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# Deux Poids, Deux Mesures

## A critical frame analysis of the Dutch debate on family-related asylum claims

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# Abstract

When law overlaps with the family, a dilemma emerges: how to do justice, through law, to individual freedoms without jeopardizing family life, and vice versa? This thesis presents a critical frame analysis of the ways in which this dilemma is negotiated within Dutch refugee law. The study focuses on two family-related asylum claims within which the dilemma is at play: (i) family reunion for foster children of refugees; and (ii) refugee claims based on forced marriage. While family relations figure in the first case as a source of protection, they constitute a form of oppression in the second. The study adopts a theoretical model developed on the basis of a variety of concepts within critical framing theory as well as through an inductive reading of selected policy documents and case law.

The overall conclusion of this thesis is that the dilemma of doing justice, through law, to individual freedoms without jeopardizing family life, and vice versa, is negotiated in two divergent ways but in both cases three similar frames dominate the debate. The 'boy at the dike' frame portrays asylum seekers as potential intruders by questioning the legitimacy of their family bonds; the vulnerability frame victimizes them; and the culture frame is nurtured by orientalist understandings of their family lives. The first is a unilateral default state frame, while the other two frames are double-edged as they are constructed both by the state and lawyers. While the state constructs the vulnerability and the culture frame to reinforce its default frame, lawyers mobilize both as counter-frames. Within state frames, the relation between the individual, the family and the state is unstable. The state endorses the individualistic approach when it devalues and questions family bonds based on foster care and when it represents those family ties as a potential source of oppression. In contrast, the state embraces the family-unit approach when it privatizes forced marriage; when it widens the scope of state protection to include protection by male family members; and when it represents forced marriage as a negotiable cultural affair. In the first scenario the state claims control over the family, while within the second it refrains from claiming any control over the family.

In this vein, the study also showed that there is a disjuncture between the state approaches to family ties in refugee law, on the one hand, and within regular migration law, on the other. This disjuncture articulates a *'deux poids, deux mesures'* policy and suggests that the individualistic approach, on the one hand, and the family-unit approach, on the other, seem to function as strategic tools to be used to (not) interfere with the family lives of asylum seekers whenever the state sees fit. The frame serves to mask and justify the state strategic choice. The effectiveness of counter-frames constructed by lawyers depends on the strategies through which those frames are mobilized. While children lawyers stimulated

social change by embracing a de-centred approach to law, refugee lawyers dealing with forced marriage failed to challenge the pre-existing power relation, as they went with the flow and adopted a centred approach to law.

Finally, in terms of methodology, this study showed that critical frame analysis has an added value for examining case law in comparison with a legal-dogmatic approach. Law and rights would in principle frame legal-dogmatic analysis, while frame analysis helped to look at aspects beyond those two master frames. This is important because legal reasoning is not exclusively about rights and law. In addition, critical frame analysis as adopted in this study enabled the analysis of whose narratives are silenced, whose are given prominence, and the processes by which this is achieved. A legal-dogmatic analysis would in principle focus on 'what is said' rather than 'what is not said'.

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# Abbreviations

**ABRvS**: Afdeling Bestuursrechtspraak van de Raad van State (Administrative Jurisdiction Division of the Dutch Council of State)
**ACVZ**: Adviescommissie voor Vreemdelingenzaken (Advisory Committee on Migration Affairs)
**COI:** Country of Origin Information
**CRC**: Convention on the Rights of the Child
**DCI**: Defence for Children International
**DRC**: Dutch Refugee Council
**ECHR:** European Convention on Human Rights
**ECtHR:** European Court of Human Rights
**EU**: European Union
**FGM**: Female Genital Mutilation
**FMU**: Forced Marriage Unit
**HBV**: 'Honour-Based' Violence
**INS**: Immigration and Naturalization Service (Immigratie- en Naturalisatiedienst)
**KOM**: Kinderombudsman (Children's Ombudsman)
**NGO**: Non-governmental organization
**TOR**: Terms of Reference
**Rb**: Rechtbank (regional court)
**UNHCR**: United Nations High Commissioner for Refugees

# Prologue

## The Individual, Family and State

## Sahro's story[1]

Sahro was born in Somalia. She is the youngest child in the Osman family. When the civil war broke out in the early 90s, she fled, together with her family, to Kenya. Sahro's father subsequently went to Denmark, together with one of Sahro's sisters. The rest of the family (Sahro, three sisters and their mother) stayed behind in Kenya. After the father was granted asylum in Denmark, Sahro and the rest of the family joined him in early 1995. Sahro was at that time seven years old.[2] In the period between 1995 and 2002, Sahro attended various schools. Her parents divorced and maintained joint custody but Sahro lived with her mother. Sahro had difficulties with her parents who disapproved of certain aspects of her behaviour. Moreover, she had problems at schools which expelled her due to disciplinary problems. In 2003, when she was fifteen years old, her father decided to send her to Kenya in order to take care of her grandmother who was living there. Sahro's mother did not want her to go but reluctantly agreed on the understanding that it would be a short trip. Sahro travelled to Kenya on the understanding that she was going to visit her grandmother and would soon return to Denmark. However, Sahro's trip lasted for almost two years.[3] In August 2005, Sahro's father took his seventeen-year-old daughter to the Danish embassy in Kenya in order to help her apply for a 'family reunion' and re-join her mother and siblings in Denmark. Sahro explained during the reunification interview at the embassy that she had taken care of her grandmother, who had fallen seriously ill, until some of the grandmother's children had arrived from Somalia to take over the care.[4]

The Danish Immigration Service, however, rejected her application because Sahro's residence permit had lapsed, having been absent from Denmark for more than twelve consecutive months. She was not entitled to a new residence permit, since she was seventeen years old, while the new Danish immigration rules only extended a right to family reunification to children below the age of fifteen.[5] These new immigration rules were only implemented, however, after Sahro went back to Kenya. In addition, in the view of the Danish state, since Sahro's parents had custody at the time of her departure to Kenya, they could lawfully make decisions about her personal circumstances such as where she resides.[6] In appeal proceedings to national courts, Sahro's lawyer maintained that since it had not been her decision to leave the country, Sahro should not be held

