2 A theoretical framework for the analysis of spousal migration policies

For more than four decades, family migration has constituted a considerable share of all legal immigration into Europe. Many European states' guest-worker-schemes ended in the 1970s; the economic crisis beginning in 1973 saw a rise in unemployment, and few new possibilities for large-scale labour migration. Family migration continued and grew disproportionately to become the most important mode of entry for third-country nationals (TCNs) into most European countries. In the majority of Western states, family-related migration provisions are in place, allowing the admission and residence of family members of domestic nationals, of legal permanent residents, and of certain categories of newly-arrived migrants (e.g. high-skilled migrants).

Scholars have mainly attributed the political impetus behind a toleration of family migration in the early post-war years to the economic interests of employers' organisations and labour ministries in creating favourable conditions for labour migrants (Triadafilopoulos & Schönwälder 2006; Bonjour 2011). However, even in this time period, normative considerations played a role: In the Netherlands, moral interests expressed by (Catholic) MPs in parliament were important in enabling family migration rights for foreign residents in the 1960s (Bonjour 2011: 102). In Germany, a 1963 proposal to strongly restrict Turkish guest workers' right to family migration was rejected by policy-makers, who worried that discriminatory policies would provoke international criticism and damage the young liberal democracy's image in the world (Triadafilopoulos & Schönwälder 2006: 8).

The continued toleration of family migration after the 1970s throughout Europe has been explained with an ever-increasing normative importance placed on universal human rights (Soysal 1994), or rather on an expansion of basic rights, especially the right to the protection of family and the right to equal treatment in the case of foreign residents. This expansion of rights was sometimes promoted by an "activist judiciary" (Joppke 1998: 283), but has also been shown to be important as a moral framework for policy-makers and civil society, independently

© Springer Fachmedien Wiesbaden 2016
L. Block, *Policy Frames on Spousal Migration in Germany*,
Studien zur Migrations- und Integrationspolitik,
DOI 10.1007/978-3-658-13296-5_2

from courts (Bonjour 2011).[8] For the entire post-war period, norms have arguably played a crucial role in European family migration policy-making processes. For the past decade, a restrictive turn in family migration policies has been observable in several European countries (the German turn provides the main field of investigation for this research), which itself is strongly embedded in the normative framework surrounding family migration policies that has emerged since the 1950s.

Kofman (2004: 243) claims that the proportion of family-based migration out of the total overall inflows has been growing steadily across Europe without being accompanied by adequate scholarly consideration. A parallel statement can be made regarding policies governing family migration, which are also growing in relevance, although this has not yet resulted in adequate academic analysis. Therefore, in the following three sections, a tentative theoretical framework for the analysis of family migration policies is presented. The initial section explores the most important normative arguments behind family migration policies in liberal democracies, including the role that family and marriage norms play in their formulation, and proceeds to outline a theoretical framework for the analysis of family migration policies. Thereafter, two further sections explore different normative arguments relating to policies aimed at "marriages of convenience" and "forced marriages"[9] in more depth.

The chapter thus provides an overview of the (partly conflicting) normative arguments regarding general family migration policies, as well as regarding the specific policy instruments aimed at marriages of convenience and forced marriages, situated within the wider framework of family migration. It also explores and analyses the political framing approaches employed by policy-makers in order to develop and justify

[8] At the same time, some authors point towards a continued need for flexible and cheap low-skilled migrant labour in Europe also (or even especially) after the economic slump in the 1970s, leading employers to turn to family migrants, especially in the construction and service sector (Hollifield 1992: 80-95; Messina 2007: 30). While this might have partly weakened political resistance against family migration behind the scenes, it is unlikely to have considerably influenced mainstream policy-making. Furthermore, the incorporation of family migrants into the labour market differed across Europe. For instance, in the Netherlands and France, incoming family members generally gained immediate access to the labour market, while in Germany, work permits were only hesitantly given out to family migrants (Hollifield 1992: 85).

[9] As the following analysis will show, "marriages of convenience" and "forced marriages" are both highly ambiguous concepts. This ambiguity would certainly justify a continuous placing of both terms in inverted commas. However, for sake of legibility, in the remainder of the thesis both terms will be largely employed without inverted commas; this does not imply that they refer to clear-cut, empirically observable phenomena.

vital interest any individual has in being able to lead a family life, all human beings can also be assumed to have a "right to remain," which is a strong interest in living in the society where they have settled and in which they participate. This "rootedness" is a crucial consideration; otherwise governments could suggest joining one's family abroad as an adequate means to satisfy the protection of family life. As Carens (2003: 97) puts it, "no one should be forced by the state to choose between home and family" – thus only when the legitimate and crucial interest of a society's members to remain in their country of origin is combined with the individual right to the protection of family, the case for family migration provisions emerges in the first place. The "right to remain" is thus also why it is primarily established members of society (citizens or legal residents) who can lay claim to a state protection of their right to marriage and family.

It is paramount to realize that this is one of the main distinguishing features characterizing family migration, in contrast to other types of migration and possibly the most powerful normative argument in its favour: family migration is based on an existing, meaningful relationship between an outsider (or nonmember) of society, that is, the incoming family member, and an insider (or member) of society, that is the sponsor.[12] By granting family migration, the state, at least in theory, recognizes not only the importance of the relationship between individuals in the microunit of the family (thus respecting the "right to the protection of family life") but also the importance of the relationship between individuals and the wider community they belong to (respecting the "right to remain"). Authors working on family migration have begun to explore the ways in which politics of belonging and issues of identity, especially gender and family norms, interrelate with the restriction of family migration policies in the last years (Bonjour & de Hart 2013; Eggebø 2010; Gedalof 2007; Muller Myrdahl 2010; Schmidt 2011; Wray 2009).

But who is considered to be a member of society? While the membership of citizens living in their home country is not questioned by normative theorists, the position of long-term resident foreigners, also termed "denizens" (Hammar 1990), is less clear. It has been forcefully argued that foreign residents acquire certain "rights of membership" after a certain period of legal residence; Carens suggests around five years as the threshold (Carens 2002: 101-106). This suggestion is largely

[12] However, see de Hart (2009) for a critical analysis of the gendered and ethnicizing ways the European Court of Human Rights fails to take the interests of "insiders" into due account in case law on family reunification appeals.

mirrored in empirical reality in liberal democracies. While extensive political rights are usually reserved for citizens,[13] typical rights awarded to foreign residents are residential rights, social, educational and employment rights, but also, the right to family reunion[14] (Kostakopoulou 2002: 444). However, tensions may still arise regarding the specificities. For instance, it can be argued that the five years Carens suggests that it takes to establish rights of membership is too long a period of time for family members to be separated from one another without this being considered to seriously harm their family life. The universal right to family life indeed can take effect earlier than the particular right to social membership, but in this interim period the state is consequently under fewer obligations to ensure the fulfilment of this right than later, when temporary migrants become permanent residents, and thus can lay claim to membership rights.

While Carens (2003) strongly rejects any differential treatment of citizen and foreign sponsors as morally indefensible, one can posit that a distinction nonetheless exists between the two groups, as their claims to membership in the community are not equally strong. One point that can be made that weakens the family migration claims of foreigners is that migration is an intentional act and, therefore, the possible separation from one's family is merely one of the costs it induces which can be expected to be borne by the voluntary[15] migrant (Honohan 2009: 776).

[13] The exclusion of foreign residents from political participation is the basis of a related normative discussion on the permissibility thereof and the boundaries of a just framework for the acquisition of citizenship (see Bauböck 2006).

[14] The fact that in some cases, even newly arriving migrants immediately have family migration rights or, put differently, can bring family members directly along with them when migrating, is less explicable from this vantage point. Why does the state assume this kind of responsibility also for the well-being of recent, possibly short-term, migrants? Here, probably a more economic rationale is at play which nevertheless displays the state's recognition of the importance of family. Sought-after migrants (e.g. high-skilled individuals or investing entrepreneurs) are given the opportunity to be with their family in order to enhance the attractiveness of the receiving state as a migration destiny in a global competititve environment for desirable migrants.

[15] The situation of refugees is different, since their migration is assumed to be involuntary and a return to their home countries in order to establish family unity cannot be plausibly demanded. In fact, Convention refugees (i.e. recognised according to the 1951 Geneva Convention) generally enjoy family migration rights across Europe under more favourable conditions than labour migrants (see ECRE 1999). Indeed, since 2003, the Family Reunification Directive obliges its signatories to treat its Convention refugees more favourably than "regular" TCN migrants regarding family reunification in its Chapter V, Art. 9-12. For example, according to Articles 7 and 8 of the directive, Convention refugees are regularly exempted from the minimum residence time, as well as income, housing and integration, requirements applicable in other cases of family migration (see Groenendijk et al. (2007: 41-

However, the picture is not that simple since not all foreign residents have migrated, nor have all citizens of a country been born and lived all their life there. For example, the position of second or third generations, born in a host country without acquiring the citizenship in question, is complicated. Never having themselves migrated voluntarily, but finding themselves as foreign residents in their parents' (or sometimes grandparents') migration destination, they lack the legal security of citizenship without ever having made any conscious choice to migrate. This condition of legal insecurity is obviously relevant far beyond the realm of family migration rights and is generally normatively difficult to defend. Naturalised immigrants or ethnic migrants with immediate citizenship rights, such as ethnic resettlers *(Aussiedler)* in the German case, by contrast, have made a voluntary migration decision but enjoy all the rights of citizens. Another argument in this context relates to a fundamental difference citizenship makes: Citizens, contrary to foreigners, always have an unconditional right to residence in their home country. Therefore, it is occasionally argued that citizens cannot easily be expected to leave their home country in order to unite with their foreign family members abroad, while this might be a more plausible demand to be posed towards foreign residents.

Even if the responsibility assumed and the subsequent details of the policies differ across polities, some kind of family migration provisions for both citizens and foreign residents are indeed in place in most Western liberal democracies, often with reference to human rights provisions. Direct access to one's spouse and family is thus in theory accepted as a fundamental right and therefore a crucial component to individual well-being, which should be ensured by the state towards its members.

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45) on the implementation of the provisions on refugees' family reunification rights in the EU). However, the situation for non-Convention refugees enjoying some type of subsidiary protection is very diverse across Europe. While in some states subsidiary refugees enjoy roughly the same family migration rights as Convention refugees, in other polities, they are either treated similarly to regular migrants or they are not granted any family migration rights at all (John 2003: 38-40; Groenendijk et al. 2007: 42). During the asylum procedure, i.e. before (subsidiary or Convention) protection is granted, asylum seekers are generally not granted family migration (ECRE 1999).

2.1.2 Ideas on family and membership within family migration policies

Marriage and family norms within family migration policies

Marriage and family are far from being neutral, clearly defined concepts. Instead, notions of what "family" and "marriage" actually constitute, what societal and private purposes they serve, and ideas of how family and marriage should function, are in continual flux, both over time and across cultures. As is the case with most contested norms and values, even within one society there will be a plethora of different opinions on what constitutes a proper marriage and family. However, it is not individual marriage and family norms that are relevant for the present research, but rather institutional ones. What marriage and family norms does the state put forward by way of laws, policies and discourses? There are many fields in which institutional marriage and family norms are expressed. Most obviously, through marriage law, divorce law and family law the state establishes marriage and family norms. But also certain provisions in social, educational and fiscal policies reflect and establish institutional norms on marriage and family.

