Summary

Background, research question and methodology

The definition of the family has always been subject to change and will continue to evolve in the future. In recent decades, families have become increasingly diverse; this includes declining birth rates, an increase in divorces, a growing number of children born outside marriage, blended families, and families that are not based on biological ties but, for example, on adoption or foster or surrogate parenthood. In addition, the world has become globalized, with family relationships increasingly becoming 'transnational' and are thus being maintained across national borders. In a legal sense, these families are subject not only to family law but also to family migration law, which aims to regulate family relationships across borders.

Several authors have argued that family norms in migration policy do not align with the diversity of family forms in social reality. They also point to the discrepancy in how family law and family migration law respond to the increasing diversity of family forms. In short, there seems to be a tension between social developments related to family forms, developments in family law, and the interests of a restrictive migration policy. In order to gain insight into this tension, the following research question has been formulated:

> *To what extent does the perception of the composition of the (nuclear) family in society and family law differ from how this is laid down in migration law, regulations, and policy, and is there a need to adjust the interpretation of the concept of "family" in migration policy, what is this possible adjustment and what are the possible consequences associated with it?*

This research is based on various research methods. First, a literature study was conducted, which led to a comprehensive overview of (inter)national academic, professional, and 'grey' literature on the increased diversity of family forms, as well as national and international literature on the reflection of this increased diversity in Dutch and European family migration policy. Sociological literature and reports on the growing diversity of family forms and family migration policy were also included. In addition, a case law analysis was conducted, focusing on migration law. Case law sheds light on the concrete interpretation of the concept of family and shows how family migration policy is shaped by the interaction between international obligations and national law. Finally, an expert meeting took place to reflect on the conclusions and recommendations.

Findings

Social developments have changed the perspective on the relationships that are included in the definition of the family. These developments primarily concern the emancipation of women; this, in turn, has changed the position of fathers from breadwinners to nurturing parents (although it remains the case that women take on a majority of care tasks). In addition, since parents now often both work and the elderly remain in relatively good health, grandparents have an increasingly important role in caring for children. As a result grandparents also take up a more prominent position in the lives of their adult grandchildren.

These changes are closely related to the participation of women in the labour market and the welfare state. The increased economic independence of women changed views on how to best care for the elderly, and the creation of the welfare state initially led to a so-called defamiliarization. However, since the 1980s and certainly after the turn of the century, we have seen a development of refamiliarization. That means the government is withdrawing, and family members are assigned a more prominent role

in caring for each other. This increased family dependency is evident when it concerns the elderly and young adults. Currently, young adults share a household with their parents longer, and because the elderly live at home longer, promoting informal care has become an explicit objective within government policy. Transnational families maintain family ties across borders and provide cross-border support and care. Mobility, or the lack thereof, largely determines how transnational families can provide or receive this mutual support and care.

In line with international developments, Dutch family law has been liberalized considerably in recent decades, which happened under the influence of the principle of equality and the wish to provide legal protection to a larger group of family ties. However, the design of this legislation has at times proven to be very complex, and there seem to be indications that there has been an increase in conflicts. It is also questionable whether formal equality results in material equality. Although legislation, now mostly includes equality between fathers and mothers, women still take on a majority of the care tasks, including informal care. In recent years, the development of ever-increasing liberalization that started in Europe in the 1970s seems to be waning. Even countries generally considered liberal, such as the Netherlands, are faced with an increasingly conservative ideology that already or possibly translates into the deliberalization of family law. Examples in recent years are the ban on marriage between cousins and restricting the marital age to eighteen, in response to the 'strange' family forms that migrants bring with them. The silence in the coalition agreement of Schoof I on multi-parent families and surrogacy agreements may indicate stagnation in this area.

Family migration policy similarly became more liberal since the 1970s, in particular through the equal treatment of men and women, by opening up family reunification to non-marital relationships and LGBT couples. These developments were in line with those in family law. During this period, family migration was seen as a means of promoting the integration of migrants. Subsequently, since the 1990s, family migration policy has become increasingly restrictive, introducing stricter conditions, including a strict interpretation of the concept of family. This choice for a more restrictive policy was prompted by the prevailing idea among politicians and policymakers that family migration is an obstacle to integration and that it would lead to an increase in the number of immigrants. As a result, women and men, heterosexual and homosexual couples, and married and cohabiting couples have equal rights to family reunification, but under stricter conditions. However, this does not apply to everyone to the same extent. Family migration policy has become stratified by the various applicable legal frameworks, so different conditions and family definitions apply to other groups of referents and their family members. Consequently, Article 8 ECHR increasingly functions as the lower limit for family members and family forms outside existing policies.