1 The story originates in an application against Denmark that was lodged with the European Court of Human Rights (ECtHR) by Ms. Sahro Osman, a Somali national. See ECtHR 14 June 2011, no. 38058/09 (*Osman v. Denmark*).
2 *Osman v. Denmark*, par. 6-9.
3 *Ibid* at par. 9-10.
4 *Ibid* at par. 12.
5 *Ibid* at par. 14.
6 *Ibid* at par. 18 and 71.

responsible for her parent's decision.[7] However, Sahro's appeal and further appeal to higher national courts were rejected.[8]

In June 2007, she clandestinely re-entered Denmark and submitted a complaint with the European Court of Human Rights (ECtHR) on the basis of article 8 (right to respect for private and family life) of the European Convention on Human Rights (ECHR). During this procedure, the AIRE Centre[9], a non-governmental organization (NGO) based in London, represented Sahro.[10] The Court found that there has been a violation of article 8 ECHR.

This story illustrates two concerns at play when migration law overlaps with the family: the first considers the family as a source of protection, while the second views it as a source of oppression. On the one hand, there is concern for the protection of family life, such as parents' rights to decide where their children reside and the right to freely regulate their education. On the other hand, there is concern for the protection of the rights of individual family members, such as the child's right to remain in education and not to be forced by parents to quit school in order to carry out intra-familial care. These two concerns, considered at once, articulate what Mary Ann Glendon means when she points out that 'while meaningful freedom cannot be achieved in a society of isolated individuals, social groups like families have their dark side that is difficult to reconcile with individual autonomy'.[11] Thus, when migration law overlaps with the family, a dilemma emerges: how to do justice, through law, to individual freedoms without jeopardizing family life, and vice versa? This dilemma forms the central theme of this thesis. When it is negotiated, the actors involved create personal ties and build boundaries between the individual, the family and the state by defining the role of each; that is, they make moral, political and legal statements about who can make claims on whom.[12] This takes place in two divergent ways. The first considers family members as interlinked individuals belonging to the family unit; within this '*family-unit*' approach, the family acts as an intermediate group between the state and the individual.[13] The second, in contrast, considers family members as isolated individuals;

7 *Ibid* at par. 15.
8 *Ibid* at par. 18-20.
9 The AIRE (Advice on Individual Rights in Europe) Centre is 'a specialist charity whose mission is to promote awareness of European law rights and assist marginalised individuals and those in vulnerable circumstances to assert those rights.' (<http://www.airecentre.org>).
10 *Osman v. Denmark*, par. 2.
11 M.A. Glendon, *The Transformation of family law: State, law and family in the United States and Western Europe*, Chicago: The University of Chicago Press 1989, p. 310. See also: P. Muller, *Scattered Families. Transnational Family Life of Afghan Refugees in the Netherlands in the Light of the Human Rights-Based Protection of the Family,* Antwerp-Oxford-Portland: Intersentia 2010, p. 4.
12 For an inspiring discussion of family obligations, duty and responsibilities within families, see: J. Finch, *Family Obligations and Social Change*, Cambridge: Polity Press 1989, p. 1-12 and p. 237-243.
13 For a discussion of the family as a mediation structure between the state and the individual citizen, see: Glendon 1989, *supra* note 11, at pp. 291-313.

within this '*individualistic*' approach, the family is out of the equation and the individual stands in direct relation with the state.[14]

How the dilemma is negotiated can be exemplified by a close look at the arguments employed by the state, Sahro's legal representatives, and the ECtHR in the *Osman v. Denmark* judgement. Before getting into these arguments, it deserves to be first observed that while Sahro's legal representatives defended the claim as a 'family reunion case', the ECtHR examined it as an 'expulsion case'. Sahro's representatives emphasised that Sahro could not enjoy family life outside Denmark and for that reason she had to be allowed to join her mother.[15] By focusing on the right to respect for family life, they employed the 'family-unit' approach. In contrast, the ECtHR employed the 'individualistic approach' as it examined the complaint through the lens of the right to respect for private life in expulsion cases.[16] Let us now have a closer look at the arguments included in the Court's judgment to find out whether Sahro and her parents are viewed as 'interlinked', or rather, 'isolated' individuals.

**Sahro and her parents as 'interlinked' individuals**

The approach that views the family Osman as a unit was articulated by the Danish Immigration Service when maintaining that since Sahro's parents had joint custody at the time of her departure to Kenya, they could lawfully make decisions about her personal circumstances such as where she resided.[17] In the same vein, the immigration service and national courts maintained that the interruption of Sahro's residence and her separation from her family was caused by a conscious and voluntary decision made by her parents.[18] The state followed the same approach when arguing that Sahro's educational problems could not be attributed to any other than herself and her parents.[19] Within these arguments, the state is excluded from the equation, while the emphasis is on the responsibility of the family as 'unit'. By arguing that the state should respect parental custody and parental decisions regarding their children, the state represents the parents' decision to send Sahro back as being exclusively 'private and familial'. This entails that parents have the full competence to make decisions concerning their children; the role of the state should only confirm and respect such parental competence. Within this approach, the family fulfils a private function and the state should therefore respect the traditional hierarchy between parent and child. Since the family Osman is sovereign[20] over what happens within its domain, both the cause

14 Finch 1989, *supra* note 12, at p. 1-12 and p. 237-243. See also S.K. van Walsum, *Intimate Strangers* (Inaugural lecture), Amsterdam: VU Migration law series (9) 2012, p. 14.
15 *Osman v. Denmark*, par. 45 and 49.
16 *Ibid* at par. 55 and 65.
17 Both the Danish District Court and the High Court agreed with the Immigration Service (see *Osman v. Denmark*, par. 18 – 20).
18 *Osman v. Denmark*, par. 20 and 49.
19 *Ibid* at par. 50.
20 S.K. van Walsum, 'Gezinsverantwoordelijkheid en staatsverantwoordelijkheid, een politiek spanningsveld in kaart gebracht', in: van Den Eeckhout et al, *Transnationale gezinnen in Nederland*, The Hague: Boom Juridische uitgevers 2005,

of Sahro's problem, the problem itself and the solution, belong to the private family sphere. The family is thus represented as an intermediate unit between the state and the individual; it is the unit of the analysis, not the individual.