What is particularly relevant for the present research is the question of what kinds of norms the state puts forward within family migration policies. Which normative ideas regarding family, marriage and gender can be discerned within family migration policies? As will be shown later, proposing specific family and marriage norms can be instrumental for policy-makers when aiming at restricting family migration. For example, the definition of eligible family members within admission provisions is one of the ways marriage and family norms interact with migration policies. Mostly, only the nuclear family members, i.e. spouses and minor children, are admitted, which suggests that a norm of small family units is at work here. This has led to criticism that a narrow definition of the family might be biased culturally, as extended family ties are often more important in non-Western cultures. Furthermore, admitting extended family members might be crucial in order to ensure the supply of familial care (Honohan 2009: 781). Another example is the notion of familial dependency, which is a prominent feature of family migration provisions in most countries. Incoming family members, at least initially during a probationary period, derive their residence permit and often also their work permit from the sponsor's residence permit and status. Furthermore, certain family members, such as adult children or ascending relatives, are often only admitted if a (financial) dependency upon the sponsor is proven. By making dependency upon the sponsor such an important condition, states thus suggest that the family is, first,

aimed at reproduction and, second, a unit of (economic) solidarity (Kraler 2010: 47).

In an historical analysis of institutional marriage norms, Ursula Vogel (2000) proposes three inter-related perspectives to analyse wider questions of the way marriage is institutionally given meaning, which can in turn be applied to analyse marriage norms in the context of family migration policies. The first perspective highlights the power struggle between religious institutions and the state over the authority to regulate marriages, which is connected with a claim to sovereignty. In the context of migration policies, different religious institutions and national authorities compete over the power to regulate and thus define marriages as an expression of their sovereignty. Secondly, one can focus on the "extensive regulatory involvement and coercive presence of the public power in the terrain of marriage" (Vogel 2000: 179). Here, the notion of a "tripartite contract" is crucial, implying that the spouses make vows not only to each other, but to a third party (such as the kinship community, God or the state) as well. It is mainly from this perspective that the issue of the public-private nexus is highlighted: To what extent may spouses define their marriages as private? Where and in what ways does the state have the authority to define and regulate marriages? The third important political dimension of marriage concerns the "constitution of gender as a political relationship of rule and subordination" (Vogel 2000: 179). Examining the (often asymmetrical) power relations between husband and wife as constituted and reinforced by the state in its regulation of marriage is crucial when analysing migration policies as well. These three perspectives on the larger political debates involved in marriage norms (regulatory power as an instance of sovereignty, the public-private nexus and gender power relations) are paramount to any analysis of institutional marriage norms put forward by political authorities in the context of family migration policies.

However, it would be naïve to assume that all state institutions have one set of family and marriage norms, which in turn are reflected across all policy fields. Actually, conflicting and contradictory family norms might be put forward in different contexts, depending on the actors involved and the different immediate policy goals at stake. For example, there seems to be a widening gap between increasingly liberal family norms, manifested in legislation and jurisprudence recognising and strengthening the rights of familial constellations beyond the traditional heterosexual married couple, such as same-sex relationships, non-married couples or single/divorced parents, and a continuing narrowing of conceptions of family within migration legislation, which results in restrictive family migration policies.

How can this gap be explained? Kraler (2010: 48) proposes the possibility that, despite the legal consolidation of alternative family and relationship models, which seem to imply a liberal shift, family norms in most European societies might not have actually changed that much. In reference to Turner (2008: 53) and his concept of "reproductive citizenship," he underlines the continuing importance of the family as a site of both biological reproduction of citizens and cultural reproduction of the nation, which explains the ongoing institutional protection of the family as well as its position as a "site of contestation and social engineering and subject of moralising political and public discourses" (Kraler 2010: 48). On the other hand, Kraler (2010: 48) also acknowledges that family migration policies, rather than reflecting (progressive) family norms emerging in other societal contexts, must mainly be regarded as policies controlling migration. He proposes that migration and citizenship policies tend to strongly favour individuals behaving in "proper" ways, that is, economically productive, law-abiding and civically engaged persons, which is why conditions testing and ensuring these criteria are part of family migration policies. Furthermore, van Walsum (2009: 299-300) has pointed out that discrepancies between family norms discernible within family law and those found in immigration law can be explained by racialised notions of the family, leading different family norms to be applied to different groups. She shows that while the state in the Netherlands largely accepts white Dutch single mothers or even regards them as emancipated when they successfully combine work and mothering, it considers ethnic minority single mothers to be irresponsible and incapable of parenting, and their inflow accordingly a threat to social cohesion.

Even within the policy field of migration law, different marriage and family norms are articulated in different contexts. For example, as will be elaborated in the following sections, the policies aimed at combating marriages of convenience implicitly propose an ideal marriage norm based on love and the desire for the couple to live a common life together, which strongly rejects the idea of a merely contractual marriage. In the practice of marriage-of-convenience policies, rather traditional norms, such as the cohabitation of spouses, minor age differences between them, or the purpose of having common children, are all endorsed as important features of "authentic" marriages. At the same time, political framings of forced marriages criticise the gendered and generational subordination and repression of the spouses in the marriage decision, and propose instead an ideal marriage norm based primarily on individual free will, thus rather supporting the notion of marriage as an autonomously concluded contract.

Membership and family migration

Migration policies have previously been analysed as instances of "politics of belonging," that is, policies involved in "the maintenance and reproduction of the boundaries of the community of belonging by the hegemonic political powers (Yuval-Davis 2006: 205). Notions of "who belongs (more)" to the national community influence national migration policies. These policies, in turn, create hierarchies of membership by allocating rights according to "strength" or "degree" of different dimensions of membership. Membership, in the simplest terms, is the state of belonging to or being part of a group. Understanding membership as socially constructed identity categories, this membership and belonging can be contested and politicized at virtually all sites and levels of individuals forming groups (e.g., cities, neighbourhoods, associations, churches, clubs), and the question "who belongs?" is especially pertinent at the level of the nation-state – even though postnational theorists might suggest otherwise (Brubaker 2010: 64). Also, in the following, since the focus is on the analysis of national (family migration) policies, it is not individuals' conceptions of identity and membership but the social construction of membership at the level of the nation-state that is of interest – and how notions of membership are constructed and politicised by state actors through their policies. When adopting a narrow understanding of citizenship as amounting mainly to full legal membership in a given polity, citizenship and membership are strongly interrelated concepts, but distinct. Citizens' membership can be contested, just as noncitizens can be constructed to possess some kind of membership in the political community in which they reside (and at the same time in the polity they originate from). Brubaker urges to distinguish the "politics of citizenship *in* the nation-state" from the "politics of belonging *to* the nation-state"; he suggests marginal or minority populations might undoubtedly be "formal state members", that is, citizens, but at the same time their "substantive membership," that is, their access to the rights citizenship entails and/or their acceptance as "full members" of the nation, might be very much contested (Brubaker 2010: 64). Also the membership of noncitizens, that is resident foreigners or new migrants, can be subject to scrutiny and contestation in the politics of belonging. Importantly, membership is not conceptualized here as a fixed entity that might be either present or absent but along a continuum from strong to weak (thus rather than thinking of an "us/them" dichotomy, individuals can be considered "more part of us" or "less part of us"). Also, different membership dimensions can be distinguished, operating on distinct axes of social inequality. These membership dimensions can obviously intersect and interact with one

another, offsetting and/or enforcing the degree of perceived or constructed "otherness," as has been pointed out by scholars emphasizing intersectionality and belonging (Yuval-Davis 2007). In the following, we will turn to an analytical framework useful in coming to terms with family migration policies by systematically exploring them as instances of membership regulation and family regulation.

2.1.3 An analytical framework for family migration policies: Regulating membership and regulating the family

Since the late 1990s, somewhat of a policy trend has emerged across OECD countries towards an increased restriction of family migration[16] (OECD 2011: 115). In Europe, restrictions of family migration policy have been introduced at least in Austria, Belgium, Denmark, France, Germany, the Netherlands, Norway, Sweden, and the United Kingdom. Consequently, a decrease of family migration inflows can also be observed in many European countries (Pascouau & Labayle 2011: 107). Connected to this restrictive policy shift have been negative perceptions of family migration, mainly connected to two disputed issues. First, does family migration facilitate or harm immigrant integration? Second, are family migrants an asset for the economy or a burden on the welfare state?

Regarding integration,[17] two opposing arguments have been uttered. On the one hand, some scholars have claimed that family migrants integrate into host societies better than other migrants since they can make use of the established networks and support, that is, the social capital, of their sponsors. Furthermore, it has been argued that if sponsors themselves are recent migrants, being joined by their family members rather than being socially isolated is likely to enhance their capacity for integration in the host country, also since "families, especially children, themselves constitute channels for wider interaction through school and

[16] Contrastingly, Kofman and Meetoo (2008: 159) claim that Italy and Spain have facilitated family migration in the same period, for example, by the formal introduction of a right to family migration in Spanish immigration law in 1996. This divergent Southern European path might be explained by their rather recent experience with immigration flows compared to older migration-receiving states in Northern Europe. Most recently, however, Spain has put more emphasis on integration in its family migration policy too (Pascouau & Labayle 2011: 17).

[17] See Favell (2001) for a substantive critique of policy makers' and researchers' conceptualization of integration in Europe.

other activities" (Honohan 2009: 772). In this view, allowing resident migrants to be joined by their family members benefits both the sponsors and their receiving community (Cholewinski 2002: 274). This "integration-through-networks" argument thus posits that family migration has a positive impact on integration, and is also the official view of the European Union (Strik et al. 2013: 48) which is, for example, mentioned in the preamble of the Family Reunification Directive 2003/86/EC.[18] On the other hand, family migration, especially of spouses joining ethnic minority sponsors, is also claimed to contribute to self-reproducing, segregated minority communities, and is thus seen to hamper integration of both the sponsoring and the incoming spouses. This "ethnic-segregation" argument posits that family migration has a negative impact on minority integration. In recent years, in particular, the ethnic-segregation argument has become increasingly popular among policy-makers in various European countries who have been mainly influenced by observations regarding the marriage behaviour of second- and third-generation migrants opting for partners from their (grand) parents' country of origin (see Beck-Gernsheim 2007; Eeckhaut et al. 2011; Sterckx 2015).

