*Routledge Research in Asylum, Migration and Refugee Law*

# FAMILY REUNIFICATION IN EUROPE

## EXPOSING INEQUALITIES

Edited by
Ellen Desmet, Milena Belloni, Dirk Vanheule,
Jinske Verhellen and Ayse Güdük

# Family Reunification in Europe

This book provides a multi-disciplinary investigation of family reunification laws, policies and practices across the European Union.

Family reunification – the possibility for family members to (re)unite in a country where one of them is residing – has been high on the political agenda. Building on original empirical research with families and practitioners as well as in-depth doctrinal analyses, the book explores the fragmentation of legal rules, the gaps between formal regulations and practices, and their consequences for families across borders. Different contributions in the volume point to the growing inequalities among and within applicant families, based on residence status, gender, location, citizenship and socio-economic resources, due to the family reunification regimes currently in place.The book enhances interdisciplinary dialogue by providing clear insights into the specific contribution of migration law, private international law and social scientific analyses to the study of family reunification.

The book is aimed at researchers working on the topic of family reunification, as well as students of law and socio-legal studies and practitioners in the field of migration.

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deciding based on the applicant's best interests. The 'procedure' referenced earlier is the regulatory and safeguard procedure set out by Articles 5 and 7 of the 1999 Comitology Decision.[5] Article 17(2) of Dublin III presumably abandons its predecessor's conciliatory nature and specifies that 'a reply refusing the request shall state the reasons on which the refusal is based', in favour of receiving clear grounds that could be potentially useful for judicial review.

## 2. The use of Article 17(2): the numbers

### *2.1 Article 17(2) requests*

In its conception, Article 17(2) was welcomed by the UNHCR and civil society organisations as a way for EU Member States to mitigate some of the injustices of the Regulation as applied and to facilitate the reunification of families and communities (UNHCR, 2017, p. 129). Unfortunately, in practice, Article 17(2) has been rarely used by EU Member States. For example, according to Eurostat data, in 2018, a total of 1,060 take-charge requests were issued on the basis of Article 17(2) of the Regulation, which accounted for no more than 0.7% of all Dublin procedures initiated that year (European Parliament Research Service, 2020, p. 64). Over 75% of those emanated from Greece, far ahead of other countries. Its limited use continued well into the next years, always championed by Greece, followed by Malta.

Take-charge requests on the basis of Article 17(2) have often been issued on the following occasions:

1 Materiality: Primarily, for cases of vulnerable family members who fall outside the family criteria of Chapter III (European Parliament Research Service, 2020, p. 52). Non-refugee sponsors: in cases when the sponsors hold a status outside international protection rules. Since the Dublin III Regulation is a legal instrument designed to allocate the responsibility for examining applications for international protection among EU Member States, priority is given to family reunification of asylum seekers and recognised refugees of Chapter III, as mentioned earlier. Thus, reuniting asylum seekers with members of their families that hold subsidiary protection status, migratory residence permits or even citizenship fall outside of the Regulation's scope; therefore, it is left to the discretion of EU Member States to accept them.
2 Temporality:
    a. A large number of requests to take charge are taking place when the three-month deadline for sending a take-charge request has expired for familial relationships that would otherwise fall under one of the non-discretionary articles

5 Council Decision laying down the procedures for the exercise of implementing powers conferred on the Commission, 28 June 1999, 1999/468/EC. This Decision disabled the Council from dismissing a proposal by simple majority (Article 5) and increased transparency for Commission activities (Article 7); this era of EU reforms brought about attempts at achieving a power shift between the Commission and Council implementing powers and implementation of legislation in specific cases.

of the Regulation. This scenario entails the failure of the competent asylum authorities of the requesting Member State to send the take-charge request on time. Recent practice of the authorities of certain receiving Member States, especially Germany, have posed an added burden to meet the time limit criterion for outgoing family reunification requests. Following the publication of the decision in *Tsegezab Mengesteab* in 2017,[6] the Dublin Units in receiving Member States adopted an interpretation that all outgoing requests should be made within the three-month deadline counting from the moment an applicant expressed their intention to seek international protection before any authority of the requesting Member State. The novelty of the interpretation was that until then the three-month time limit started counting from the moment of the lodging of the application for international protection before the competent national authorities of the requesting Member States which were linked with the national Dublin Units. In Greece, this led asylum seekers with close family members in Germany to miss the relevant time limit since the wish to apply for international protection is expressed before the police. Hence, it can take several months or up to a year for the application to be fully registered by the Asylum Service and be brought to the attention of the competent Dublin Unit, all while the time limit has been surpassed and the discretionary article of the Regulation should be employed (AIDA, 2022, p. 73).

b. Article 17(2) has been widely used for cases of subsequent separation, i.e., when members of nuclear families travel together into the soil of the EU and then some family members decide to continue their journey to other European countries either before or after the family has lodged their application for international protection (AIDA, 2023, p. 76).