**Sahro and her parents as 'isolated' individuals**

The individualistic approach was articulated in the reasoning of Sahro's national lawyer and that of the AIRE Centre. They argued that Sahro should not be held responsible for the consequences of the decision taken by her parents, as that decision had not been taken in her best interest.[21] Within this emancipatory[22] vision, Sahro is in conflict with her parents, while the state has the duty to look beyond the exercise of parental competence and protect the child from abuse by the family. The parents' decision is seen to be the cause of Sahro's problem, namely loss of residence, and the solution implies state intervention through restoring her residence right. Within this understanding, parents and children are seen as isolated individuals and the issue is presented in terms of 'the family versus the individual'. In this way, the state and the individual stand in direct relation without the family as intermediary. A similar approach is articulated in the reasoning of the AIRE Centre when maintaining that Sahro had been forced to leave Denmark and subsequently exploited by being forced to take care of her grandmother.[23] In the view of the AIRE Centre, Sahro had been victim of forced labour and child trafficking. Within this emancipatory vision, the reunification of Sahro with her grandmother in the country of origin is represented as a source of oppression. The AIRE Centre argues on the basis of a positive state obligation entailing that when the state became aware of Sahro's situation, it should have intervened and protected her through reinstating her residence permit and allowing her to resume her education.[24] Within this reasoning, family members are considered as isolated individuals, the state is in direct relationship with the individual, and shared intimacies are out of the equation.

**Interlinked, unless…**

From the Court's perspective, respect for parental decisions is the starting point, but the child's individual rights, such as private life, cannot be ignored. In this context, the Court ascribes an independent status to Sahro's private life distinct from her parents: although the exercise of parental rights constitutes a fundamental element of family life, in respecting parental rights (family-unit approach) the state should not ignore the child's interest, including his/her own right to private life (individualistic approach).[25] The Court then

pp. 185-225 at p. 187.

21 *Osman v. Denmark*, par. 63.

22 Van Walsum 2005, *supra* note 20, at p. 187.

23 *Osman v. Denmark*, par. 62.

24 *Ibid* at par. 46.

25 *Ibid* at par. 73.

summarily rejected the AIRE Centre's argument based on child trafficking because Sahro never reported this issue to state authorities, including the embassy, or to her national lawyer.[26] This suggests that the Court embraces the family-unit approach and rejects the framing of family life between Sahro and her grandmother as a form of child trafficking.

**Broader and deeper analysis**

The case of Sahro served to introduce and exemplify how the dilemma of doing justice, through law, to individual freedoms without jeopardizing family life, and vice versa, is negotiated. Through the study reported in this book, I strive to take a broader and deeper look at the ways in which the dilemma is negotiated. I do this through the magnifying glass of refugee law in which family relations figure either as a source of protection or as a source of oppression.[27] I focus on Dutch refugee law and take the legal and political debate on two family-related asylum claims as case studies: while family relations figure in the first case (family reunion for foster children of refugees) as a source of protection, they constitute a form of oppression in the second (refugee claims based on forced marriage).

26 *Ibid* at par. 62 and 49.

27 Van Walsum 2012, *supra* note 14, at p. 22. My study is part of a broader research project titled '*Migration Law as a Family Matter*' initiated by Sarah van Walsum after having received a Vici NWO Grant. In addition to my research, the project included two other PhD sub-projects. Nadia Ismaïli compared how custody and access are regulated in national and international jurisprudence both in family and migration law: N. Ismaïli, Who cares for the child? Regulating custody and access in family and migration law in the Netherlands, the European Union and the Council of Europe, *Migration Law Series* (18), 2018. Johanne Søndergaard examined whether divergent public opinions regarding gender and migration can partly explain the resistance of member states to harmonizing family related migration policies: J. Søndergaard, *Opinionated Family Migration Policies? Public opinion and resistance to EU harmonization of family reunification policies in Europe* (diss. Amsterdam VU), 2016. For more information about the whole project, see van Walsum 2012, *supra note* 14, at p. 21-23.

# 1

# Chapter 1

## *Mise* en Scene

The present chapter first introduces the two family-related asylum claims through which I analyse how the dilemma of doing justice, through law, to individual freedoms without jeopardizing family life, and vice versa, is negotiated (section 1). When doing this, and in order to broadly contextualize both claims, I briefly present how they are addressed in international law and Dutch regular migration law. Second, I go on to present the aim of my research (section 2). The chapter then showcases the theoretical model I adopted to analyse how the dilemma is negotiated (section 3). After this, I present my research questions (section 4). I then explain how I collected and selected my data (section 5) and how I conducted the data analysis (section 6). The chapter ends by outlining the rest of the thesis (section 7).

## SECTION 1: TWO FAMILY-RELATED ASYLUM CLAIMS

This section introduces the two family-related asylum claims that form my case studies. I do this through contextualizing the *Tuquabo-Tekle* judgment[28] within Dutch migration and asylum policy. This judgement originated in an application, against the Netherlands, lodged with the ECtHR by Mrs Tuquabo-Tekle, an Ethiopian national. The claimant's application is based on article 8 ECHR (right to respect for private and family life) that provides as follows:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

*The Tuquabo-Tekle judgement*

In 1989, after her first husband passed away, Mrs Tuquabo-Tekle fled from Ethiopia to Norway, where she was granted asylum. She had left her daughter Mehret with her uncle and grandmother in Eritrea, while her son stayed in Ethiopia with her friend. In 1991, her son was granted a family visa to reunite with his mother. Although it was impossible at that time to reunite with Mehret, her mother had the intention to fetch her later. In 1992, Mehert's mother married Mr Tuquabo, who was living in the Netherlands. She then moved with her son to the Netherlands to live with Mr Tuquabo. The couple subsequently had two children. In 1997 (i.e. almost eight years after having left Eritrea),

28 ECtHR 1 December 2005, no. 60665/00 (*Tuquabo-Tekle and others v. the Netherlands*). For a detailed analysis of this judgment, see T.P. Spijkerboer, 'Structural Instability: Strasbourg Case Law on Children's Family Reunion', *European Journal of Migration and Law,* vol. 11 (2009), pp. 271-293.