A second set of arguments concerns the (economic) productivity of family migrants. Finding family migrants in the United States to be nearly as productive in the long term as employment migrants screened for their skills, Jasso and Rosenzweig (1995: 86) suggest that family-based support networks enhance the occupational upward mobility of spousal migrants. Hollifield (1992: 80-95) illustrates how, after the recruitment stop in the 1970s, German and French employers gladly turned to family migrants to fill continuing labour needs in the construction and service sector. Also, Honohan (2009: 772) claims that in many instances family migrants indirectly enhance overall societal welfare by providing unpaid care and household work or by contributing informally but significantly to family businesses. Contrastingly, it has been argued that family migrants tend to be unproductive. Contrary to the treatment of labour migrants, receiving states do not select family migrants according to their skills or other resources but rather admit them solely due to their link to the sponsor. The ensuing "non-selection" is thus often seen as likely to

[18] Recital 4 of the preamble of Directive 2003/86/EC reads "Family 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."

produce an inflow of economically unproductive migrants, who are potentially a burden on the welfare state.[19]

Summing up, when family migration is viewed as furthering integration and producing productive inflows, family migration rights might be readily granted. However, when subscribing to the negative arguments of family migration as leading to unproductive, burdensome inflows that also have a negative impact on integration, the admission of family migrants is deemed to be potentially detrimental to the overall interests of society. Significantly, it is this negative view of family migration that has acquired salience in recent years: family migration thus seems to be increasingly perceived as unwanted in many Western European states. At the same time, however, these same states, especially in their capacity as liberal democracies, are under pressure to protect the fundamental rights of their individual members to the protection of marriage and family life. How can the liberal state limit family migration to achieve its migration management goals without completely disregarding its human rights obligations?

In section 1.2, I suggested that a "liberal discursive constraint" exists that limits liberal democratic governments' possibilities to openly disrespect individual rights. This constraint compels governments to frame restrictive migration policy instruments in such a way that the general commitment to fundamental individual rights is not questioned. In other words, policies possibly harming individual rights need to be appropriately framed either to achieve other much more pressing goals (including protecting other human rights), or to actually not infringe any individual right by demarcating the right itself or those entitled to lay claim to it. The alternative, open disrespect for individuals' rights, is difficult to reconcile with a state's self-definition as a liberal democracy.

I propose that two policy approaches can be observed in Europe to control family migration, while at the same time keeping in line with the broad human rights discourse of the protection of family life. As out-

[19] Due to the general tendency toward social homogamy, especially regarding education level (see Blossfeld & Timm 2003), social and educational characteristics of incoming partners are likely to mirror those of their sponsors. This means that largely unskilled labour migration inflows—as have dominated many European countries in the past—would be accompanied or succeeded by similarly unskilled spousal migration. However, transnational and migratory dynamics can also alter this tendency toward homogamy, especially in the following generations and with ethnic majority partners. When immigration is sought after, the bargaining position in the marriage market can be enhanced for low-income or uneducated sponsors (Charsley 2005: 94; Glowsky 2007: 299; Hooghiemstra 2001).

lined above, family migration is based on liberal states' commitment to the protection of **family** and to an obligation to safeguard the rights of its society's **members**. The liberal discursive constraint compels any restrictions to be framed as changing the definition of social membership and family instead of questioning the respect for the protection of marriage and family as such. Accordingly, the following analytical framework categorises family migration policies into those instruments regulating social **membership**, and those instruments regulating the **family**. Within these two logics, regulation takes place, firstly, by circumscribing the eligible **categories** of societal members and family ties, and secondly, by scrutinising the **quality** of social membership and family ties respectively. The following will explore the two approaches and briefly outline some of the policy instruments that exemplify them.[20]

	Social **membership**	**Family** ties
By circumscribing **categories**	Requiring sponsor to have certain legal status	Legal proof of relationship; maximum age for children
By scrutinising **quality**	Income requirement; (pre-) integration conditions	Evaluation of whether marriages are based on love/consent; scrutinising of parental ties

Table 1: Examples of policy approaches regulating membership and family ties

Regulating membership

With regard to the **regulation of membership**, states control family migration by allocating family migration rights according to different membership categories. They do so by evaluating the legal status of the sponsor and the quality of this social membership. Both of these phenomena will be explored in turn. At the risk of stating the obvious, the sponsor is required to have some legal membership status in the community in order to claim family migration rights. The sponsor needs to be a citizen or

[20] The policy instruments mentioned in this section are mere examples of the approaches described. While the German case is dealt with extensively in chapters 3, 4, 6 and 7, a more comprehensive overview of recent legislative changes in selected other European countries is presented in chapter 5. See Kraler (2010: 29-49) and Groenendijk et al. (2007) for overviews of family migration policies across Europe.

a foreign resident in possession of a valid residence permit. Accordingly, irregular migrants who are not legal members of the community do not enjoy family migration rights in most polities. Furthermore, immigrants often need a minimum residence time and/or must have acquired a consolidated residence permit before family members can join them. Thus, apart from cases mentioned above where immediate or early family migration is granted to desired migrants, a basic social membership in the community of the sponsor must be present before being granted family migration. These conditions can be tightened: In France, the minimum period of legal residence for foreigners prior to being able to sponsor family migration was raised from 12 to 18 months in 2006 (Kofman & Meetoo 2008: 160).

Another manifestation of regulating membership through legal categories, which has already been mentioned above, is the preferential treatment of citizen sponsors vis-à-vis foreign resident sponsors. The rationale behind this is that only citizens' membership in the community includes an unconditional right to residence. It is also sustained by the notion of a presumed stronger "rootedness" of citizens in society and the connected comparably higher sacrifice placed on them if they had to migrate abroad to establish family unity. In practice, many policies award more favourable conditions of family migration to citizens than to foreign residents. For instance, in the USA, citizens are allowed to sponsor a broader range of their family than foreign residents, including siblings and parents (Demleitner 2003: 293). Also, spouses of foreigners are subjected to annual quotas leading to waiting periods of up to 5 years, while US citizens' spouses are immediately granted green cards and only subject to regular processing delays (Abrams 2007: 1636). In Germany, fewer requirements concerning income and housing are imposed on citizen sponsors than on foreign resident sponsors. This point is of relevance at the supranational level as well: According to the 2004 Free Movement Directive, EU citizens residing in other Member States have much more extensive family migration rights than what is enshrined as the minimum standard for TCNs in the Family Reunification Directive of 2003.

"Rootedness" also plays an increasingly important role in determining the "quality" or "intensity" of someone's membership to the society in question. This notion is also reflected in European jurisprudence on family migration, with courts regularly evaluating the bonds of the sponsors in the host country when determining whether an emigration to establish family unity abroad can be considered a viable option or

not.[21] Regulating the quality of membership relates to the integration debate since the quality of social membership concerns not only foreign residents but also ethnic minority citizens. In case the sponsors' integration into the host society is considered insufficient, their membership might be questioned and, accordingly, spousal migration restricted on an individual or collective basis.

One policy instrument that very directly reflects this idea of scrutinising the quality of membership through an assessment of rootedness is the so-called "attachment requirement" in Danish spousal migration law.[22] Since 2002, this provision requires all transnational couples applying for spousal migration in Denmark, both with citizen and foreign sponsors, to prove that their "combined attachment" to Denmark is "significantly greater" than their attachment to any other state (Danish Immigration Service 2015a). A closer look at the membership definitions implicitly present in this policy is illuminating. The required attachment is measured by evaluating the length and continuance of the sponsor's (and possibly the incoming spouse's) prior residence in Denmark, the presence of other family members and acquaintances in Denmark, the level of the couple's Danish language skills and their education and/or labour market participation in Denmark. Extended visits to other countries as well as the presence of children and other family members abroad are (negatively) taken into consideration as well. If custody or visiting rights to a child living in Denmark exist, the requirement is usually waived entirely (Danish Immigration Service 2015a). Here, membership leading to family migration rights is thus defined by length of residence on the one hand, but also by other variables such as language skills and personal strong bonds to other members (especially children) of the host society. Participation in gainful employment and language skills are regarded as especially important factors enhancing social membership: The regular residence requirement of 15 years stipulated for sponsors is reduced to eight years if the sponsor is in continuous full-time employment and speaks Danish on the job. It can be even further reduced to five years if the sponsor's job is considered "particularly integration-furthering,"

[21] For example, in its *Sen v Netherlands* judgement, the ECtHR decided that the Dutch decision to refuse minor Sinem Sen a residence permit was in breach of Article 8 ECHR, partly due to the fact that Sinem's parents had had two further children in the Netherlands after their immigration. The family could thus not be expected to leave the Netherlands in order to reunite with their oldest daughter, Sinem, in Turkey and she was granted a residence permit. See van Walsum (2009: 302) and section 5.1.1.

[22] See section 5.2.3 on Danish spousal migration policies for a more detailed description of the provisions of the attachment requirement.

that is, requiring high levels of Danish skills (Danish Immigration Service 2015b).

This policy instrument suggests that acquiring a strong membership claim through long residence can be at least partly offset by personal rootedness in the country and especially through participation in the education and the labour market, and by having certain language skills. There were protests following the initial implementation by expat Danes, who were prevented from returning to Denmark with their foreign family members because they failed the attachment requirement. The policy was changed to exempt citizens who had held Danish citizenship for more than 28 years. While the policy now clearly discriminates between naturalised and Danish-born citizens (Ersbøll 2009: 3), as well as against young adults (under 28) vis-à-vis older citizens, it also hints at a rather ethnic conception of membership that is implicitly present within family migration policies. In July 2011, the UK government proposed the introduction of a similar attachment requirement into UK spousal migration laws, specifically citing the Danish policy as a model (UK Border Agency 2011: 19).

Despite this Danish policy being, at least up until now, rather unique, it shows that apart from evaluating legal membership status, the regulation of membership may also include an assessment of the quality of this social membership. Personal and emotional links to other members of society and language skills can be evaluated, it is presumed, in the same way as the socio-economic status can be assessed. This evaluation of socio-economic achievement is actually another very widespread instrument of family migration control and I propose that it can also be categorised as an instance of regulating social membership. Put bluntly, the better the socio-economic status, the "better a member" the sponsor is, and, accordingly, the more rights that are awarded to him/her in the field of family migration. For example, it is very common to oblige sponsors to fulfil certain socio-economic standards regarding employment, income, housing and independence from social welfare in order to sponsor family migration. While these instruments obviously also serve the policy goal of preventing family migrants from becoming a burden on the welfare state, I suggest that, implicitly, highly normative notions of "good members" of society are put forward by these policies. Sponsors are expected to be law-abiding, economically self-supporting individuals, who actively engage with society at large through their language skills and civic involvement (see also Kraler 2010: 49), in order to "earn" the right to sponsor family migration. Significantly, these conditions can be tightened: In 2004, the Netherlands increased the income that sponsors needed to earn in cases of "family formation" to 120 per cent of the min-

imum wage.[23] Nonetheless, more liberal examples also exist. Portugal, which is governed by the most favourable family migration conditions in Europe according to the most recent MIPEX report (Huddleston et al. 2011: 15), temporarily lowered the "means of subsistence" that immigrants needed to sponsor family migrants from 100 per cent to 50 per cent of the minimum wage in 2009.[24] The government stated that this reduction was due to the international economic crisis, which would temporarily leave many migrants in situations of involuntary unemployment and professional instability (Serviço de Estrangeiros e Fronteiras 2009: 36).