3 Special cases: in extremely rare circumstances, Article 17(2) was used to request the reunification of members of minorities with their communities in other Member States, as in the case of the Mandean people in Spain who rejoined their larger community present in Germany (UNHCR, 2017, p. 130). Recently, the discretionary clause in Article 17(2) was used as the legal basis for ad hoc voluntary relocation schemes of migrants saved at sea to other EU countries, following their disembarkation in Italy and Malta, the so-called Messina model supported by the then European Asylum Support Office (EASO, 2019). Last but not least, it is also reported that during the pandemic, the humanitarian provision was used as an additional basis for accepted take-charge requests that have missed the six-month transfer deadline due to Covid-19 travel restrictions in order for the procedure to be re-activated again (AIDA, 2021, p. 80).

### *2.2 The outcomes of Article 17(2) requests*

If the number of cases requesting reunification based on Article 17(2) is very low, then the rate of acceptance of these claims seems even more disheartening. According to civil society organisations from Greece – the country in which, as already

6 CJEU, 26 July 2017, C-670/16, *Tsegezab Mengesteab*, ECLI:EU:C:2017:587.

mentioned, the humanitarian clause is employed most frequently – in the period 2020–2021, 80% of Article 17(2) cases were rejected contrary to 20% of cases rejected when submitted on the bases of the binding articles of the Regulation (FENIX, 2021, p. 6). These data seem to coincide with the ones published by the Greek Asylum Service for 2020, where from the 3,740 relevant cases, only 683 were accepted, a percentage of roughly 18% (AIDA, 2021, p. 80). No official data specifically for Article 17(2) procedures have been provided from the Greek Asylum Service in the following years, but since the application of the Article has remained the same no significant changes can be expected (AIDA, 2023, p. 72).

There are certain factors frequently reasoned when deciding upon rejecting an Article 17(2) take-charge request. The main reason why requests for applying the humanitarian clause are refused is reportedly linked to the different evidentiary requirements among Member States to establish family links or a relationship of dependency. According to Article 16 of the Dublin III Regulation, pregnant women, newborn children, elderly people and sufferers of serious illness and severe disability that are dependent on their children, siblings or parents shall be brought together by Member States provided that family ties existed in the country of origin and the family members are able to take care of the dependent person. It should be noted, though, that a relationship of dependency is not a requirement for the application of Article 17(2) under the Dublin Regulation. Nevertheless, the majority of Member States arbitrarily use it as an additional prerequisite for applying it (UNHCR, 2017, p. 131).

Another usual justification for the rejection of these cases is that 'there are not enough humanitarian grounds', a verbatim quote from rejections received by the Greek Dublin Unit (FENIX, 2021, pp. 19–20). In these cases, following a rejection, there is little more that can be presented beyond re-emphasising the extent of the dependency or providing further arguments to justify the gravity of the humanitarian situation of the applicants during a re-examination request. As a result, disputes regarding the applicability of the humanitarian clause can at times lead to lengthy negotiations between the Dublin Units of different Member States concerned before a conclusion is reached, contrary to the spirit of the Regulation.

The common requests for re-examination of cases of Article 17(2) of the Regulation have caused the Dublin Units of certain Member States to adopt a new practice in order to reject these cases more swiftly, citing an interpretation of judgement *X and X*.[7] In these cases, the Court of Justice of the European Union (CJEU) ruled through the preliminary question procedure that requested Member States should answer re-examinations of take-charge requests within two weeks, otherwise the requesting Member States become responsible for the applicants. The Court noted that this strict time limit is compatible with the objective of the Dublin III Regulation for rapidly processing applications for international protection when the same applicant has applied in more than one Member State and encouraged them to engage in sincere cooperation by promptly re-examining such requests.

7 CJEU, 13 November 2018, C-47/17 and C-48/17, *X and X*, ECLI:EU:C:2018:900.

However, according to information provided by the Greek Dublin Unit, the authorities of many receiving Member States implemented this ruling to mean that only one re-examination request for each case is accepted starting in 2020, even though this is not mentioned anywhere in the CJEU's judgement and, on the whole, it concerned a different Dublin procedure than family reunification. It has been observed that many re-examination requests concerning cases under Article 17(2) remain intentionally unanswered by receiving Member States for a period exceeding the two-week time limit, and a final response rejecting any further examination usually comes only after a reminder is sent by the Greek authorities (AIDA, 2021, p. 76, 2023, p. 72).

## 3. The use of Article 17(2): jurisprudence

### *3.1 Supranational courts*

It goes without saying that given the limited use that the humanitarian clause has received from Member States, there is not an extensive jurisprudence from supranational courts handling its application. The European Court of Human Rights (ECtHR) has not yet dealt with a case that explicitly concerns family reunification on humanitarian grounds as contained in Article 17(2) of the Dublin III Regulation. When it comes to the CJEU, two cases are worth noting, in our opinion. Although they do not deal directly with Article 17(2) of the Regulation, they provide useful conclusions for its application. Recently, in the decision *M.A & others* of 2019,[8] the Court reiterated that the wording of Article 17 of the Dublin III Regulation generally supports an approach that the exercise of the discretionary clause is entirely optional for Member States.