Mehert's mother applied for family reunification, so that Mehret could join her in the Netherlands. Mehret was at that time fifteen years old.[29] The Dutch Immigration and Naturalisation Service (INS) rejected the application: the requirement of the 'actual family bond' was not met because the close family ties between Mehret and her mother were considered to have ceased to exist. In the INS's view, since Mehret's mother had left Eritrea, Mehret had been living with her uncle and grandmother, she was integrated into the latter's family and thus no longer actually belonged to her mother's family.[30] In appeal, Mehret's lawyer put forward that there were sound reasons why the mother was unable to bring Mehret to Norway or the Netherlands before 1997. The lawyer adds that Mehret could no longer lead a normal life in Eritrea as she had reached marriageable age and her grandmother had decided that, for that reason, Mehret should stop going to school.[31] The national court held that since she fled Eritrea, the mother had no longer exercised parental custody over her daughter and found that Mehret was integrated into the family of her uncle and grandmother.[32] When the claim reached the ECtHR, it unanimously found that the way in which the Dutch government applied the 'actual family bond' requirement was contrary to article 8 ECHR. Mehret was then allowed to reunite with her mother in the Netherlands.

In its judgement, the Court held that the *family bond* between Mehret and her mother had not ceased to exist (par. 1.1 below). It also considered the circumstance that Mehret reached an age at which she runs the risk of *forced marriage*, in the country of origin, as a factor that plays in favour of the reunification with her mother (par. 1.2 hereafter).

## 1.1 Family bond

The Court first observed that parents who leave children behind when they settle abroad cannot be assumed as having definitively decided that their children are to permanently stay in the country of origin, without any intention of a future family reunification.[33] It then points out that the mother always intended[34] to be reunified with her daughter and that she involuntarily left her behind because she fled Eritrea in the course of a civil war to seek asylum in Norway.[35] Under these circumstances, the Court found that the requirement of the 'actual family bond' was not in conformity with article 8 ECHR. This Dutch requirement

29 *Tuquabo-Tekle and others v. the Netherlands*, par. 8-12.
30 *Ibid* at par. 12
31 *Ibid* at par. 13.
32 *Ibid* at par. 16.
33 *Ibid* at par. 45. The Court refers in this respect to one of its previous judgments: ECtHR 21 December 2001, no. 31465/96 (*Şen v. the Netherlands)*, par. 40.
34 *Tuquabo-Tekle and others v. the Netherlands*, par. 45.
35 *Ibid* at par. 47.

is applicable in the context of 'regular family reunion' (i.e. when the parent has a non-asylum related residence permit, such as Mehret's mother[36]; par. 1.1.1 below) as well as in the context of 'family reunion for refugees' (i.e. when the parent has an asylum residence permit; par. 1.1.2 hereafter).

### 1.1.1 Regular migration law

This paragraph presents a brief historical overview[37] of the development of the 'actual family bond' requirement in regular migration law regarding children who wish to reunite with their parents residing in the Netherlands.

To begin with, Dutch family reunification policy dates back to early 1970's, a period during which the Netherlands faced an increasing number of migrants from Suriname, a former Dutch colony. The Dutch state attempted to reduce this migration flow through certain policy measures, but they were found discriminatory because Surinamese were also Dutch citizens. In 1974, the negotiations regarding the independence of Suriname started and included a debate on the Dutch future migration policy that would regulate immigration rights of future Surinamese citizens. In this context, Suriname demanded a specific policy respecting Surinamese family norms, in particular common law marriages and extended family relations such as those based on child fostering.[38] The Suriname's demand was partly met with the result that family reunification was allowed with unmarried partners and with foster children, under the condition of having an 'actual family bond' with the applicant.[39] In 1976, the Dutch government decided to grant migrant workers the same possibility to reunite with other family members as long as they actually belong to the family of the applicant.[40] In this context, specific reference is made to children from a former marriage, illegitimate children, children of divorced parents and to foster children. Dutch courts welcomed this policy and adopted an open understating of family bonds.[41] The requirement of the 'actual family bond' was thus introduced in 1976 to enable extended family members to reunite when they were dependent on a family member residing in the Netherlands.[42] It was thus initially introduced as a facilitator for extended family reunification.[43]

36 Although she has an asylum background, her residence permit in the Netherlands was regular because she entered the country through regular family reunification.
37 This overview is largely based on the work of Sarah van Walsum as referred to hereafter.
38 S.K. van Walsum, *The Family and the Nation. Dutch Family Migration Policies in the Context of Changing Family Norms*, Newcastle upon Tyne: Cambridge Scholars Publishing 2008, at p. 144-145.
39 *Ibid*.
40 *Ibid* at p. 148.
41 *Ibid* at p. 153-154.
42 See also: *Kamerstukken II* 1975/76, 13 600, nr. 6, p. 47.
43 B. de Hart, T. Strik and H. Pankratz, *Family Reunification: A barrier or facilitator of integration? Country report of the Netherlands*, Nijmegen: Radboud University Nijmegen 2012, p. 31.

However, in 1982, the government found the courts' approach to family bonds too open and submitted higher appeals with the Council of State. This resulted in marriage regaining its place in family migration policy. The open definition of child-parent bonds was thus restricted. In practice, it was difficult to reunite with illegitimate children, children from a polygamous marriage and foster children. In the state's view: if the Netherlands accepts all these diverse forms of child-parent bonds, Dutch immigration law would be ineffective; and the merely fact that an applicant is 'appointed to be the legal guardian of the child' cannot be sufficient to be eligible for family reunification.[44]

In practice, this policy consisted in a restrictive interpretation of the 'actual family bond' requirement even in cases concerning minor children whose parents were residing in the Netherlands.[45] In 1985, the government communicated for the first time what the requirement concretely means: the family bond should have existed in the country of origin; it should not be broken; it was broken when the child is integrated into another family or if s/he was independently living, while the parent was not given custody or failed to provide financial support.[46] However, the period of time sufficient to admit that the child is integrated into the other family was not pre-determined in policy guidelines.[47]

In 2001, the requirement of the actual family bond was subject of a complaint with the ECtHR, submitted by a Turkish family.[48] The Dutch state considered the family bond between the parent and the child left behind in Turkey as ceasing to exist. However, the Court ruled that article 8 ECHR was violated after assessing the following criteria: the child's age, the situation of the child in the country of origin, and the extent to which the child is dependent on parents. The Court emphasized that the parent's decision to leave a child behind cannot be considered as irreversible. In this context, it explicitly referred to its jurisprudence in the field of family law and points out that family life is *dynamic* and that the state has a positive obligation to facilitate the normal development of family bonds.[49] In practice, however, the government consistently argued that this Court's judgment was very exceptional that it was not of general significance for Dutch family reunification policy.[50]

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44 Van Walsum 2008, *supra* note 38, at p. 155.