Furthermore, socio-economic assessments of membership are also intermingled with other membership criteria. As mentioned above, in some countries, such as Germany, while foreign sponsors need to provide proof of employment, income and housing, citizens do not. Here, the obligations to establish socio-economic membership are higher when directed towards foreigners than citizens. This is in line with the stronger legal membership claims of citizens outlined earlier. However, in 2007, German spousal migration law was changed, extending the income requirement that previously was only applicable to foreigners to citizen sponsors in cases where it can be "reasonably expected" that the couple could establish their union outside of Germany.[25] The commentary to the law mentioned naturalised and dual nationals as examples of such cases. This provision is strongly connected to the above-mentioned notion of "rootedness" in society as an indicator of the intensity of someone's membership in that society, but also exemplifies again an ethnic conception of membership, since mostly ethnic minority citizens were affected by the rule. Their membership claims are thus implicitly categorised to be weaker than those of ethnic German citizens, since in this point they are treated just as foreign sponsors and required to provide additional evidence for their membership through socio-economic achievements in order to sponsor family migration.

Thus, in Germany too, "[c]lass intersects with ethnicity in establishing who is to be most severely regulated" (Wray 2009: 593). Implicitly assessing the quality of someone's membership along ethnic lines, as occurs with the Danish attachment requirement or the income requirement for ethnic minority citizens in Germany, can be criticised for being

[23] This provision was, however, struck down by the ECJ in the 2010 *Chakroun* case (see section 5.2.1).
[24] Portaria No. 760/2009 of 16 July 2009. Diário da República, 1ª série, No. 136, p. 4509.
[25] This provision was overruled in 2012 by the BVerwG. See sections 4.2 and 6.2.3.

highly discriminatory. At the same time, some special foreign sponsors, especially if their migration is considered to be socio-economically favourable, such as highly-skilled migrants or entrepreneurs, are subjected to less stringent conditions in order to have their family join them than even citizens of the state in question. This exemplifies how socio-economic attainments can even override legal status membership claims.

The most recent emerging trend within the policy approach of regulating social membership is that of also imposing conditions on the incoming spouses. I propose that this new type of policy instrument can also be understood to constitute a form of membership regulation, as here the future membership qualities of the incoming spouses are evaluated. These provisions are mainly politically framed within the above-mentioned sceptical view concerning family migration's impact on minority integration. This notion of membership is intimately connected to the recently emerging perspective that "the lack of integration or the assumed unfitness to integrate are grounds for refusal of admission to the country" (Groenendijk 2004: 113). Obligations to prove language capacity and civic knowledge, often demanded prior to admission, have been introduced in order to emphasise both the fundamental necessity and current deficiency of family migrants' integration into the social, economic and cultural life of the host society. To date, the Netherlands, France, Germany, Denmark, Austria and the UK have already installed such integration requirements for family migrants.

Regulating family ties

I will now turn to policies that exercise family migration control by defining the boundaries of marriage and family, and in so doing, embrace specific family norms. Within this second approach – and analogously to that of regulating social membership – family migration control is exercised first by defining the categories of family members eligible to apply for family migration and, second, by assessing the quality of the familial relationships in question. Policy instruments regulating the family exemplify the power of the state as the bearer of sovereignty as proposed by Vogel (2000).

Regarding family categories, while overt gender and racial discriminatory measures are difficult to justify in liberal democracies nowadays, examples of the typical hurdles in place across Europe include maximum age limits for children, proof of dependency of adolescents and the exclusion of multiple spouses, of siblings and other extended relatives. This circumscription of the eligible family to spouses and minor

children is strongly embedded within the Western cultural norm of the nuclear family as the main locus of affection, care and shared economic responsibility. The exclusion of multiple spouses also suggests a rejection of non-Western marriage norms. Also, minimum ages for both spouses (sponsoring and incoming) have been installed in various European countries, setting it at 24 years (in Denmark), 21 years (in Austria, Belgium, and the Netherlands) or 18 years (in France, Germany, Sweden, and the United Kingdom). Again, this implies a Western norm of marriage at a later stage within adulthood, at least in the migration context. All governments argued this measure would prevent young adults from arranged and forced marriages (Strik et al. 2013: 54). As these are mainly thought to be Muslim practices, the restriction can also be interpreted as contesting the cultural membership of Muslim minorities. It has, for instance, been shown how in the 2007 U.K. consultation on raising the minimum age, the government juxtaposed supposed White middle-class family values (e.g., marrying later) with ethnic minority transnational marriage practices, associating them with force and victims (Wray 2009: 607). Similar observations have been made within Dutch political discourse (Bonjour & de Hart 2013) and will be traced in the later analysis for Germany. However, defining different categories of family regulation need not always go in a restrictive direction. In the course of instituting same-sex civil partnerships in the course of the 2000s, various European states expanded family migration rights to include these, and thus enlarged the eligible family in this respect (e.g. in Germany since 2001, in the UK since 2005, in Switzerland since 2007). Thus, progressive family norms can also lead to more liberal family migration policies.

Just as is the case in relation to social membership, states can also assess the "quality" of family ties through policy instruments that scrutinise familial relationships. Even categories of family members clearly included in family migration provisions, such as minor dependent children, parents of minor citizens and legal spouses, can be disenfranchised from family migration rights if the nature of their relationship to the sponsor is deemed to be in some way inadequate. This can occur by scrutinising biological parental ties by means of DNA tests,[26] evaluating the extent and importance of social parenthood for the affected minor or by qualifying some marriages as "proper" and others as "improper", as is

[26] See Murdock (2008) on the French decision to introduce DNA tests in order to assess biological parent-child relationships in order to qualify for family migration and see Taitz et al. (2002) regarding the introduction of DNA testing to prove biological relationships in the context of family migration across various Western states.

the case with marriages of convenience and forced marriages. By disallowing family migration if the verdict is negative, the state does not only forcefully impose marriage and family norms in the context of migration, but also manages to justify measures that might otherwise be perceived as infringing on the individual right to marriage and family protection. This is similar to the framing of asylum seekers as "bogus" or "economic refugees" who accordingly are not protected by any international convention. The restriction of asylum policies can accordingly be framed to solve this "problem" of bogus asylum seekers, which diverts attention from other possible human rights infringements.

Another example of regulating family ties via quality is the probationary period enshrined in many policies tying the incoming spouse's residence permit to that of the sponsor. Only after this probationary period can the spouse obtain an independent residence permit making a separation or a divorce from the sponsor possible. This probationary period was recently increased from two to three years in both France (in 2006) and Germany (in 2011), while in the UK the government has proposed to increase it from the current two to five years (UK Border Agency 2011). These provisions articulate a marriage norm of dependency and long-lasting relationships. Furthermore, they are framed as instruments in the fight against marriages of convenience.

It is this last approach of regulating the family by scrutinising its quality that the following section will analyse in more depth from a normative point of view by exploring the notions of marriages of convenience and forced marriages and especially the policy initiatives that have emerged within spousal migration legislation across Europe with the pronounced aim of combating these marriages.

2.2 Marriage-of-convenience policies: Preventing the state from being duped?

Intrinsically connected to a growing concern and subsequent scrutiny of family migration outlined above is the worry about possible "abuses" of relevant provisions by way of so-called marriages of convenience, commonly conceptualised as marriages conducted for the sole reason of gaining a residence permit, against money or as a favour, between individuals not in any kind of "romantic" relationship. Thus, in a political climate sceptical of family migration, marriages of convenience are increasingly perceived as a way to illegitimately enter the labour markets and welfare systems that states are anxiously trying to close off for migrants. This

anxiety reverberates in policy responses as well.[27] As de Hart (2006: 51) observes:

> Media stories about "odd couples" (the elderly woman with a 25-year old African male), high estimates of the number of marriages of convenience (up to 80% in the Netherlands), and gangs dealing in marriages of convenience not only appealed to the public imagination, but also to politicians who, in response, pleaded for legislation to prevent such marriages.

The following section will explore the conceptual and normative implications of state policies that aim to uncover and criminalise so-called marriages of convenience. Instead of trying to establish a normative argument regarding the ethics of immigration admission (see Carens 2003), or entering into a debate about how to morally weigh up different entrance claims (see Gibney 2004 on refugees and Honohan 2009 on family migration), this section sets out to critically analyse and evaluate the normative implications of policy instruments that aim to prevent marriages of convenience. These policy instruments, which regulate the family by scrutinising the quality of family ties, may take the form of general provisions applying to all couples engaging in spousal migration with the underlying goal of fighting marriages of convenience, such as the establishment or extension of probationary periods. Alternatively, such policies may be manifested in administrative measures that single out "suspicious" couples and specifically scrutinise their relationships, as will be explicated below. The perspective of the public-private nexus (Vogel 2000) is particularly salient within these latter policies. In general, this section thus explores two main, contrasting questions: How can policies on marriages of convenience be normatively justified? How can policies on marriages of convenience be normatively criticised?

[27] A parallel discourse regarding "adoptions/paternities of convenience" has emerged in some European states and partly led to several policy initiatives, but will be largely disregarded largely for the sake of space. One example of these developments involves the bizarre story of German expatriate Jürgen Hass. In in May 2006, it emerged in the media that Hass had over 300 children in Central Europe, India and Latin America that he had recognised as his own in order to enable them to claim German citizenship. Hass also stated that he planned on expanding his "brood" to 1000 children as a personal vendetta against German authorities (DER SPIEGEL 2006; Phillips & Harding 2006). The story caused an outcry about this "legal loophole" and eventually led to the drafting and adoption of a new law in 2008 (*Gesetz zur Ergänzung des Rechts zur Anfechtung der Vaterschaft* (VaAnfRErgG)), granting public authorities the right to appeal an acknowledgement of paternity (§ 1600 BGB Abs. 1 Nr. 5) if no social-familial relationship between the father and the child exist and residential rights for the child or the mother are derived from paternity (§ 1600 BGB Abs. 3).

2.2.1 How to justify marriage-of-convenience policies

The acceptance that states are entitled to control immigration into their territory as an integral part of their sovereignty and democratic self-determination[28] (Walzer 1983), as is also commonly recognised by international law, leads to the emergence of certain normative arguments supporting policies aimed at impeding marriages of convenience.

The main argument in favour of policies that specifically aim to impede marriages of convenience is that they can prevent the abuse of family migration policies. As outlined above, family migration provisions are essentially based on Western states' commitment to the protection of marriage and family of those under their legislation. This commitment of liberal states is especially strong vis-à-vis their own citizens, and somewhat less strong vis-à-vis foreign residents of their polities.

How does the rationale behind family migration policies relate to marriage-of-convenience policies? Marriages of convenience are interpreted as being an abuse of family migration policies, since the expected familial relationship is not present in these cases, thus offsetting the foundations on which the entrance claims are based in the first place. In other words, if the particular familial tie is not a given, the state is under no legal or ethical obligation to grant the foreign spouse admission; on the contrary, both spouses attempting to abuse the legislation in this way could be perceived as engaging in criminal behaviour. The illegitimacy of the abuse has two dimensions: Marriages of convenience constitute, firstly, a skipping of admission queues vis-à-vis other migrants or refugees and, secondly, an undermining of state sovereignty in migration control through fraud. Policies targeting marriages of convenience do not delegitimise family migration claims as such, but go one step further back and regulate the family ties by questioning the authenticity of the marriage, i.e. the particular familial relationship, which is indeed worthy of state protection.