In a previous decision concerning Dublin II known as *K. v. Bundesasylamt* (2012),[9] the notion of humanitarian grounds was examined based on Article 15 of the Dublin II Regulation, which provided that only dependent people could be reunited with family members based on humanitarian grounds and cultural considerations, contrary to the current form of Article 17(2) of the Dublin III Regulation. In its ruling, the EU Court interpreted, inter alia, that family reunification on humanitarian grounds can include the reunification of a grandmother with her daughter-in-law and grandchildren in the notion of relatives and noted that the person who is found in a difficult humanitarian situation can be the one in the receiving state. The Court underlined that given the possibility for Member States to derogate from the binding articles of the Regulation, such a derogation can be justified only if an exceptional humanitarian situation has arisen. In the present case, it did find that the sickness and disability of the daughter-in-law and her inability to care for her minor children constituted an exception that could justify the presence of her mother-in-law in the same Member State to support her. Nevertheless, it was a very

8 CJEU, 23 January 2019, C-661/17, *M.A & others*, ECLI:EU:C:2019:53.
9 CJEU, 6 November 2012, C-245/11, *K.*, ECLI:EU:C:2012:685.

narrow interpretation which did not allow room for replication in other cases and the Court did not provide additional criteria or examples as to which circumstances create adequate humanitarian grounds for discretionary family reunification. Given that Article 17(2) of the Dublin III Regulation no longer calls for the dependency of family members who wish to be reunited, the notion of humanitarian grounds still remains largely undefined by the CJEU.

### *3.2 Domestic courts*

National court decisions in receiving Member States have produced mixed results when dealing with family reunification cases based on the humanitarian clause in the Dublin III Regulation. As mentioned earlier, the majority of take-charge requests were sent to Germany and the United Kingdom before departing from the European Union, and for this reason relevant case law from these countries is of particular interest (RSAegean, 2019, pp. 16–18). In Germany, there have been some cases where national courts have overruled negative decisions of the national Asylum Service rejecting family reunification based on Article 17(2) of the Dublin III Regulation for nuclear families who had voluntarily separated after entering EU soil. For instance, the Administrative Courts of Wiesbaden and Lüneburg ruled that the German authorities' discretion assessing humanitarian reasons had to be reduced to zero when it comes to single parents and their unaccompanied minor children.[10] Likewise, the Administrative Court of Frankfurt ruled that an Afghan family had humanitarian reasons within the meaning of Article 17(2) to be reunited, because members of a nuclear family are concerned, taking into account the high importance of the right to family unity and the best interests of the children.[11]

In a recent 2019 case,[12] the Berlin Administrative Court adjudicated that the responsibility of Germany to examine applications for international protection did not cease because of the expiry of a deadline, because the humanitarian grounds of Article 17(2) were confirmed due to the closeness of the familial relation. Although the deadline for responsibility had expired, the court found that Germany was still responsible for examining the applicants' asylum applications due to the close familial relationship between the applicants and their family members in Germany. This decision sets an important national precedent for prioritising the objective of family reunification under Article 17(2). It is crucial to note that the court's decision aligns with the human right to respect family life, as protected by Article 7 of the Charter and Article 8 of the ECHR. Furthermore, the court's reasoning highlights that the mere expiry of a deadline cannot be used to deny family reunification, as this would violate the interests of the applicants and their fundamental rights. The court also recognises that allowing Member States to reject their responsibility by simply ignoring the two-week deadline would undermine the Dublin regime's

10 VG Wiesbaden, 25 April 2019, Az. 4 L 478/19.WI.A; VG Lüneburg, 8 June 2019, Az. 8 B 111/19.
11 VG Frankfurt a. M., 27 May 2019, Az. 10 L 34/19.F.A.
12 Administrative Court Berlin, 15 March 2019, VG 23 L 706.18 AF.

purpose of promoting family reunification and protection of asylum seekers' rights. While positive in their outcomes, these decisions do not shed much light on the issue of family reunification with extended family members as defined in the Dublin III Regulation since they all dealt with nuclear family relationships that would fall under the binding articles of the Regulation, had the three-month deadline been respected.

Another decision from the United Kingdom could be more useful in this regard.[13] The case concerned a Syrian national who was an unaccompanied minor residing alone in Greece, where he made an application for international protection. The Greek authorities submitted a request for the United Kingdom to take charge of the asylum request so that he may be reunified with his cousin pursuant to Article 17(2) of the Dublin III Regulation. This request was refused by the British authorities on the basis that, inter alia, the family relationship was not within the scope of Article 2 of the Dublin III Regulation. Indeed, as mentioned earlier, under Article 2 of the Dublin III Regulation, family members and relatives of an unaccompanied child are spouses, parents, grandparents, aunts, uncles or another adult responsible for the applicant according to the law or practice of the state concerned. The Upper Tribunal overturned the decision of the national authorities and noted that there was sufficient evidence to show that family life between the applicant and his cousin exists, based on extreme emotional dependency between the applicant and his cousin, and evidence that the applicant's cousin assumes a position of a father figure.

