the official evaluation [of pre-entry tests] are not directly confirmed by the official statistics'. Analysing recent policy developments and political debates around family reunification in **Austria**, Kraler et al. (2013) mention several NGO comments and reports criticising similar deficiencies. All these examples give rise to scepticism regarding the extent to which family reunification policies are evidence-based. Instead, Strik et al. (2013: 63) accuse governments to sometimes be 'involved in "policy-based evidence-making"' when proposing or introducing new legislations which directly or indirectly entail unequal effects on different groups or categories of family migrants.

Conclusion

> Migrants are not only aliens, but also human beings, women and men, deserving respect and possessing rights even though they may not be citizens of the state they visit, reside in, work, etc. (Hammar 1994: 195).

This paper has approached the issue of family reunification from a rights-based perspective and has systematically compared patterns of and rationales behind unequal treatment among TCNs across different national policy frameworks. The analysis thereby helps to explain much of the logic behind the highly complex system of stratified rights and obligations confronting TCNs who legally reside within the EU and wish to be joined by a close member of their family. The theoretical and conceptual framework underlying this investigation allows to distinguish two different sets of rights generally held by international migrants. On the one hand, there are rights which all of them are automatically entitled to by virtue of being human, and which states have to respect under any circumstances. These include the right to liberty and security, humane treatment, freedom of religion and expression, as well as non-discrimination. On the other hand, there are rights which are

deliberately granted by an individual state to immigrants fulfilling certain conditions, such as the right to enter, reside, work or settle within its territory. Clearly, the *right to family reunification* marks a point of intersection between both spheres, since it is underpinned not only by the unconditional human right of the sponsor to have his or her private and family life respected, but also by the highly conditional right of the family member living abroad to enter and stay, work and/or settle in the same country as his or her sponsor. Thus, policies of family reunification reflect not only the obligations of states in relation to migrants' human rights, but also their own sovereign right to *manage* (most) immigration according to their own national interests. It is this particular context which leaves family reunification far from being a neutral application of a universal human rights norm, but instead renders it a *highly selective process* (Kofman et al. 2011).

Accordingly, any assessment of the legitimacy of making distinctions between different groups and categories of migrants or their sponsors ultimately depends on which of the two underlying principles (the migrant's right to family life vs. the host state's sovereignty to control immigration) is seen as predominant in any particular case. A comparative analysis of such instances in different EU Member States has shown that while specific conditions and requirements for reunification vary considerably in both scale and scope, they clearly reveal common patterns and rationales. On the one hand, this can be explained by their common foundation on international human rights obligations or specific EU legislation; on the other, it points towards very similar overall interests, perceptions and fears related to specific groups of family migrants. Overall, the results suggest that in countries that regulate family reunification most restrictively (like Denmark), instances of unequal treatment are much more widespread. The findings thereby confirm the argument of Strik et al. (2013), whereby the increasing fragmentation of outsider statuses is the result of states trying to minimise access to certain rights, which have been progressively extended to immigrants over recent decades. On the contrary, more liberal policy frameworks (like in Portugal) operate within far less complex systems of immigration statuses, thereby allowing less differentiation and creating less inequality regarding the access to such rights.

From the perspective of governments and politicians, this also clearly limits the scope for immigrant selection, i.e. their capacity to comprehensively *manage migration flows.* From a rights-based perspective, however, it remains highly questionable whether managing migration by granting differential access to fundamental rights such as the right to family life can be regarded as an option legitimately available to liberal-democratic states. It has therefore been suggested that in order for any distinctions made between different groups of persons to comply with liberal democratic norms and principles, the underlying arguments and justifications must be based on objective realities and supported by robust scientific evidence. In the realm of family reunification policies many such distinctions have been shown to follow from at least seemingly pragmatic and rational arguments. All too often, however, these justifications seem to rest on a general public perception rather than substantial empirical evidence of a certain social problem, which undermines both their validity and legitimacy. Thus, in the absence of a general rule, every (even potentially) selective limitation to the right to family reunification must be evaluated in terms of its appropriateness and proportionality. This means to carefully weigh the legitimate interest of the migrant family to live together in a particular host state against that of states in retaining their capability to select immigrants according to their own socio-cultural preferences, economic needs and ethno-nationally biased definitions.

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