Thus, in theory, restrictive marriage-of-convenience policies are not at odds with liberal family migration policies. On the contrary, they might be interpreted as a serious commitment of the state to the importance of family life for individual well-being by only attributing family migration rights to "genuine" families and denying these rights to illegitimate claimants. The backlash argument, as brought forward by Carens (1992), is crucial in this context as well. Not extending any control over the quality, i.e. "genuineness" of the alleged familial ties of migrants

[28] For a challenge of this claim, see Carens (1987; 1992).

might cause a disproportionate abuse of this mode of entry, leading in turn to a "swamping" of migrants under the family pretext. This would necessitate restrictive policy measures and lead states to clamp down on family migration altogether, affecting genuine families as well.

One might go even further and oppose granting family migration rights in the first place. One argument against (even "authentic") family migration is the more urgent and thus possibly normatively superior admission claims raised by refugees (Gibney 2004). Furthermore, a utilitarian argument can be made supporting the state's right to admit migrants exclusively according to their (expected) contribution to society instead of according to family ties. Lastly, the issue of the multiplier effect and inherited privilege that is associated with family migration can be interpreted as problematic from a (global) justice perspective (Honohan 2009). These arguments question the normative basis on which any family migration policy rests and could be interpreted to further justify any legislative attempts to keep family migration at a restrictive, minimum level, if it must be put in place at all.

2.2.2 How to criticise marriage-of-convenience policies

Two serious, interconnected problems can be discerned regarding policies on marriages of convenience. The first issue concerns the difficulty of defining a marriage of convenience and the second one the difficulty of measuring or "detecting" a marriage of convenience. I will discuss both issues in turn and then outline their normative implications regarding the seemingly conflicting goals at hand, i.e. the individual right to family protection and the collective right to restrict migration.

Defining a marriage of convenience

As outlined above, the main thrust behind policies aimed against marriages of convenience is the idea that this practice constitutes an abuse of family migration legislation. Recapitulating, while a sovereign state has the right to control, according to certain procedural constraints, who is allowed to settle in its territory, it is also recognised that family ties are crucial to individual well-being and that the state bears a certain responsibility to ensure the protection of its residents' family life, regardless of the origin of the family members. Therefore, the question of distinguishing a "genuine" marriage from a marriage of convenience is imperative,

since the former is assumed to be crucial for the sponsor's wellbeing and thus needs to be protected, while the latter is not.

However, the difficult question that emerges is: How exactly should a marriage of convenience be distinguished from a "genuine" marriage? Nowadays in Europe, civil marriages are usually legally valid as long as the two spouses contractually agree to marry, which is by definition also the case with marriages of convenience.[29] However, since family migration claims are based on the notion of the importance of particular, intimate relations with immediate family members, the standards of a "genuine" marriage within the migration context are placed somewhat higher. Often, the idea of a marriage based mainly on love is contrasted with the notion of a marriage of convenience motivated only by material interests. Institutions thus establish marriage norms by defining the (im-)permissible motivations to conclude a marriage in the context of family migration and by evaluating the presence/absence of these norms and motivations with couples perceived to be "suspicious." Furthermore, policies of probationary periods of typically several years for the incoming spouses endorse a notion of marriage as a long-lasting commitment and also penalise divorces.

With regard to refugees, Carens (2001: 11; 2003: 102) has repeatedly pointed towards the difficulty of establishing a clear threshold in determining who is a "genuine" refugee with a strong moral claim to asylum, i.e. persons suffering (possibly life-threatening) persecution from an oppressive regime on the one hand, and "fake" refugees with no moral claim to asylum, i.e. persons who face no danger in their home country and who want to use the "asylum ticket" to gain admission and access to the receiving country purely for economic or hedonistic well-being on the other. In Carens' view, in reality most refugees will not fall into one of the above extreme cases but rather somewhere in between on a continuum between "genuine" and "fake," with "mixed motives for their flight and facing varying degrees of risk" (Carens 2003: 102).

A very similar analogy can be drawn with regard to "genuine/fake" marriages. Most marriages are situated somewhere along a continuum between the prototype "genuine" marriage, with love being the sole motivation for marrying and material considerations playing no role at all, and the prototype "fake" marriage of convenience, with no

[29] This is also the reason why Lumpp (2007: 22) questions the parallel German term "*Scheinehe*" (bogus marriage) since it implies a legally invalid marriage. Within marriages of convenience, the spouses intend to enter a legally valid marriage, though they do not intend to lead a marital life.

familial relationship existent or envisioned between the spouses and a desire to improve standard of living being the sole incentive to enter into the marriage. If few pure "genuine" or "fake" marriages exist, but most fall into the large grey zone between the two extremes, with mixed motivations and incentives,[30] how should the state draw a clear line between what is a marriage of convenience and what is not? How can it be morally justified that wherever the line is drawn, those cases falling just outside the definition will closely resemble those cases just inside the definition, much more than either case can resemble the extreme cases at the ends of the continuum?[31] To classify the former as "genuine" marriages and the latter as marriages of convenience would not be "true to moral realities" (Carens 2001: 11); establishing more categories does little to solve the problem. In addition, considering the temporal dimension, another possibility emerges: Apart from the marriage ceremony being a fixed, one time event, a marriage is also an institutionalised partnership which extends and changes over time. How should definitions surrounding marriage-of-convenience incorporate the possibility of changing motivations to sustain a marriage, once concluded? Can a marriage initially concluded out of convenience purposes develop into a "genuine" marriage if the spouses do fall in love and vice versa?

Obviously, in practice, some kind of line must be drawn. Often, laws and policy papers speak of marriages of convenience if the "sole purpose" of the marriage is access to a residence permit. How morally and practically defensible this definition is, is up for debate Carens reminds us that:

> …it is important to be conscious of the discrepancies between legal categories and moral continua. (…) Since we need definitions, we should try and have good ones (…) not draw distinctions among claimants that are arbitrary or otherwise morally indefensible (Carens 2001: 11).

Furthermore, restrictive immigration policies and marriage-of-convenience policies can have a perverse combined effect, which could be termed the "paradox of convenience." Transnational couples wishing to live together in order to pursue their relationship can be pressed to marry comparatively early on in their relationship if no other possibilities of admission are viable for the incoming spouse. This leads to the para-

[30] Jelínková and Szczepaniková (2008) empirically sustain this hypothesis in their work on bi-national marriages in the Czech Republic.
[31] Carens (2003: 102) makes exactly this point for individuals who barely qualify as refugees and those who barely do not.

doxical situation of state policies pressuring individuals, who might not feel ready to commit to a marriage, into concluding one in order to be able to live in the same country together.[32] For many transnational couples lacking other possibilities, an incentive thus exists to conclude a marriage with a considerable amount of "convenience" involved, i.e. the convenience of being together as a couple. In a similar vein, Joppke (1999) speaks of "catch-22" situations in his analysis of the so-called primary-purpose rule[33] in Great Britain, a rule that was a unique example of an extreme institutionalisation of marriage-of-convenience policies:

> The primary-purpose rule puts applicants into a catch-22 situation, because the very application can be taken as evidence that the principal reason of the marriage is immigration to Britain. Gerald Kaufman of the Labour Party phrased the dilemma this way: 'How does one prove that one's application is not intended to achieve admission, when the success of one's application will, of course, result in one's admission?' (Joppke 1999: 126)

Detecting a marriage of convenience

Even ignoring the difficulties outlined above regarding attempts to establish a working definition of what actually constitutes a marriage of convenience and what does not, another interrelated problem remains: How should these marriages be measured regarding their degree of "authenticity"? As with most "criminal" activities, the individuals consciously engaging in a marriage of convenience are unlikely to come forward and declare themselves openly "guilty." Instead, it is up to the state to "detect" whether a marriage can be classified as one of convenience or not.

There are commonly two steps to this procedure. In the first step, "suspicious" couples are singled out by the responsible civil servants dealing with the case (pertaining to the civil registry, the aliens authorities or the representations abroad) according to a particular set of indicators, which differ from state to state, but often include the lack of communication possibilities, an only brief period of acquaintance prior to

[32] This effect is empirically confirmed by Kraler (2010: 68).
[33] From 1985 until 1997, the so-called primary-purpose rule was an integral part of British family migration policy. Spousal migration applicants had to prove that their marriage had not been primarily concluded in order to enter the UK. The burden of proof that reasons other than immigration were the main motive of the marriage lay on the applicant. Many spousal migration applicants, especially from the Indian sub-continent, were refused access on the grounds of the primary-purpose rule (see Wray 2006: 307-308; Joppke 1999: 114-128; Sachdeva 1993).

marriage, a large age difference between the spouses (especially when the wife is significantly older than the husband[34]), a history of prior marriages, separate domiciles and an impending expulsion of the incoming spouse (Council of Ministers 1997; de Hart 2001: 20; Keim 2010). In any case, a considerable amount of discretion is left to the civil servants in charge. After raising the suspicion that a marriage of convenience might have taken place, state authorities proceed in different ways; most commonly, they interview the spouses, both separately and jointly, and pose questions on the couples' history, future plans and everyday life, as well as specific traits of the respective other spouse. By observing the couple's interaction as well as controlling their intimate knowledge of one another, authorities seek to establish whether the marriage is one of convenience or not. Other measures are (surprise) house visits, the questioning of neighbours and the request of documents bearing proof of a long-standing and emotional relationship (e.g. bills addressed to both spouses, private correspondence, photographs). The entirety of these procedures will be labelled "intimacy inquiries" in the following. These intimacy inquiries bear on at least three interconnected normative issues: Cost-benefit balance, discrimination and privacy rights.

When state authorities attempt to measure the "genuineness/falseness" of marriages suspected of convenience, they are spending their time and thus public resources on this enterprise. Therefore, one might justifiably question the balance of costs and benefits. Even with a workable definition of what constitutes a marriage of convenience and with a catalogue of indicators, intentions and feelings are extremely volatile and very difficult to measure. The result is most probably a lengthy procedure to determine the authenticity of the marriage. Therefore, it is reasonable to ask whether the benefit (i.e. presumably fewer marriages of convenience) is worth the price (paying civil servants to conduct this task) for the taxpayers. Going a step further, one can also question the effectiveness of the measurements: Due to procedural difficulties, it may very well be that "fake" marriages pass the test and "genuine" ones do not, further casting doubt on the public benefit of the entire undertaking. Scale is an important consideration here. For example, in 2005, a mere 8 per cent of those marriages investigated in Vienna were determined to be of convenience (Digruber & Messinger 2006: 295). This leads de Hart to question "whether expansive legal measures are really required for a

[34] See the statements of a German aliens authority civil servant (Stuttgarter Zeitung 2011).

relatively small number of proven marriages of convenience" (de Hart 2006: 261).

The second issue is that of discrimination, which potentially occurs at two levels. First, transnational marriages are discriminated against vis-à-vis non-transnational marriages, since the policies, though varying in degree and scope, clearly also work as *de facto* deterrents for these marriages. The procedure to marry a person who does not gain any residence status improvement by the marriage is significantly less complicated than the procedure of marrying one that does. Secondly, in the course of the intimacy inquiries, there is a danger of discrimination of different groups of couples along nationality, religious, race or gender lines, which constitute just the arbitrary and morally indefensible lines Carens (2001: 11) warns against. Empirical evidence demonstrates that discrimination takes place both overtly and covertly, i.e. both institutionally and officially enshrined, as in Great Britain along gender and ethnic lines during the years of the "husband ban"[35] (Joppke 1998: 290), and more surreptitiously (possibly even unconsciously) under the discretion of the civil servants handling the cases, either when determining who is subject to an inquiry in the first place and/or when judging the evidence gathered thereafter.[36] Such practices might even be construed as constituting an "abuse of the abuse," i.e. an employment of the discourse on abuse, outlined earlier, to achieve another goal, namely closing down legal migration channels for certain groups even further.