## 4. A heterotopic analysis of Article 17(2): mirroring containment, scattering people

### *4.1 Sharing 'burdens' and 'relieving' definitions in the European asylum regime*

Where does that practice – that *legal politic* – leave us? The blind spots and omissions of the European asylum and immigration regime are just as systemic as voluntary, as it is increasingly recognised (Bhartia, 2010, p. 331) through the cumulative challenges presented by the refugee crises of the 21st century (Nascimbene, 2016, p. 101). Refugee law is thought to be one of the rights-informed areas of law whose regime, statutes and adjudication centre on an individual-based, rather than a state-based focus; its schemes regard protection of the individual instead of protection of the sovereign state or more 'traditional' socially contracted rights (Schmalz, 2021, p. 363).

However, the concept of 'burden-sharing' (or 'responsibility-sharing') gathers its specific interest in the state body (Schuck, 1997, pp. 247–248; Zolberg, 1994, p. 162) – a state body whose internal point of view (Hart, 1994, pp. 89–91) lays

13 UK Upper Tribunal, 23 June 2020, *BAA & Anor, R (on the application of) v. Secretary of State for the Home Department*, 227 (IAC).

in constructing legal strategies of elimination and containment (Aleinikoff, 1992). That is to say, states' behaviour and systems of international protection regulate in feedback loops – responding, challenging and synergistically progressing their law-making to effectively adapt the 'normative world' to serve the material needs of the 'real world' (Schewel, 2019). In burden-sharing terms, this translates to restrictions legislated to comprehensively contain the refugee *spatially* in territory, *temporally* in procedure, and *competently* in termed and definitive 'entitled' protection (Noll, 2000, p. 41).

The structural principle of 'burden-sharing' – self-regulated by implication as well as by design (Thielemann et al., 2010, pp. 137–143) – leads to numerous interlinked results. The overwhelmed systems of the countries of first entry render burden-sharing a stranding mechanism for asylum seekers: through its delineation of normative protective, procedural and settlement limits, burden-sharing designates itself as a dually purposed referee in immiseration. 'Dually purposed' since it is, firstly, spatially containing and, secondly, wait-prolonging for asylum applicants (Human Rights Watch, 2017). The second end of that dual function gives rise to a tier of States unable to effectively regulate individual entrance to their choosing – compared to those able to do so more successfully – thus, corroding these States' internal point of view as law-making actors and enforcing an external point of view upon them by means of the wider institutional design in the EU asylum scheme. The generalised state of containment is produced at the first stage of the asylum-seeking process, wherein refugee existence – within or away from a refugee camp, detention centre, ghetto or specific facility – becomes a special, liminal heterotopia in space and time – therefore, a *chronotope* (Valverde, 2015) – under international human rights law (Giesen, 2015). Thus, using Nimführ and Sesay's definition of the reception conditions in requesting Member States as a transinsular 'island' (Nimführ & Sesay, 2019), we identify two State-sanctioned components: a spatial one – *containment* – and a temporal one – *indefinability*. These meanings may not consciously inform the direct normative reasoning of the Dublin Regulations or the European domestic and supranational courts in question, yet their instruments and resulting domestic cases are still seized as an opportunity to extend an apologetic response (Koskenniemi, 2006, § 254; see also Mouzourakis, 2014, p. 13) towards Member States 'burdened' by current crises.

Thus, *burden-sharing* is to mean *definition-relieving*, as well: to leave the interpretation of such breaches open is to ease standards and severity of criticism, wherein a separate status for refugee cases is created. For example, in the sharp observations of Marie-Bénédicte Dembour, the ECtHR is inclined to 'condone rightlessness' through cases such as *Bonger v. The Netherlands* (2005),[14] rendering the applicant unable to access Dutch social services and work while unlikely to return to his country of origin; the other non-rights in question include the negative definitions of settlement and family association (Dembour, 2015, pp. 442–481). In this example, the treatment a State reserves for its citizens and non-aliens is

14 ECtHR, 15 September 2005, *Bonger v. The Netherlands*, No. 10154/04.

prioritised by the Court, whereas the legal space reserved for asylum applicants becomes a Foucauldian *heterotopia*.