45 Aliens Circular 1982, Chapter B-19, section 2 ('*Verblijf bij echtgeno(o) t (e) of gezin*') par. 2.1.1 and 2.2.2 (<http://cmr.jur.ru.nl/cmr/vc/vc82/deelb/deelb19/>).

46 S.K. van Walsum, M. Hop and M. Kablou, 'Het recht op gezinsleven in Nederland van buitenlanders', *NJB*, vol. 62 (36) 1987, pp.1151-1155. See also T. Strike, C. Ullersma and J. Werner, 'Nareis: 'het feitelijke-band'-criterium in internationaal perspectief', *A&MR*, vol. 9 (2012), pp. 464-471, at p. 465.

47 S.K. van Walsum, 'Against All Odds: How Single and Divorced Migrant Mothers were Eventually able to Claim their Right to Respect for Family Life', *European Journal of Migration and Law,* vol. 11 (2009), pp. 295-311, at p. 297.

48 ECtHR 21 December 2001, nr. 31465/96 (*Şen v. the Netherlands).*

49 For a detailed analysis of the *Şen* judgment, see: Van Walsum 2009, *supra* note 47, at p. 302-303. See also: Spijkerboer 2009, *supra* note 28, pp. 271-293.

50 Van Walsum 2009, *supra* note 47, at pp. 305-308.

In 2002, the state communicated that the family bond is broken after a separation of more than five years except when there is no one to care for the child in the country of origin, or when the parent was not able to trace the child because of a war situation.[51] This 'five years' time limit was, however, continuously challenged in national courts and in 2004 the issue reached the ECtHR in the context of the *Tuquabo-Tekle* case. Although the separation between Mehret and her mother lasted for a period longer than five years, the Court found the family bond as not having ceased to exist. In the Court's view, 'parents who leave children behind while they settle abroad cannot be assumed to have irrevocably decided that those children are to remain in the country of origin permanently and to have abandoned any idea of a future family reunion'.[52]

In October 2006, almost ten months after the Court's judgment, the government communicated that the actual family bond needs to be re-interpreted in the light of the *Tuquabo-Tekle* judgment.[53] The government reported that parents and their biological children continue to have a family bond that cannot easily end, because family life in the sense of article 8 ECHR only ends under very exceptional circumstances. [54] Since then, the requirement of the actual family bond is met when family life in the sense of article 8 is established except when the child is self-reliant, has formed its own family, or when s/he is charged with the care of children born outside marriage.[55]

To sum up, the requirement of the actual family bond was initially introduced as a facilitator, but it was later interpreted in a restrictive way and became an obstacle. As a result of international jurisprudence, the Dutch state amended the requirement to be in line with article 8 ECHR. Since 2006, this provision should be guiding when interpreting family bonds in the context of family reunification. This means that: family life should be seen as a dynamic process; parents and their children continue to have a family bond that cannot easily be considered as ending because family life only ends under very exceptional circumstances; and the parent's decision to leave the child behind should not be seen as irreversible. This articulates the family-unit approach within which the family is the unit of the analysis, not the individual: the family acts as an intermediate group between the state and the individual; and family members are viewed as interlinked individuals belonging to the family unit. This approach embraces what is called 'diversity' approach to parenthood within which the nuclear family model is not guiding, in contrast to the 'integrative' approach within which marriage is guiding.[56]

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51 *Ibid* at p. 305. See also: *Kamerstukken II* 2001/02, 26 732, nr. 98.
52 *Tuquabo-Tekle and others v. the Netherlands*, par. 45.
53 *Kamerstukken II* 2006/07, 19 637, nr. 1089, p. 1-2.
54 *Ibid* at p. 2-3.
55 *Ibid* at p. 1.
56 L.C. Mcclain & D. Cere (eds), *What is Parenthood? Contemporary Debates about the Family*, New York and London: New York University Press 2013, at p. 2-5.

The 2006 policy change can be seen as the end of the story of the 'actual family bond' in the context of regular migration law. However, as nicely pointed out by Sarah van Walsum, that 'happy' ending was not self-evident and the *Tuquabo-Tekle* judgment alone was not the exclusive reason behind it.[57] In addition to the ECHR's critique, in the period between that judgment and the government's 2006 policy amendment (namely more than 10 months), the requirement had been the subject of a legal debate within which courts were not convinced that it was in line with international and European law.[58] The 2006 amendment can thus be seen as a social change that was achieved through 'law'. In the words of Sarah van Walsum, the story of the actual family bond in regular migration law reveals that

> '(…) law, and hence also universalistic principles as expressed through European human rights law, is not monolithic, but fragmented and fraught with contradictions and logical flaws. In serving conflicting interests, it can also facilitate surprising coalitions. It is, after all, nothing more and nothing less than the result of dynamic processes of human interaction. (…) There is nothing inevitable or irreversible about the workings of the European Convention. The effectiveness of this, or any other expression of human rights law, remains dependent of the concrete power relations in which it is mobilized.'[59]

What about the story of the actual family bond in refugee law? How are family bonds approached and interpreted in the context of family reunion for children of refugees residing in the Netherlands? The next paragraph introduces this issue and lays down the path to my first case study, namely 'family reunion for foster children of refugees'.