Another issue that arises from these policies relates to the effects that can result from the violation of the privacy of the spouses. Since the condition to be evaluated (i.e. a marriage and its authenticity) is such a private and intimate matter, the procedure often breaches the spouses' privacy by conducting (separate) interviews on intimate matters, house visits, interviews with neighbours and the like. These proceedings are often perceived as extremely invasive and humiliating by the spouses and place a lot of strain both on the relationship and on the individuals. Therefore, marriage-of-convenience policies can also be considered to violate human rights provisions defending individual privacy.[37] Both the Universal Declaration of Human Rights (UDHR) and the ECHR include the right to privacy and the right to family in the same article, suggesting an intrinsic connection between the two. In the case of transnational mar-

[35] From 1969-1985, it was extremely difficult or even impossible to enter the UK for incoming male spouses, especially for black ones (Wray 2006: 306).
[36] See Verband binationaler Familien und Partnerschaften, iaf e.V. (2001) for various empirical accounts of discrimination along gender and racial lines.
[37] E.g. Article 12 of the UDHR and Article 8 of the ECHR.

riages involved in a family migration process, however, a certain trade-off seems to exist: Either the couples cooperate with the authorities and give up part of their privacy in order to (hopefully) be granted the right to reside together, or they protect their privacy but risk their family. Obviously, most cases are not as dramatic as this, but the two rights, which commonly are considered as sustaining one another, come into tension in the case of transnational marriages suspected of being "bogus." The issue of scale, as mentioned above, is crucial here as well. Can the existence of some (few) marriages of convenience justify the institutional violation of privacy for a large number of transnational marriages? Joppke (1999) also touches upon some of the questions that I have aimed to untangle:

> And immigration officers are asked to measure what cannot be measured: intention. Because immigration officers are nevertheless forced to make a decision, a second set of 'hidden' immigration rules has been built up to inform such decisions. One of these secret instructions recognizes that there are 'no absolute criteria' on which a decision can be based, and that 'if there is no clear evidence either way . . . [an applicant] should no longer be given the benefit of the doubt' (quoted in CRE, 1985: 64). The most questionable component of the subjective science of intention-measuring is the separate consideration of the genuineness of marriage, which can be quasi-objectively assessed by the actual intention and practice of living together, and of primary-purpose proper, for which there is no such indicator. Splitting both components apart means that perfectly genuine marriages can still fail the primary-purpose test. (Joppke 1999: 125-126).

2.2.3 The European preoccupation with marriages of convenience

At the European level, several legislative steps were taken to consolidate policies specifically targeted at marriages of convenience.[38] As early as 1993, an EU resolution on the harmonisation of national family reunification policies contained a point stating that "Member States reserve the right to determine whether a marriage was contracted solely or principally for the purpose of enabling the spouse to enter and take up residence in a Member State, and to refuse permission to enter and stay accordingly."[39] In 1997, another Council resolution was agreed upon dealing exclu-

[38] See de Hart (2006) for an extensive presentation of these policy instruments and the various legislative processes leading up to their conclusion.

[39] Resolution on the Harmonization of national policies on family reunification, Ad Hoc Group Immigration, Copenhagen, 1 June 1993, [SN 2828/1/93 WGI REV 1], point 4 under the "Principles Governing Member States' Policies on Family Reunification" (see Guild & Niessen 1996: 254; de Hart 2006c: 252).

sively with marriages of convenience,[40] this time specifically addressing marriages of foreigners with both Union citizens and third-country nationals. Furthermore, marriages of convenience were similarly recognised to be present if "the sole aim" of the marriage is the circumvention of rules and the obtainment of a residence permit for the foreign spouse (Article 1). Moreover, as noted by de Hart (2006: 253), in contrast to initial drafts, the final resolution explicitly rejects any systematic checks of all marriages with third-country nationals, and instead aims to limit checks to those marriages with "well-founded suspicions" in its preamble. The remainder of the resolution lists an extensive catalogue of possible indicators of a marriage of convenience, including the lack of cohabitation, the "lack of an appropriate contribution to the responsibilities arising from marriage," the spouses not having met before marriage, inconsistencies in the spouses' accounts of their respective personal details, the spouses not speaking a common language, financial retribution having been part of the marriage contraction and a past history of marriages of convenience. In order to obtain this information, authorities may consider "statements by those concerned or by third parties," "information from written documentation," or "information obtained from inquiries carried out" (Article 2).

While both of these resolutions are non-binding instruments, in 2003 the issue was included into binding Community legislation as part of the Family Reunification Directive. Article 16(2b) of the directive enables Member States to reject family reunification entry and residence applications or refuse their renewal if it is shown that "the marriage, partnership or adoption was contracted for the sole purpose of enabling the person concerned to enter or reside in a Member State." In order to determine this, Member States' authorities can conduct "specific checks and inspections where there is reason to suspect that there is fraud or a marriage, partnership or adoption of convenience" (Article 16(4)).

It is important to note though, that the directive deals exclusively with family reunification sponsored by third-country nationals, thus the provision on marriages of convenience strictly also only applies to those marriages, just as is the case with the 1993 resolution mentioned earlier. Contrastingly, the 1997 resolution dealing exclusively with marriages of convenience does not differentiate between citizens and foreign residents; it explicitly applies to marriages "concluded between a national of a Member State or a third-country national legally resident in a Member

[40] Council Resolution of 4 December 1997 on measures to be adopted on the combating of marriages of convenience *Official Journal C 382, 16/12/1997*

State and a third-country national" (Article 1). In this vein, the 2004 Free Movement Directive, which concerns EU citizens and their family members, mentions in Article 35 that "Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience." In practice, while many national policies do differentiate between their own citizens and their foreign residents when it comes to family migration rights, marriages of convenience are perceived as a problem in both cases. Accordingly, many European states have in recent years introduced articles into their migration law dealing with, and criminalising, marriages of convenience[41] – in fact, most new Member States have done so in the course of implementing EU law.[42]

In conclusion, the preoccupation about an abuse of spousal migration provisions in the form of so-called marriages of convenience have led most European states to institutionalise certain mechanisms to detect and prevent them, mostly in the form of intimacy inquiries. While state institutions might legitimately claim a right to counteract obvious abuses of family migration provisions, the procedural and normative difficulties connected to defining and measuring marriages of convenience need to be considered as well. Regardless of these difficulties, marriages of convenience are not only targeted directly in most European states, but policy-makers also frame this phenomenon as a reason for introducing other restrictive measures.

2.3 Fighting forced marriages: Defending liberal norms?

In Europe, heightened political sensitivity to the topic of forced marriages and connected demands for policy initiatives to fight them are rather recent. The discussion on forced marriages only gained real prominence in the late 1990s and especially post-9/11 when debates surrounding the perceived dangers of migration, relating to an alleged failure of multiculturalism and minority integration intensified. In many national public spheres, forced marriage debates were preceded by intensive press coverage of so-called "honour killings," which mostly involved cases of young girls of migrant Muslim origin who refused or escaped forced

[41] For example, in Austria this is regulated by § 117 Abs 1-2 Fremdenpolizeigesetz 2005, in Germany by § 27 Abs. 1a Nr. 1 Aufenthaltsgesetz and in Belgium by § 146*bis* Civil Code.
[42] See European Commission, DG Justice, Liberty and Security (2006) and European Commission, DG Justice, Freedom and Security (2007).

marriages and subsequently were killed by members of their family (Razack 2004: 150).

In the UK, it was the 1998 case of Rukhsana Naz, who was of Pakistani-origin, which sparked off a nation-wide debate. Naz was strangled by her brother and mother after wanting to divorce her husband, who she wed in an arranged marriage, and after she had refused to abort her baby that was conceived out-of-wedlock. The Swedish case of Fadime Sahindal, who was shot dead by her father in 2002, caused uproar throughout Scandinavia: Fadime had previously opposed her family's plans of forcing a marriage upon her, and had instead maintained a relationship with a Swede. She then fled her family with police help and widely publicised her plight by, amongst other things, giving a speech to the Swedish parliament before her murder (Williams 2002). In Germany, Hatun Sürücü, a young woman who was killed in 2005 at a Berlin bus stop by one or more of her brothers,[43] attracted widescale media coverage. Hatun had escaped a forced marriage and was living independently, raising her son, and completing her education (Lau 2005). In all cases, second-generation migrant Muslim women had broken with their families by rejecting the proscribed marriage and lifestyle patterns, and were subsequently – and supposedly as a direct consequence – murdered by members of their families.[44] While "honour killings" might be seen to

[43] The judicial aftermath of the Sürücü case exemplifies the complexities when dealing with crimes committed within families. A revision of the case is currently pending. In April 2006 the youngest of Hatun's three brothers, Ayhan Sürücü, who was 19 years old at the time of the act, was sentenced to nine years in prison as a minor in the first instance after pleading guilty as the sole perpetrator. The role of the two older brothers, who the prosecutors suspected of having assisted in the planning and execution of the murder was highly contentious throughout the trial. The Federal Court of Justice (*Bundesgerichtshof*, BGH) has overturned the acquittals of the two older brothers in August 2007 (BGH, 5 StR 31/07; see Pressestelle des Bundesgerichtshofs 2007) and thus reopened the case. However, this second hearing, burdened by difficulties of Ayhan acting as a witness and the two older brothers needing to be tracked down by international arrest warrants in Turkey, has not begun yet (Beikler 2008).

[44] However, scholars such as Schiffauer (2005) have warned against using the concept of honour killings/violence to denote any family-related drama in ethnic (especially Muslim) minorities. Ethnicising conflicts in this way can distract from other underlying structural (e.g. socio-economic) problems and prevent finding effective solutions and policies. As early as 1997, Lama Abu-Odeh has critically compared the concept of "honour killings" of the East to the "passion killings" of the West, with the former being attributed to "culture" and the latter merely representing a deviant, yet legally (semi-) tolerated behaviour. Volpp (2001: 1187), Razack (2004: 152), Phillips (2007: 95) and Dustin and Phillips (2008: 412) similarly question this binary distinction between Western free choice and capacity for moral action on the one side and Eastern culturally determined and internally condoned behav-

constitute the tip of the iceberg, or as the extreme cases where forced marriage "went wrong," the intensive debates related to these incidents generated the first calls for policy responses. Subsequently, policies aiming at specifically combating forced marriages (hereafter: forced marriage policies) were installed in most Western European countries, in the shape of preventive, criminalising and/or mitigating measures. This section discusses these rather recent policy measures and the rationale behind them from a normative point of view.