The concept of family in current family migration law is characterized by great complexity. The concept is variable and differs for different categories of families. Although the concept has partly been broadened, including recently, with the policy for young adults, the policy remains strongly characterized by restrictive tendencies. The most striking aspect is the use of the concept of 'actual' family ties in Dutch policy, which is next to the concept of family life. Also, social developments have not fully been included in family migration law, mainly concerning the role of fathers, care tasks of grandparents, and informal care for the elderly.

Conclusions and recommendations

The findings of the study have confirmed that there is indeed a discrepancy in the definition of the family in terms of social perception, family law, and migration law, which results from the way the definition of family is interpreted in migration law.

Protecting the development versus protecting existing family life

Firstly, family law protects both existing family relationships and relationships in development In contrast, family migration law focuses primarily on recovering existing family ties and much less on developing family one. Even existing family life is not always protected since the assessment of 'actual' family ties in the context of Article 8 ECHR - particularly in the case of family reunification with refugees and biological fathers - still involves a further substantive assessment of family ties. Family migration policy assumes an existing and particularly strong degree of mutual dependency between family members, with hardly any room for family members to shape their own family life or recognize its dynamic nature. Moreover, strict policies and lengthy procedures have consequences for maintaining family ties, which can be held against applicants, and can have serious consequences, particularly for refugee families. The guiding principle of recovering existing ties is insufficient if the changed circumstances of family members are not considered in the implementation of migration law or policy.

Different assessment of the interests of the child

In family law, a concrete assessment of the child's interests is made to justify a deviation from the assumption of joint care by both parents. In migration law, on the other hand, in legislation, implementation and case law, choices made by parents are often considered to be of greater importance than a child's interest in the presence of a parent. Parents' actions are central, and the child's interests are assumed to be adequately met. Migration law presumes that the ordinary course of events is that a child 'belongs' to the parent and, therefore, follows the parent, not the other way around. The different assessment of the interests of the child in both areas of law is reinforced by the fact that family law works with open norms, which leave room for the judge to make an individual assessment in which the developmental needs of a child and the fact that circumstances can change are taken into account. Although the family migration policy also contains norms open to interpretation, migration policy defines more strictly which specific circumstances should be considered when determining if family life exists.

Young adult and elderly policies

Where it concerns young adults and the elderly, there is a discrepancy between the social perception and family law on the one hand and family migration law on the other. The requirement in the family migration policy of 'more than normal emotional ties' that applies to those who fall outside the nuclear family assumes a very high degree of dependency between adult family members that cannot arise at a distance and ignores the fact that new care needs can develop over time. That means the current policies for young adults and the elderly do not sufficiently consider what applies in general government policy, namely, the visible appreciation and recognition of the role of informal caregivers and grandparents and the increased dependency of young adults. In general government policy, the reciprocity of care relationships is taken as a given. In contrast, adults are exclusively seen as a group that is a risk for the Dutch welfare state regarding migration policy.

Stratification of procedures in family migration policy

A key finding of this study is the observed stratification of family migration policy. This stratification is partly the result of EU law itself - which contains different entitlements to family reunification for EU citizens and third-country nationals - but is primarily a choice of the Dutch government. Due to the increasingly restrictive family reunification policy, the difference between EU citizens on the one hand and third-country nationals and Dutch nationals on the other has increased. Outside the nuclear family, family members can only claim a right to reside on the basis of Article 8 ECHR. As a result, Article 8 ECHR is no longer a means to make an exception in special cases but has become a policy under which a more significant number of categories of family migrants are included. While (formal) equality, influenced by Article 8 ECHR case law, is a guiding principle in family law, the stratification of the right

to family migration leads to increased inequality between EU citizens, Dutch citizens, and third-country nationals. The stratification also leads to increased complexity and duration of decision-making and legal procedures. Research has shown that long-term separations make it difficult for migrants to focus on study, work, and their integration process; this undeniably has consequences for society as a whole.