### *4.2 Heterotopia in the European asylum regime: an ECtHR perspective*

Utopia is described as 'the perfected form of society' as it is; a mirror that allows society to see itself in a placeless, yet tangibly descriptive, reflection (Foucault, 1984, p. 3). A heterotopia, on the other hand, is a real place. It is where the Other inhabits, in crisis and deviance (Foucault, 1984, p. 4) or even a constant state of in-between (Holzer, 2013, p. 837) – arguably, a state in which asylum applicants are both experiencing as well as being labelled with (Lee & Nerghes, 2018). Yet, asylum applicants' existence is not the sole heterotopia depicted in the 'real world'. The ideal utopic of the European domestic and supranational courts as mechanisms interpreting the Convention unwavered by political considerations lay in stark contrast of their heterotopic functions: firstly, by creating judicial spaces of rightlessness and, secondly, by juris-inertively evading definition-making (see Section 4.3). Similarly, at the basis of this chapter: the utopic European Union, and its heterotopic legal and tangible spaces. Examples from a slightly different European jurisprudence to the one summarised in previous sections – now taking into consideration the ECtHR instead of the CJEU – showcase the liminal legal and 'real world' heterotopia asylum-seekers jurisprudentially inhabit. The liminal legal heterotopias occur as courts function juris-inertively when faced with international protection cases; and 'real-world' heterotopias occur in terms of the judicial treatment of the actual space (Witteborn, 2011, p. 1149) and mobility (Lafazani, 2013) asylum seekers occupy. The following ECtHR cases help demonstrate these two heterotopias.

In *J.R. and others v. Greece* (2018),[15] the Strasbourg court concluded that Article 3 of the ECtHR was not violated in a Greek hotspot where asylum seekers were detained; while the conditions at the hotspot were deemed potentially inhumane or degrading, it was semi-open and the applicants' occasional capacity to leave the premises eclipsed the severity of the actual conditions of containment. Similarly, in *Saadi v. The United Kingdom* (2008)[16] the dissenting judges considered the majority reflection of § 64 endorsing the Article 5 § 1(f) exception upholding the State's 'undeniable sovereign right to control aliens' entry into and residence in their territory' to be in stark contrast with viewing asylum seekers to be '*ipso facto* lawfully within the territory of a State'. They heavily criticised the measures justified as proportional as 'substantially weakening the scrutiny' exercised by the ECtHR. Hence, in *J.R*. the occasional capacity to leave the premises was enough to qualitatively eclipse the severity of the actual conditions of containment, while in *Saadi* State protection is similarly delimitated as non-obligated by way of detention. Through such precedent, a liminal status is created wherein asylum seekers

15 ECtHR, 25 January 2018, *J.R. and others v. Greece*, No. 22696/16.
16 ECtHR, 29 January 2008, *Saadi v. The United Kingdom*, No. 13229/03.

are deposited in a legally alienating heterotopia that is actively justified in its role as such, enabling 'containing' States to resume their practices unpurposed by considerations for international protection and almost burdening the applicant with responsibility for their rights.

### *4.3 Juris-generative and juris-inertive recognitions: two sides of the same coin?*

But what do the aforementioned ECtHR decisions of *J.R*. and *Saadi* have in common with Article 17(2) jurisprudence? In contrast to applicants whose human rights infringements compelled the court to generate a declaratory jurisprudence stating negative (non-)rights, courts engaging with Dublin jurisprudence are compelled to engage with the regulation derivatively, stating positive yet modest and predictable rights in relation to state obligations. Such judicial approaches frame a specific heterotopia which asylum applicants are expected to occupy. In the way of Pierre Bourdieu's 'fossilised' social space (Bourdieu, 2020, pp. 26, 250–251) – whose immutable and inert nature renders its function irrelevant to the 'real world' – as far removed as Luxemburg or Strasbourg may be from the refugee camp of Lampedusa and the Controlled Access Centre of Samos, their courts help draw the borders of asylum seekers' existence within, and even beyond, those very spaces. These juris-generative mechanics reveal the double consequence upon applicants and the Dublin system alike.

Firstly, the judicial expectations of standards of living, procedural adherence and State practice – whether it is that of a benevolent 'mutual coercion' or a 'race to the bottom' (Thielemann et al., 2010, p. 33) – towards asylum seekers are of legal consequence even if spatially and temporally out of touch in the first place, thus 'fossilising' themselves. Even though these conditions are already imposed upon all applications for international protection, applicants expected to meet the added material criteria present for the special considerations of family reunification applications become a factor that accumulates complexity. Said material complexity becomes void of meaning and rarely applied according to the spirit of the Regulation – translating to uncontroversially enforcing nuclear family relations where deadlines have unjustly affected an application, as shown earlier. Thus, the meaning and utility of Article 17(2) becomes 'fossilised' in its own right on the level of assessing individual cases, while maintaining its ambiguous and opaque character.

Secondly, the derivative and unsurprising applications of Article 17(2) give rise to the term *juris-inertive*. 'Derivative and unsurprising' since, in another CJEU-ECtHR parallel, enforcing an Article 17(2)–related State obligation whose highest threshold had reasonably been met by applicant need and relation (see, e.g., *K v. Bundesasylamt*)[17] starkly resonates with the juris-generative negation of State obligation seen in the ECtHR cases *J.R*. and *Saadi*. 'Juris-inertive' because adjudicatory

17 CJEU, 6 November, 2012, C-245/11, *K*., ECLI:EU:C:2012:685.

inertia in applying Article 17(2) to cases matching its character and purpose for the sake of more unconventional familial relations leads to the humanitarian clause being left unexplored, blurry and critically opaque.