### 1.1.2 Refugee law

Although the 1951 Refugee Convention[60] is silent on the right to family reunification for refugees, the Final Act of the 1951 United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons[61] recommends states to take 'the necessary measures for the protection of the refugee's family, especially with a view to: ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country'.[62] Similarly,

57 Van Walsum 2009, *supra* note 47, at p. 297.
58 *Ibid* at p. 309.
59 *Ibid* at p. 311.
60 UN General Assembly, *Convention Relating to the Status of refugees*, 28 July 1951, United nations, Treaty Series, vol. 189, p. 137, as amended by UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267.
61 UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, 25 July 1951, A/CONF.2/108/Rev.1.
62 Recommendation B of this Act stipulates as follows: "THE CONFERENCE, "CONSIDERING that the unity of the family, the natural and fundamental group unit of society, is an essential right of the refugee, and that such unity is constantly threatened, and "NOTING with satisfaction that, according to the official commentary of the *ad hoc* Committee on Statelessness and Related Problems (E/1618, p. 40) the rights granted to a refugee are extended to members of his family, "RECOMMENDS Governments to take the necessary measures for the protection of the refugee's family, especially with a view to: (1) Ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the

the United Nations High Commissioner for Refugees (UNHCR) Handbook stipulates that: 'If the head of a family meets the criteria of the definition, his dependents are normally granted refugee status according to the principle of family unity.'[63] The same Handbook prescribes that 'the principle of the unity of the family does not only operate where all family members become refugees at the same time' and that it 'applies equally to cases where a family unit has been temporarily disrupted through the flight of one or more of its members.'[64] Moreover, the Executive Committee on the international protection of refugees recommended that 'every effort should be made to ensure the reunification of separated refugee families' and hoped that 'countries of asylum will apply liberal criteria in identifying those family members who can be admitted with a view to promoting a comprehensive reunification of the family.'[65] In addition to these international norms, article 8 ECHR stipulates in its first paragraph that 'everyone has the right to respect for his private and family life'.[66] This shows that states are invited to admit the positive obligation consisting in taking the necessary efforts to make the reunification of separated members of refugee families possible.

At the national level, article 29 of the Dutch Aliens Act allows for the grant of asylum to certain groups of family members of people who have already been granted asylum. Asylum residence is granted to such family members not because they necessarily meet the asylum criteria, but because of their family ties to someone who does. In the parliamentary history of article 29 of the Aliens Act explicit reference is made to the above-mentioned international instruments and it is stated that article 29 implements those norms.[67] Both biological and foster children can be reunited with their parents holding an asylum status in the Netherlands.[68] Given the particular situation of refugees from war-torn countries, such as Somalia, and in the light of the international norms outlined above, we might expect that

family has fulfilled the necessary conditions for admission to a particular country; (2) The protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption."

63 UNHCR, *Handbook on Procedures and criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 1979, Chapter VI 'The principle of family unity', par. 184.

64 *Ibid* at par. 186.

65 UNHCR, *Family Reunification*, Conclusion No. 24 (XXXII), 21 October 1981.

66 The same words are included in article 7 of the Charter of Fundamental Rights of the European Union. In addition, article 24 (3) of this Charter stipulates that 'every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.' Further, the 'Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification' prescribes in its preamble (nr. 8) that 'special attention should be paid to the situation of refugees on account of the reasons which obliged them to flee their country and prevent them from leading a normal family life there. More favourable conditions should therefore be laid down for the exercise of their right to family reunification.' Besides, Article 9 (1) of the Convention on the Rights of the Child prescribes that states shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine that such separation is necessary for the best interests of the child. Further, article 10 (1) prescribes that applications by a child or his or her parents to enter or leave a state for the purpose of family reunification shall be dealt with in a positive, humane and expeditious manner. Finally, Article 10 (2) prescribes that a child whose parents reside in different States shall have the right to maintain on a regular basis personal relations and direct contacts with both parents.

67 *Kamerstukken II* 1998/99, 26 732, nr. 3, p. 6 & 38.

68 Paragraph C1/4.6.1 of the Aliens Circular as applicable before the 2009 amendment.

family reunification for children of refugees would be more facilitated than regular family reunification.[69] However, although refugees are exempted from the income requirement and administrative charges, the way in which the requirement of the 'actual family bond' was applied in their case shows that family reunion for children of refugees was more difficult to obtain. While the story ended in 2006 'happily' for parents holding regular residence permits, the struggle continued for parents holding an asylum status, as the interpretation of the requirement remained restrictive in their case.[70]

In the first place, the assessment of the family bond in the light of article 8 ECHR continued to be excluded from the proceedings. This exclusion was based on the so-called 'watershed' (i.e. strict distinction) between regular and asylum-related residence permits.[71] This distinction is enshrined in the Aliens Act.[72] The Council of State ruled that it implies that regular and asylum elements of residence claims should always be separately assessed.[73] Consequently, because article 8 ECHR does not constitute a ground for issuing an asylum residence permit, it is not applicable in the case of family reunion for refugees, because their reunification claims would lead to an asylum residence permit, not to a regular one. This means that arguments on the basis of article 8 could not be examined in the procedure of family reunion for refugees because of the strict distinction between regular and asylum-related residence. If refugee families want their applications to be assessed in the light of article 8, they should follow the regular procedure for which they have to pay administrative charges and have to comply with the income requirement. Thus, children of refugees were treated differently from children of parents holding regular permit residence when it comes to the role of article 8 EHCR in the procedure.

Another inequality concerns breaking the family bond. When the biological child is integrated into another family, the family bond was always considered to be definitively ceasing to exist.[74] Biological children of refugees were, therefore, treated differently from biological children of parents holding regular permit residence. Regarding foster children, the mere fact that the foster child is 'housed' in another family was sufficient to conclude that the family bond had ceased to exist. Unlike biological children of refugees, being housed in another family does not have to be definitive to conclude that the family bond

69 The Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification prescribes in its preamble (nr. 8) that 'special attention should be paid to the situation of refugees on account of the reasons which obliged them to flee their country and prevent them from leading a normal family life there. More favourable conditions should therefore be laid down for the exercise of their right to family reunification.'

70 S.K. van Walsum, 'Jurisprudentie over migratierecht en gezinsleven. Deel II: Artikel 8 EVRM', *A&MR,* vol. 10 (2010), pp. 520-530, at p. 523.