Interaction family law, migration law and social security

Family law has not only influenced migration law but also the other way around. Restrictive tendencies in migration law have led to a certain degree of deliberalization of family law, as is evident from the introduction of the Act on the Prevention of Sham Marriages and the Act on the Prevention of Forced Marriages. Moreover, one of the reasons for the reluctance to recognize social parenthood through the introduction of multiple parenthood is the fear of what this would mean for the right to family reunification. The discrepancy between the two areas of law so far has been reduced by making family law more restrictive. However, none of these legislative amendments were based on empirical research on the extent of the phenomenon, and subsequent evaluations cast doubt on their effectiveness. The interaction with social security law has only briefly been discussed. Yet, it has become apparent that the rights granted – or denied – in the context of the welfare state influence the interpretation of the concept of family in both family and family migration law. It is, therefore, important to investigate the impact of social security law on the ability of migrants to exercise family life.

Recommendations

The above results have led to recommendations for legislators, implementing bodies, and the judiciary.

Firstly, family life is a dynamic concept and should be interpreted as such. In Dutch family migration law, the concept of actual family ties assumes that the bond between parents and children can be considered broken so that family reunification can be refused. The ECtHR has been critical of this concept in the past, while it is also disputed whether the current interpretation is in accordance with the Family Reunification Directive. In recent case law, the CJEU has given substance to the concept of actual family life, which allows for a dynamic interpretation: it includes not only existing family life but also the development of family life. And family life can be shaped by means of legal, material, financial, and emotional dependency. Such a dynamic interpretation of the concept of family would not only be more in line with current social and family law views. Moreover, it would also result in a less strict interpretation of the concept of family.

In line with this, the stratification of family migration policy should be reconsidered by the Dutch legislator. The stratification leads to unequal treatment of different groups of migrants and makes decision-making by the Immigration services complex and lengthy. It is recommended to adopt a more uniform interpretation of the concept of family life in family migration law, whereby a connection can be sought with the interpretation of actual family life in EU law.

The definition of family in the family reunification policy concerning young adults or the elderly should also be adjusted. It is recommended that the specific regulations for young adults be maintained and specific regulations for the elderly reintroduced, whereby those regulations should not be phrased and implemented so narrowly that recourse to the framework of Article 8 ECHR is still necessary.

It is also recommended that the interests of the child be strengthened in the determining family life. Different options for the legislator would be to implement the general standard of Article 3 CRC in national law and to include a right to residence with a child as a ground for residence. The legislator could also lay down more procedural rights, such as those already applied in family law, including the right to be heard or the appointment of a special curator. In addition, the immigration services and

migration law practice should build up more expertise in family law and pedagogy. It is important that, when determining if family life exists, it is investigated how the child is doing, what the child's family ties are, and what the effects of a particular decision are on the child's future development. Initiatives already put in place to better assess the child's interest in asylum procedures should be extended to the entire family migration context.

Finally, it is recommended to be cautious when translating migration law objectives into family law. The discrepancy between both domains can also be prevented and reduced by including the family law objectives, such as the ability to develop family life, equality, emancipation, and protection of the weak, when designing family migration policy, which is similarly aimed at protecting the family unit. Moreover, follow-up research into the interaction between family law, family migration law, and social security is desirable. This research could focus on the role of the state in social security and family migration policy since the state has a financial interest in both fields.

To conclude

Overlooking the extended period described in this report, we note that there has been a long-standing tendency towards strict regulations and strict application in family migration law. There seems to be an institutionalized distrust – which, regarding the family definition, manifests itself in the debate on sham recognitions and sham marriages. However, this distrust is not based on facts. The emphasis on fraud, as became apparent following the 'Allowance scandal', is at odds with the increased importance of the principle of proportionality for legislators and the judiciary: the test of suitability, necessity, and balance of the chosen means. The legislator, the immigration judge, and immigration services play an important role in a culture change. Placing more categories of family migrants in the legal framework of Article 8 ECHR is not a solution to the increasingly restrictive family migration policy described in this report.