Tribunals wilfully neglecting to apply a clause in its full capacity due to potential political unease amongst Member States sheds light on two instrumental points. Firstly, that judicial inertia can form results just as restrictive as judicial generation and, secondly, that judicial inertia in fully exploring the potential applications of a critical clause relieves the burden of devising clear or practical definitions for its future use, thus relieving State obligation to abide by such termed standards, too. These standards are absorbed by affected States through ECtHR judicial behaviour, even if they result in circumstances that are liminal and increasingly difficult to navigate for protected individuals (Dembour, 2015, pp. 442–481).

### *4.4 Family (?) anxieties*

#### *4.4.1 Othering and heterotopic approaches*

In the case of family reunification on humanitarian grounds, the heterotopia does not merely concern different approaches towards the specific cluster of caseloads regarding asylum seekers, but also towards family forms deviating from the Western European standard. We have identified two layers in the lack of either proof of dependency or 'humanitarian grounds' when it comes to court reasonings and Dublin III cases' negotiations between States. Firstly, the functional, legal-pragmatist layer embodies the concept of *necessity*: wherein *who* is familially dependent, redundant and necessary is being interrogated while the grounds claimed for reunification are placed under considerable scrutiny. Then, the second layer responds to what is being sought out by relevant judicial authorities when examining the application of Article 17(2): *resemblance*, the material proof of dependency and exhibits of the legal or biological closeness of someone whose relationship to the applicant best resembles that of a Western European family-relational ideal. Thus, even if the goal of the humanitarian clause is not explicitly such, the precedent categorically constructed in the case law reviewed has by now rendered Article 17(2) a strict threshold for family reunification. The European West is the enforcer of liminal circumstances and simultaneous arbiter of other(ed) relationships – hence, instrumentalising Article 17(2) as another tool of 'burden-sharing' denialism among Member States.

It would, of course, be naïve to posit that this vein only runs through family reunification on humanitarian grounds: such considerations are constantly applied to binding provisions in the Dublin III Regulation, often enacting an underlying purposed attitude in the general regime of family reunification: clauses (9) and (10) of the 2003 Family Reunification Directive (2003/86/EC) mark an explicit preference for prioritising the nuclear family ('that is to say the spouse and the minor children'), while extended family and polygamous marriages were left to State discretion without regard for 'making family life possible'. Different political, legislative and judicial institutions arrive at the same point through varied means: for

example, the 2014 Proposal for establishing a Union Resettlement Framework[18] nearly commanded the character of such "heterotopic" criteria. Article 10(1)(b) states that 'Member States may give preference inter alia to third-country nationals or stateless persons with . . . social or cultural links, or other characteristics that can facilitate integration in the participating Member State,' deftly underlining the 'integration potential' of the applicant(s) as possible substantive criteria for resettlement (Bamberg, 2018, p. 8). Similarly, reducing the scope of dependency clauses 'as a quid pro quo for the increased scope of the family reunification clauses' (ECRE, 2021, p. 32) in the Commission Proposal for Regulation on Asylum and Migration Management is symptomatic of that transactional and protectionist approach. The juris-generative text relating to Article 17(2) of the Dublin III Regulation arranges the various representations of familial bonds and dependency through an intentional lens of necessity and redundancy, proximity and 'otherness', facilitating an agenda of legal and political conservatism gatekeeping putative European values. The very recent rejection by Member States of the Commission's proposal to include a wider family definition to the improved rules of responsibility, a proposed instrument comparable to the Dublin III Regulation under the new Migration Pact Agreement show that Europe is not ready to abandon this position (ECRE, 2023).

#### *4.4.2 Why this family?*

> 'Their' good, re-invigorative communities also look like fragmentary ethnic enclaves. 'Their' traditional family values threaten to overturn our still new and fragile gains in gender equality.
>
> (Honig, 2001)

Member States themselves provide excellent examples of this European value-integrationist model: in recently independent, late 19th-century Greece, the concept of 'civilisation' and the 'civilised life' was imported by Western Europe through a newly founded bourgeois class recognised by historians Cassia and Bada to encompass three fundamental elements; firstly, a preference towards an urban way of living and 'professional class' conduct; secondly, an insistence on continuous schooling and higher education for the offspring of the higher classes; and third, a focus on patrilineal nuclear family rather than extended, 'anarchic' lineage ties (Cassia & Bada, 1992, p. 18). To be civilised was to ensure an order of priority for affluent dowry arrangements, providing a resource baseline of both material and social capital for immediate offspring, securing an advantageous union in the future. Henceforth, living with extended family, endorsing traditional practices of

18 Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council, 13 July 2016, COM/2016/0468 final.

fostering or adopting children of relatives, and polygamy, were deemed 'uncivilised' (Cassia & Bada, 1992, pp. 15–27). This is only but one example of how European dynamics of cultural hegemony lent their paradigms to idealised occidental representations of what it takes to be 'civilised', 'not-backward', and 'modern'. Of course, these Western European ideas about kinship, lineage and familial ties were not limited to newly independent 19th-century Greece, but have formed a standard intricately intertwined with the concept of 'quality of living' that lives on in the 21st century (Hareven, 1991). Hence, the category of family deemed 'necessary' and 'dependent' has been constricted by laws and policies in a way that is rigidly stratified and highly interiorised, to the extent it renders those who do not abide by it socially and culturally different (Vertovec, 2011).