71 See for example ABRvS 10 December 2002, nr. 200205827/1.

72 For a discussion of the 'watershed' in the light of EU law, see H. Battjes, 'De waterscheiding en het Europese asielrecht', *A&MR*, vol. 2 (2010), pp. 56-58.

73 See for example ABRvS 26 June 2006, nr. 200509794/1.

74 Paragraph C1/4.6.1 of the Aliens Circular as applicable before the 2009 amendment.

ended in the case of foster children.[75] Foster children of refugees were, therefore, treated differently from biological children (of both regular and refugee parents) when it comes to breaking the family bond.

In 2009, the policy became more restrictive after the government communicated that the reunification procedure for foster children had been abused.[76] This policy basically implied that when the foster child is housed into another family *after* the parent fled the country of origin, the family bond is considered to be broken.[77] Foster children were thus differently treated from biological children when assessing breaking the family bond. In addition, reunification interviews, conducted with foster children at Dutch embassies to examine the family bond, were intensified.[78] Although the 2009 policy initially aimed at tackling fraud in the case of foster children, the procedure regarding biological children also became restrictive. In their case, as of 2010, parental DNA testing was no longer the first resort.[79] The idea is that since the actual family bond is not equal to the biological bond, interviews with biological children need first to be conducted, before offering a DNA testing, to prevent fraud and abuse.[80] The result of this policy was: problematic interviews[81] and high refusal rates[82].

The effects of the 2009 policy engendered a fierce legal and political debate that gave rise to landmark policy changes. Regarding foster children, the Council of State (2012) found the distinction between foster and biological children regarding breaking the family bond as contradictory with the law. The Council's judgement was subsequently incorporated in the Aliens Circular (2013) in which explicit reference is made to it.[83] This 2013 policy change implied that foster children and biological children would no longer be treated differently with regards to breaking the family bond.[84] Family reunification for foster children was therefore brought in line with family reunification of biological children. Regarding this latter group, the government communicated in 2013 that the interpretation of the actual family bond would be similar to its interpretation in regular family reunification: i.e. the family bond

75 *Ibid*.
76 *Handelingen II* 2008/09, 58, pp. 4686-4689.
77 Besluit van de Minister van Justitie van 24 juli 2009, nr. 2009/18, houdende Wijziging van de Vreemdelingencirculaire 2000, *Staatscourant* 2009 nr. 12691, 24 augustus 2009, pp. 1-2. [Hereafter: *WBV 2009/18*]
78 *Kamerstukken II* 2008/09, 19 637, nr. 1261.
79 Advies van de Kinderombudsman (KOM), *Gezinshereniging, Beleid en Uitvoering 2008-2013*, (KOM/003/2013), Den Haag: KOM 2013, p. 17.
80 *Kamerstukken I* 2012/13, 31 549, nr. J, p. 4-5.
81 Defence for Children International, *Kind in het buitenland mag bijna nooit naar ouder in Nederland*, Press release 5 January 2012, p. 4-10.
82 Letter from the Minister of Immigration and Asylum to Defence for Children, '*Wob verzoek tbv gezinshereniging*', 13 December 2011, nr. 5711168/11.
83 See ABRvS 10 October 2012, nr. 201112315/1/V1, par. 6.2 and Besluit van de Staatssecretaris van Veiligheid en Justitie van 30 mei 2013, nummer WBV 2013/13, houdende Wijziging van de Vreemdelingencirculaire 2000, *Staatscourant* 2013 nr. 15221, 7 juni 2013 [Decision to amend the Aliens Circular] (hereafter: *WBV 2013/13*), p. 5.
84 *WBV 2013/13*, p. 5.

will no longer be considered as broken when the child is integrated into another family; there is always family life in the sense of article 8 ECHR between parents and their minor biological children; the biological bond is equal to the actual family bond; the family bond can cease to exist only in exceptional cases.[85] Family reunification for biological children of refugees was, therefore, brought in line with article 8 ECHR and thus with regular family reunification. Since the biological bond is equal to the actual family bond, parental DNA testing would thus be the first step in the case of biological children. In addition, since foster children would no longer be treated differently with regards to breaking the family bond, article 8 ECHR would also be applicable in their case. This in particular means that the family bond can cease to exist only in exceptional cases. In addition to this policy change, the legal and political debate over the period between 2009 and 2013 resulted in the incorporation of article 12 of the Convention on the Rights of the Child (CRC) and the General Comment (No. 12) of the UN Committee on the Rights of the Child in the reunification procedure. Article 12 CRC prescribes that the state should assure to the child the right to freely express his/her views in all matters affecting him/her and that the child's views should be given due weight.[86] The General Comment (No. 12) aims to assist states when implementing article 12 and recommends conducting child-friendly interviews.[87]

The preceding briefly presented the story of the actual family bond in refugee law. The legal and political debate over the period between 2009 and 2013 triggered policy change consisting in: equality between 'refugee' and 'regular' children; equality between biological children and foster children; and implementation of child-friendly guidelines. How did this social change occur? Which actors participated in the debate that gave rise to it, and how? These and other related questions are addressed in the next chapter focusing on the debate on foster children that forms my first case study I will draw on to analyse how the dilemma under study is negotiated. The idea behind this focus is explained hereafter.

As previously mentioned (see Prologue), I wish to take a deeper look at how the dilemma of doing justice, through law, to individual freedoms without jeopardizing family life, and vice versa, is negotiated in Dutch refugee law. By deepening our understanding of how this dilemma is negotiated, I aim to contribute to the broader debate on family ties in refugee law. This contribution consists in gaining insight in the ways in which key actors deal with that dilemma as well as into the process within which it is negotiated. To gain these insights,

85 See *Kamerstukken I* 2012/13, 31 549, nr. M, p. 8 and *WBV 2013/13*, par. C2/4.3.

86 For a critical analysis of the 'voice' of the child, see: L. Lundy, 'Voice is not enough: conceptualising Article 12 of the United Nations Convention on the Rights of the Child', *British Educational Research Journal*, vol. 33(6) (2007), pp. 927-942.