In an attempt to normatively "map" the field of forced marriage policies in Europe, a first part will shed light on the general concept of forced marriage, its international legal definition and the general rationale for states to devise policies against it. The second part addresses the aspect of cultural minority practices that is highly relevant for the treatment of the issue in Western European states, since the practice of forced marriages is seen to emanate mainly from within ethnic or religious minorities, and minority protection norms might come into conflict with forced marriage policies. In the third and last part, migration is included in the analysis. As in Europe, forced marriage is largely considered to be an ethnic minority practice, migration enters the picture as marriages can be either enforced abroad, with citizens or foreign residents emigrating, or spouses "imported" and forced into marriage in Europe. Since many of the policies that aim to curb forced marriages are situated within migration law, this nexus must be critically evaluated. It is also within this nexus that forced marriage polices appear to regulate family ties by scrutinising their quality.

2.3.1 Forced marriages and the rationale for state action

In order to begin any theoretical or normative exploration of state policies on forced marriages, it must be clarified what is actually understood by the concept of forced marriage and how and why this phenomenon necessitates government action: What is the rationale behind any public policy aimed at eliminating the practice of forced marriage?

A forced marriage is basically a marriage concluded without the full or free consent of one or both of the future spouses. This practice infringes fundamentally upon Article 16(2) of the UDHR, which states

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iour on the other. These issues of cultural stereotyping, stigmatisation and agency denial will be further touched upon in the section on forced marriage as a minority practice.

"Marriage shall be entered into only with the free and full consent of the intending spouses." Similar articles can be found in the 1966 International Covenant on Economic, Social and Cultural Rights,[45] the 1966 Covenant on Civil and Political Rights,[46] as well as the 1962 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages.[47] Forced marriage has even been conceptualised as a form of contemporary slavery by the relevant UN working groups and rapporteurs, thus breaching Article 4 UDHR which grants freedom from all forms of slavery (Bielefeldt 2005: 5).[48] Furthermore, a forced marriage often leads to other human rights violations in the ensuing (enforced) marital life, which frequently lacks crucial (sexual) self-determination. Sexual aggression and rape, as well as domestic violence, can seriously harm physical and mental integrity and in consequence pose serious health risks to individuals forced into marriages. The right to work and education might also be infringed as a consequence of marital dominance and virtual or actual imprisonment (Bielefeldt & Follmar-Otto 2007: 14). Potential violations of human rights to life, liberty and security (Art. 3 UDHR), freedom from cruel and degrading treatment (Art. 5 UDHR), free development of personality (Article 22 UDHR), freedom to work and employment (Art. 23 UDHR) and to the right to education (Art. 26 UDHR) are therefore possible consequences of forced marriages as well.[49]

However, even if a forced marriage constitutes an infringement of human rights, it is not immediately obvious why any state needs to design policies to actively contravene this practice. At this point it is thus important to conceptualise *who* is actually forcing one or both spouses into the unwanted marriage. In most empirical evidence on contemporary practices of forced marriages in Europe, individuals are mostly forced into an unwanted marriage by their own family members and/or those of their spouse. Stemming from the cultural practice of arranging marriages among families, forced marriages often occur when the mar-

[45] Article 10(1) reads "The States Parties to the present Covenant recognize that (…) Marriage must be entered into with the free consent of the intending spouses."
[46] Article 23(3) reads "No marriage shall be entered into without the free and full consent of the intending spouses."
[47] Article 1(1) reads "No marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person after due publicity and in the presence of the authority competent to solemnize the marriage and of witnesses, as prescribed by law."
[48] See for example the Report of the Working Group on Contemporary Forms of Slavery on its thirty-first session, A/HRC/Sub.1/58/25. 22 August 2006.
[49] See Schöpp-Schilling (2007: 205-208) for an analysis of the relevance of international human rights instruments for forced marriages.

riage arranged is imposed on one or both spouses against their will by means of psychological and physical threats and violence. Authoritarian and non-egalitarian family structures, which often position older generations above younger ones as well as male members above female ones, lead to a power asymmetry potentially enabling the stronger family members to force the weaker ones into marriage. The domestic nature of this phenomenon plays a crucial role in devising effective policies, since the practice is hidden in the private sphere and since the victim and perpetrator(s) are often closely related as well as emotionally and economically bound together. Accordingly, commonly cited reasons for individuals remaining within forced marriages are the fear of being rejected by (parts of) their families and/or the worry of exposing family members to criminal prosecution and conviction, leading to overall (sometimes unbearably) high "sociopsychological costs" of exit (Reitman 2005, as cited in Phillips & Dustin 2004: 533).

Originally however, human rights were conceived to demarcate the legitimate boundaries of government authority and violence vis-à-vis its citizens, without having much significance for the private sphere. It was only during recent decades, *inter alia* influenced by feminist literature, that a new consensus spread among Western liberal democracies. Human rights are increasingly conceived of as not only limiting state power, but also as prescribing a duty for the state to actively ensure that the human rights of all individuals are respected horizontally, that is, by third parties. Furthermore, the idea has gained prominence that, if necessary, states should create the infrastructure to enable individuals to claim the human rights that they are endowed with (Bielefeldt & Follmar-Otto 2007: 14). Regarding forced marriages, a practice that mostly occurs within the private sphere of the family without state involvement, this idea of horizontal human rights validity and enforcement is the main rationale behind state policies that aim at eliminating them. From a human-rights-based perspective it could be followed that policies should ideally aim at empowering potentially and actually affected individuals to more self-determination and enable them to actually enjoy the human rights awarded to them by international conventions.

Furthermore, apart from being signatories to international conventions, all Western liberal democracies have transposed most of the rights mentioned above into their national constitutions. Legal provisions relating to (physical) coercion, extortion, kidnapping, abduction, false imprisonment, (sexual) assault and rape criminalise these human rights violations. Therefore, next to having international human rights obligations, Western liberal states ought to combat criminal practices occurring in the context of forced marriages as part of maintaining the rule of law

in their territories. Most European polities also contain a clause in their marriage laws that invalidate marriages where one or both spouses wed under duress[50] and some have even specifically introduced forced marriage into their criminal law[51] as well.

Thus far, I have been silent on gender in an attempt to systematically analyse the phenomenon and carefully evaluate the responses normatively without reproducing common stereotypes. Human rights provisions protect both men and women from being forced into marriage. Clearly however, the overwhelming focus of all political and legal endeavours is on women as victims of forced marriages, even though recently some attention has surfaced regarding male victims (Elger 2008); the British authorities even repeatedly mention a male victim rate of 15 per cent (Foreign and Commonwealth Office 2004: 2). Additionally, homosexual victims of both sexes are surfacing as a group to be considered by practitioners as well (Thiemann 2007; Forced Marriage Unit 2008).

Nevertheless, forced marriage is generally understood as a problem mainly affecting young women, as they are seen to a) be more sexually controlled than men and more likely to be forced into marriage in the first place, b) less able to resist familial pressure than young men when marriage arrangements are put on the table and c) experience the negative consequences of an enforced marriage to a much greater extent than men, as a plethora of other gender-based discriminations potentially reinforce and exacerbate the rights violations endured in the context of the forced marriage (Schöpp-Schilling 2007: 203). It is therefore no surprise that the most important international instrument focussing specifically on women's rights, the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), contains an article proscribing forced marriage as well.[52] Western liberal states have largely

[50] In the German case, § 1314 Abs. 2 Nr. 4 BGB (*Bundesgesetzbuch*) invalidates marriages concluded under threat.

[51] In 2005, forced marriage was introduced as an especially serious case of coercion into the German Criminal Code (*Strafgesetzbuch*, StGB) with the new § 240 Abs. 4 Satz 2 Nr. 1 (see Kalthegener (2007) for a detailed discussion of the German criminal prosecution of forced marriages). In 2011, a law was passed that made forced marriage a specific type of offense, moving the unchanged wording from § 240 to the newly created § 237 StGB. See section 4.2.5.

[52] Article 16 (1) reads "States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: (…) (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent (…)."

incorporated a doctrine of gender equality into their constitutions, policies and discourses. When thus conceptualising forced marriage as a form of gendered violence, an additional strong case for state policies to combat these practices emerges. Indeed, forced marriage is almost entirely interpreted to be an instance of intolerable gender subordination, as will be shown later. Therefore, within forced marriage policies the gender perspective mentioned by Vogel (2000) is paramount, though not in the sense of the state institutionally subordinating women. On the contrary, the dominant institutional framing is that of emancipating oppressed women and of enabling them to enjoy the equal rights they are entitled to.

Summing up, it is Western liberal democracies' commitment to horizontal human rights, maintenance of the rule of law and gender equality that provide the main rationale to devise forced marriage policies. At this theoretical level, the case for some kind of forced marriage policies is a strong one. It is when turning to the practical empirical contexts that possible difficulties emerge, as will be shown in the following sections.

2.3.2 Forced marriages as a minority practice?

Although arranged marriages were the crucial political and economic institution which organised nearly all aspects of society across Europe until the at least the nineteenth century (Coontz 2005) – which presumably led to a certain incidence of forced marriages as well[53] – modernisation processes have led to substantial shifts in the legal, political and social meaning of marriage with strong emphasis on romantic love (Giddens 1992), individual self-determination and mutual consent as the main legitimate basis of marriage within Western Europe. Against this backdrop, in Europe practices of arranged and forced marriages are seen to nearly exclusively occur within ethnic minority communities.[54] If the

[53] Since most literature on contemporary forced marriages assumes that a widespread practice of arranged marriages leads to a higher incidence of forced marriages, forced marriages can be presumed to have historically existed in Europe as well. However, few studies exist on forced marriages within European history and culture – though Strobl and Lobermeier (2007: 28) mention the phenomenon in reference to European aristocracy in passing.

[54] As to be expected, the presence of different minority communities across Europe has led to different focuses for research. In Great Britain the discourse mostly refers to "South Asians" and the Forced Marriage Unit cooperates directly with police forces in Pakistan, India and Bangladesh (Dustin & Phillips 2008: 410), while in Germany, the public discussion revolves nearly exclusively around the Muslim community in general and the Turkish

practice of forced marriage is situated among ethnic minorities, the question of minority group rights comes into play.

As articulated most prominently by Kymlicka, minority groups can be seen to have "societal cultures" which give meaning in essential ways to their members' lives. As living within the culture is so important, its survival is crucial for the individual autonomy of the groups' members (Kymlicka 1995: 76). As they do not belong to the majority culture, these societal cultures are under potential threat of extinction and their prevalence is not sufficiently guaranteed by the mere protection of the individual rights of their members. Accordingly, in order to contribute to individual wellbeing, societal cultures must be further protected by special group rights.[55] This kind of reasoning, coupled with individual human rights being awarded equally to members of minorities, such as the freedom to practice religion and the right to non-discriminatory equal treatment, have strongly influenced the development of multiculturalism as a political doctrine. As Bielefeldt (2005: 7) outlines, it is intrinsic to the nature of liberal democracies committed to human rights to be religiously, ideologically and culturally plural – we can thus speak of a positive relationship between human rights and multiculturalism. What additional issues arise when conceiving of forced marriage as a minority practice? Do minority group rights overrule the individual human rights considerations outlined earlier?