The media often overlooks migration for the purposes of family ties and needs (Blinder & Allen, 2016). Instead, opinions about migration and asylum tend to be based on fears of the replacement of the 'rightful citizen' by the expansive (Mudde, 2009), larger families fostered by the 'other' culture (Müller, 2016). State sovereignty has long been linked to controlling populations (Agamben, 2016), with contemporary conservatism often viewing exerting this control as a goal in itself, as a cultural politic driven by anxieties about cultural loss (Vertovec, 2011). The extended family has taken on a political-cultural role, symbolising the rejection of progress and modernity in Europe (Vertovec, 2011) – similar to how the headscarf has been used in France to represent the rejection of sexual liberty and consumer values. These representational cultural tropes transform the rightful access to extended familial ties into a stand-in for suspicion, backwardness, ambiguity and deception.

## 5. Conclusion

This chapter has analysed the application of the humanitarian clause in Article 17(2) of the Dublin III Regulation. Commencing by explaining the creation and development of this article, it presented its limited use in the administrative procedures of the Dublin Units of the Member States, followed by its equally limited engagement with the jurisprudence of national and European courts. The interpretative tactics of European courts (the CJEU and ECtHR) in cases reasoning with State obligations regarding the spatial, temporal, as well as competent containment imposed on asylum seekers and in cases regarding family reunification under the humanitarian clause mirrors each other. Through high-threshold considerations of ECHR Article 3 and derivative, unimaginative applications of Dublin III Article 17(2), these mirror images both manage to ease 'responsibility-sharing' among Member States – while safeguarding occidental ideas of social order regarding individuals othered by citizenship, their containment and the structure of the family. Thus, familial relations meant to be taken into account in the spirit of the humanitarian clause yet evading the 'Western' mould are deposited to the very same legal heterotopic category as other facets of the refugee condition (reviewing as such the more obvious legal heterotopia of containment in the ECtHR cases of *J.R.* and *Saadi*), essentially being assigned a similarly liminal status by being left juridically untreated.

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# 11 Family reunification policies in Italy

## Ambivalences, discrimination, resistance

*Francesco Della Puppa*

### 1. Introduction

The family-related dynamics of migration and the process of family reunification are becoming increasingly central to the debate on EU member states' policies on migrants' entry into and social integration within the EU (Bonizzoni & Cibea, 2009; EMN, 2008; Gil Araujo, 2008;Kraler, 2010). In fact, family reunification is currently one of the main modes of legal entry into EU member states (Tognetti Bordogna, 2004).

A certain concept of family and domestic life has always constituted a *conditio sine qua non* of the social construction of the 'good citizen', linking individual, family and state (Sayad, 2002). Migration policies are a central node in this complex relationship. The conditions that the state establishes in order to 'regulate' the entry and residence of migrants' family members reflect the family model of the state and the society of destination; that is, they reveal its conception of the family as an interdependent and hierarchically ordered compact unit with the task of mediating between the individual, the state and society.

Starting from these assumptions, this chapter will analyse how the reunited and reunitable family is constructed in a socio-legal sense in the Italian policies on the subject, in order to fully understand the effects of Italian policies on migrant family structures. In so doing, my analysis will be inserted within the strand of sociological studies aimed at investigating the policies that regulate reunification, observing them from a perspective centred on processes of stratification (Lockwood, 1996) that condition and concretely redefine the intersection between the potential enjoyment of the right to a family unit and the class position, status, nationality, gender and generation of those who exercise it (Bertolani et al., 2013; Kraler, 2010; Morris, 2003; Tognetti Bordogna, 2011). The legal framework of family reunification acts as a 'double device', shaping, on the one hand, what the (migrant) family should be and look like (that is, who is part of the family and who is excluded from it) and, on the other hand, how the migrant family is supposed/obliged to contribute to the economy of the society of destination. Thus, as will be elaborated in more detail later in this chapter, reunification policies identify some family members (formally married partners and children) as entitled to reunification and exclude others, either partially (parents) or totally (siblings, adult children, etc.). Furthermore, to obtain

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permission for reunification, the first-migrant applicant is forced to increase their discipline and productivity at work (getting a stable job and sometimes needing to look for a higher salary) and to restrict their sociality outside of work (to save economic resources and optimise working hours).