These questions are obviously connected to the perception of minority rights and the legitimacy of protecting them. What qualifies as a minority right, for example? And at what costs should they be defended? Okin (1999) was among the first to identify the problematic tendency of multiculturalism and the associated tolerance of cultural minority practices to legitimise or even protract cultural elements that discriminate or oppress certain (weaker) members of the minority group. By embracing the liberal idea of allowing cultural diversity and thereby reducing structural inequalities between groups, illiberal practices might flourish that could lead to inequalities within groups increasing. Okin is particularly

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one in particular. However, some official German documents also stress the point that forced marriages are not an exclusively Muslim or Turkish problem, repeatedly citing cases from Buddhist-Hindu Sri Lanka or Christian Greece and Southern Italy (Justizministerium Baden-Württemberg 2006: 2).

[55] However, Kymlicka (1995: 95-101) clearly distinguishes between voluntary migrants and national minorities regarding the force of their claims, making the case that the latter can justifiably claim self-government rights while the former ought to settle for polyethnic rights.

preoccupied with gender equality and focuses on practices typically located within ethnic minorities considered oppressive to women, such as female genital mutilation, polygamy and forced marriage. She fiercely criticises the predisposition of liberal multiculturalists to regard cultural groups as homogenous and ignore the fundamental internal power discrepancies as well as the importance of the private sphere in shaping, transmitting and enacting these (gendered) power differences (Okin 1999: 12). If one follows Okin's reasoning and applies it to the case of forced marriages by conceptualising it as an unacceptable minority practice of gendered violence, a very strong case for forced marriage policies emerges. Tolerating forced marriages under the pretext of minority rights is likely to further aggravate the situation of the (female) victims.

The distinction between forced marriages and arranged marriages comes into play in this context. Reiterating both Okin's notion of gendered violence and certain ideals of multicultural accommodation, most political manifestos dealing with the issue denounce forced marriages as unacceptable infringements upon (minority women's) human rights, while arranged marriages are perceived as permissible expressions of minority cultural practices (e.g. Foreign and Commonwealth Office 2004: 2). This approach would thus seem to be a popular way of reconciling the two opposing principles: Western states can accept cultural practices of minorities that are different (or archaic) as in the case of arranged marriages, as long as human rights are respected. If and when, however, as in the case of forced marriages, this threshold of human rights is crossed, Western tolerance of minority cultures ends. This kind of reasoning could be seen as a normative prescription in favour of designing effective forced marriage policies, which do not conflict with the practice of arranging marriages.

In theory, this distinction might seem to constitute an adequate and comfortable way of resolving the conflict between minority protection and human rights. In practice however, this differentiation is itself loaded with problems. As it is fundamentally based on the notion of consent as the main marker distinguishing between an arranged, consensual marriage and a forced, non-consensual marriage, difficulties arise when looking closely at the concept of consent and its opposite, coercion. How are consent and coercion defined? How are they measured? In the present context of minority practices, the impact that certain (cultural) socialisations have on individuals' ability to freely consent or dissent is of par-

amount importance.[56] Put differently, the question is how the mere option of exit can become reality (Phillips & Dustin 2004).

Without being able to enter this entirely separate discussion, suffice it here to say that a clear-cut distinction between forced and arranged marriages is highly contentious. Straßburger is among the sociologists who regard arranged marriages as important and legitimate cultural practices, while acknowledging the obvious difficulties of the large grey zones that exist between different cases (Straßburger 2003; Straßburger 2007). Kelek, on the other hand, one of the most important public figures engaged in the German debate on the issue, has often vociferously asserted that both arranged and forced marriages are expressions of the same authoritarian family structures which truncate individual self-determination. As a result, she argues that the distinction ought to be abandoned altogether[57] (Kelek 2005).

However, even when leaving the controversial distinction between forced and arranged marriages aside, the strong focus on forced marriages as sites of gender oppression[58] is not straightforward either. Indeed, scholars such as Bhabha (1999), Volpp (2001) and Razack (2004) have questioned the binary contrasting of gender equality in the West with complete gender subordination within "Eastern" minority cultures. This binary distinction is not only asserted by Okin but also within many public debates and policy frames, seemingly obliging us to choose between feminism and human rights on the one hand and multiculturalism and group rights on the other (with the choice tending towards the former). Instead, these authors invite readers to consider the pitfalls related to such oppositional distinctions. Their common underlying concern is the peril of oversimplifying "cultural" traits and stigmatising entire minority groups in the process. For example, both Volpp (2001) and Razack

[56] An extensive discussion of the paradigm of liberal autonomy and the notions of choice and consent in the context of minority practices can be found in Deveaux (2006).

[57] The fact that Necla Kelek herself was a subject of a forced marriage in her youth as well as her own Muslim Turkish background are often perceived as factors adding to the authenticity of her claims, while her critics have accused her of essentialist representations of Islam as barbaric, patriarchal religion and Turkish "parallel societies" within German society as inherently gender oppressive. This discussion culminated in a heated media debate in 2006 between Kelek and her detractors, led by Yasemin Karakaşoğlu (for a detailed analysis of the controversy, see Rostock & Berghahn 2008: 354-356).

[58] A rather understudied perspective relating to forced marriages is the oppression exerted by the older generation upon the younger one since the core focus is always gender. Evidence on male victims of forced marriages (Foreign and Commonwealth Office 2004: 2) and on the pressure exerted by the older female generation within forced marriages (Samad & Eade 2002) point towards the significance of including the generation nexus into future analyses.

(2004) show how gender equality is far from being the norm in Western states either, and thus heavily criticise the double standard deployed in this context. Furthermore, they question the helpfulness of employing concepts such as "culture" as a determining factor in individuals' actions. To them, this has encouraged a common discourse that tends to portray the minority/migrant/Muslim/Black male as backward and dangerous and the minority/migrant/Muslim/Black female as a perpetual victim, thereby denying the latter any kind of agency in the process. From this point of view, policies aimed at curbing forced marriages might be perceived as being imperialistic and inherently stigmatising of minority cultures.

2.3.3 Forced marriage policies within migration law

In this last part, the connection between the issues of forced marriage and immigration in general, as well as the situation of forced marriage policies within immigration law, will be considered. How are forced marriages connected to immigration? As outlined above, in Europe forced marriages are generally situated within ethnic minorities, predominantly of non-Christian origin. Individuals from ethnic minorities have entered European states by way of immigration, originally mostly in the context of (former) colonial ties or guest worker programs. However, this migration has already spanned several generations and *ius soli* provisions, as well as naturalisation policies, have incorporated sizeable sections of the ethnic minorities into the citizenry. Thus, even if conceiving of forced marriages as an ethnic minority practice, there is no necessary link to migration. A marriage can be forced upon one or both potential spouses completely outside of the migration context, making the near exclusive location of forced marriage policies within (restrictive) migration law across most European states somewhat questionable.[59]

However, certain links between migration and forced marriages remain and, as just mentioned, these links have often prominently pro-

[59] A notable exception constitutes the UK Forced Marriage (Civil Protection) Bill, which was passed in July 2007. Dustin and Phillips laud both the preceding policy process, characterised by a "trend towards consultation and engagement with the voluntary sector" (2008: 419), as well as the problem-setting within the law as it "provides recourse for people coerced into marriage with domestic, not just overseas, partners, thereby shifting the focus of official activity away from its problematic association with immigration; and it places forced marriage within the wider context of domestic violence, thereby favouring generic over culture-specific legislation" (2008: 411).

vided some of the rationale behind restrictive family migration provisions across various European states. The most commonly debated phenomenon are so-called "import brides"/"import grooms." Here, one or both spouses are forced into a marriage that is subsequently located in Europe where one of the spouses has a regular residence, and the other spouse enters as a spousal migrant. In this context, two important mechanisms come into play. Firstly, the "migration ticket" might be perceived to enter dowry negotiations and actually lead to a higher incidence of forced marriages. Secondly, incoming spouses find themselves in a rather vulnerable situation, both socio-economically as well as legally. Lacking language skills, social contacts and knowledge of the workings of the host society and depending for their residence permit upon the sponsor – at least during an initial period – migrant victims of forced marriages can be seen to be much less likely to escape the situation than someone who has grown up in the host society. Put differently, migrants constitute more exposed victims. Within this logic, generous spousal migration policies can even be seen as being directly responsible for forced marriages. This is part of the argumentation behind curbing forced marriages by controlling spousal migration more extensively.

Another possible way in which migration law is crucial for forced marriages is in relation to emigration: A marriage might be enforced abroad between citizens or foreign residents of European states, for example during family vacations. In the case of foreign residents, migration laws in Europe often stipulate that after a certain period of time abroad, a permanent residence permit expires, impeding their return to Europe.[60]

In what constitutes a clear example of state attempts to regulate the family, recent policy initiatives across Europe claim to combat the practice of forced marriage by targeting spousal migration, e.g. by increasing the minimum age of spouses eligible to apply for spousal migration and by introducing integration requirements which must be provided prior to entry. The official discourse legitimating these policy changes refers to discouraging family members from forcing young migrants-to-be into an unwanted marriage, as well as to empowering the potential "victims" through education and enabling them to mature into adulthood. However, only restrictive measures in migration policy seem to be embraced in an attempt to fight forced marriages, while enough evidence

[60] In Germany, this is regulated by § 51 Abs. 1 Nr. 7 AufenthG. The regular period that a permanent resident can leave Germany without it having consequences for their residence permit is six months. See Freudenberg (2007: 247).

exists that liberalising certain aspects of (spousal) migration might have a preventive and empowering effect as well.

The analysis has mapped out the normative arguments surrounding state policies that aim to combat forced marriage by considering human rights, minority rights and the issue of migration. In addition to being an extremely complex issue, it is also highly politicised and different actors involved tend to exploit stereotypes on both sides of the debate, which is further enabled by the widespread lack of data on this hidden phenomenon. Policy-makers' depictions of forced marriages as a widespread problem located within spousal migration, an instance of official attempts to regulate the family, has developed into an important framing approach enabling the introduction of restrictive policy responses, as the exploration of the German case in the later chapters will show.

Conclusions

Even though no absolute right to family migration is enshrined in international law or any domestic constitution, family migration provisions are in place in most Western liberal democratic states because norms do matter. However, norms matter not only when allowing family migration, but also when restricting it. The chapter showed how the right to the protection of family and the power of social membership together form the normative basis for family migration policies in Western liberal democracies. At the same time, since both "family ties" and "social membership" are vague and contested concepts, by investing these notions with certain meanings, policy-makers may in turn create a legitimate basis to control family migration, while staying within the discursive realm of protecting the right to family of their members. At times when family migration is perceived to be undesirable and thus restricting it is one of the priorities of migration policy, policy-makers may make use of different approaches in order to justify instruments of migration control.

When regulating social membership, policies assess the legal, civic and socio-economic membership claims of sponsoring (and recently also of incoming) spouses, thereby suggesting specific norms of social membership, sometimes in discriminatory fashions. Policy instruments situated within the approach of family regulation, by contrast, employ specific, sometimes even contradictory norms of marriage and family in order to circumscribe the admissible family and assess the "quality" of the familial bonds claimed. The remaining two sections focused on the

policy instruments relating to the notions of marriages of convenience and forced marriages, respectively, normatively assessing both the general thrust behind them as well as the (critical) issues arising through their implementation.

Chapter 3 will introduce the case under research, Germany, by exploring the historical post-war development of family migration policies. It will also provide an overview of the empirical reality of this phenomenon and of the basic legal framework relevant to spousal migration in Germany.