Paradoxically, whereas these policies make the road to family reunification fraught and bumpy, Italian society fears, blames and stigmatises migrants who are on their own, that is, migrants who have not gone through the process of family reunification. However, this blame and fear, as will be shown later, are expressed in different ways based on migrants' gender and the nature of their work in Italy; that is, whether they are migrant men or migrant women and whether they are migrants who carry out a 'productive' job or their work is linked to the 'reproductive' sphere. The latter involves domestic and care work that is usually done within the domestic sphere of native Italians, as often happens in Mediterranean Europe. A male migrant who works in the primary or tertiary sector creates fear in Italian society and is perceived and represented as a threat to the social order and to a shared morality. By contrast, a migrant woman who works as care worker for an Italian family and who, therefore, must concentrate her emotional labour (Hochschild, 1979) and care work on 'our' family members, is preferable if she has not completed the family reunification process and does not live with her family in Italy. In fact, focusing on the Italian case is helpful for dealing with the central question of how family reunification policies construct a specific type of migrant family and migrant labour. Italy is a Mediterranean country characterised, on the one hand, by a 'Mediterranean model of migration' (King & De Bono, 2013; Pugliese, 2011), the structural presence of a shadow economy and the inclusion of many immigrants in this segment of the labour market (*ibidem*) and, on the other hand, by a so-called Mediterranean or familist welfare regime in which the family covers many socio-economic functions that in other European nations are the responsibility of the state or the market (Esping-Andersen, 1995).

The first section of this chapter reconstructs the sociological and regulatory debate on family reunification in Italy, while the second elaborates further on the migrant family and reunification in Italian legislation, providing a sociological and historical reconstruction of Italian policies of family reunification. The third section takes up the concept of civic stratification elaborated on by DavidLockwood (1996) and adopted by Lydia Morris (2003) to show how policies of reunification in fact reproduce and strengthen this stratification. In the fourth section, the link between work and family reunification is analysed, showing how Italian policies subordinate the possibility of migrants' family life to their work – their productive and economic capacity – making the reunification process into a labour regulation device.

## 2. The sociological framework

For some years, the Italian sociological literature has been investigating the dynamics of migrant families through analysing the processes of migrant family reunification (Ambrosini et al., 2010; Bonizzoni, 2009; Lainati et al., 2008;

Scabini & Rossi, 2008; Tognetti Bordogna, 2011). These studies have described the changes in generational and gender roles that occur within the migrant family before and after migration and reunification (Tognetti Bordogna, 2005). The family reunification process has also been studied in its different experiential forms and modalities (carried out by first-migrant applicant men or first-migrant applicant women, for a spouse, children, parents, etc.) and in relation to the various difficulties and repercussions that it can have for the families involved (Ambrosini, 2014; Bonizzoni, 2009; Lainati et al., 2008). The reunification process has been understood as a migratory strategy enacted by whole households (Tognetti Bordogna, 2011) and as a fundamental step in the social construction of male migrants' adult masculinity:Della Puppa (2014) shows how Bangladeshi migrant men use family reunification to rebuild their image, perception and self-representation as responsible adults and family men in their country of destination. These studies have also highlighted the emancipatory acts of many of the women who have been reunited with their husbands – freeing themselves from the subordination of an unwelcoming family environment (*ibidem*) or escaping unsatisfactory marriages and family relationships (Ambrosini, 2014; Banfi & Boccagni, 2009) – as well as the suffering and frustration experienced by those who are reunited against their will (Della Puppa, 2014). Other topics explored include long-distance motherhood and reunification (Ambrosini, 2014; Bonizzoni, 2009); the different migratory paths related to family or care work, marked by the different gender styles of men and women (Ambrosini, 2014; Bonizzoni & Boccagni, 2013); and the obstacles encountered by and support given to migrant care workers in reunification processes (Ambrosini, 2014; Della Puppa, 2012).

In European countries with a longer history of immigration, the debate includes a discussion of 'second-level' or 'newly formed' reunifications (Tognetti Bordogna, 2005; Kofman, 2004). These definitions refer to the situation in which, once they have created the necessary conditions for doing so, the first migrant (in this case usually a man) returns to his country of origin to get married – usually an arranged marriage – with a woman who joins him in the country of destination immediately afterwards. These studies emphasise the role that the family plays in reproducing assumed practices as an obstacle to social integration in the country of destination. Such practices include forced marriages (Grillo, 2008; Kofman et al., 2011; Kraler, 2010), the self-segregation of national migrant communities (Strasser et al., 2009) and the role the family plays in favouring the entry of third-country nationals within the national borders of EU countries through an 'instrumental' use of the institution of family reunification (*ibidem*).

From the point of view of the political debate on reunification, the focus has shifted from safeguarding the *minimum threshold* of migrants' 'human rights' to the *maximum defence* of the EU territory from the threat of 'undesirables'. There is thus a dual and contradictory thrust in the norms and practices of EU states regarding the enlargement of citizenship rights: while European democracies declare their commitment to guaranteeing the human rights enshrined in the universal conventions to which they are signatories – including the right to respect for family life – they also claim autonomy in determining who is allowed to enter the state's borders