87 In paragraph 34, the UN Committee on the Rights of the Child recommends as follows: 'A child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age. Proceedings must be both accessible and child-appropriate. Particular attention needs to be paid to the provision and delivery of child-friendly information, adequate support for self-advocacy, appropriately trained staff, design of court rooms, clothing of judges and lawyers, sight screens, and separate waiting rooms.' General Comment No. 12 of the UN Committee on the Rights of the Child, 'The right of the child to be heard' (GRC/C/GC/12), 2009, par. 34.

we need to closely look at cases in which the dilemma is at stake. One of these cases is family reunification for minor children of refugees. My aim is, however, not to study family reunification itself, but the dilemma under study. Obviously, this dilemma is not at play in all parts of the debate on family reunification for children of refugees. We thus need a focal point.

Arguably, the dilemma is most visible in the case of family reunion for foster children compare to that of biological children. Reunification of children with their biological parents is generally viewed as being in the interest of the child. In contrast, the system of child fostering is generally viewed as bearing both the potential to protect and oppress the child: 'while in one position the foster practices may hurt, in another position they may be advantageous'.[88] There is no agreement over the definition of this family practice, but it is generally viewed as a functional way to delegate the parental role of education and nurturance to other family members, neighbours or other community members.[89] Instead of using the term 'child fostering', other scholars refer to: social parenthood; exchange of children; child relocation; child adoption; and child mobility.[90] The double-edged nature of child fostering (protection/oppression) is acknowledged in anthropological literature[91] and can also be illustrated by the story of Sahro (see Prologue). Sending Sahro back to stay with her grandmother in Kenya could be seen as child fostering that, from the perspective of her parents, aims at Sahro's re-education. This can therefore be seen as a source of protection of the child in the sense of 'education', at least from the perspective of her parents. In contrast, from the perspective of the AIRE Centre, sending Sahro back to stay with her grandmother is a form of child trafficking.[92] Since the dilemma under study is the central subject of my study, my focus on foster children would help deepen the analysis of how it is negotiated.

My first case study, therefore, should be seen as a 'photograph' of family reunification taken through the 'viewfinder' of foster children. This focus has two main consequences for my analysis and findings. It first results in the exclusion of the debate on parental DNA testing from the analysis. In addition, it disables a deeper comparison between the policy regarding biological children, on the one hand, and foster children, on the other. However, these consequences are not significant because my aim is to examine the dilemma and not the whole debate on family reunification. Moreover, since the issue of family reunification

88 C. Notermans, 'Children Coming and Going: Fostering and Lifetime Mobility in East Cameroon', in: E. Alber, J. Martin & C. Notermans (eds), *Child Fostering in West Africa: New Perspectives on Theory and Practices*, Leiden: Brill 2013, pp. 155-176, at p. 175.

89 Alber et al 2013, *supra* note 88, at p. 5.

90 *Ibid.*

91 See for example Notermans 2013, *supra* note 88 and J. Martin, 'Experiencing Father's Kin and Mother's Kin: Kinship Norms and Practices from the Perspective of Foster Children in Northern Benin', in: Alber et al 2013, *supra* note 88, at pp. 111-134.

92 See also: Glendon 1989, *supra* note 11, at p. 310.

only concerns one part of this study, the exclusion of biological children is not problematic because the main comparison I wish to make is between the ways in which the dilemma is negotiated within the debate on family reunification for foster children of refugees contrasted with the debate on 'forced marriage in refugee law' that forms my other case study I will draw on to analyse how the dilemma is negotiated. The next paragraph introduces this second family-related asylum claim.

## 1.2 Forced marriage

In the *Tuquabo-Tekle* judgement, the ECtHR considered the circumstance that Mehret reached the age at which she could be married off as a factor that played in favour of the reunification with her mother. The Court maintained that Mehret's age made her more dependent on her mother and that it makes it more pertinent to allow her to re-join the mother. The Court adds that although Mehret's mother disagreed with the decisions of the grandmother, she was unable to do anything about them as long as Mehret was staying in Eritrea.[93] Although the Court took the threatening forced marriage into account, it did not however admit a state positive obligation to provide protection to Mehret (in the sense of admission) solely on the basis of forced marriage.[94] In what follows, I will contextualise forced marriage within international human rights law (par. 1.2.1) and then present an overview of how the issue is approached in regular migration and domestic law (par. 1.2.2). I will subsequently introduce the issue of forced marriage in refugee law that forms my second case study (par. 1.2.3.).

### 1.2.1 International human rights law

The freedom of choice regarding marriage is incorporated in various international law instruments as being a fundamental human right strongly connected to the right of self-determination.[95] Article 16 of the Universal Declaration of Human Rights (UDHR) states that 'marriage shall be entered into only with the free and full consent of the intending spouses'. Article 23 of the International Covenant on Civil and Political Rights (ICCPR) stipulates that 'no marriage shall be entered into without the free and full consent of the intending spouses'. Similarly, article 1 of the Convention on Consent to Marriage prescribes that 'no marriage shall be legally entered into without the full and free consent of both parties'. Article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) states that 'marriage must be entered into with the free consent of the intending spouses'. Further, Article 16 of the Convention on the Elimination of all Forms of Discrimination against

93 *Tuquabo-Tekle and others v. the Netherlands*, par. 50.
94 *Ibid.*
95 C. Dauvergne and J. Millbank, 'Forced Marriage as a Harm in Domestic and International Law', *The Modern Law Review*, vol. 73(1) 2010, pp. 57- 88. See pp. 58-61 for a detailed overview of the relevant international legal framework.

Women (CEDAW) stipulates that states shall ensure the right freely to choose a spouse and to enter into marriage only with free and full consent.

With regard to the ECHR, it is first arguable that the effects of forced marriage are often sufficient to engage article 3, as it often involves physical and psychological harm that can amount to inhuman and degrading treatment.[96] It can also be advocated that forced marriage violates the right to respect for private life in the sense of article 8 that includes the right to bodily and psychological integrity.[97] Since this provision places a positive obligation on the state to take action to protect an individual from interference, through the action of another individual, in his/her private life, the state might have to intervene in the family to comply with that obligation.[98] However, in contrast to the right contained in article 3, the state can be permitted to not intervene in the family if the rights of other concerned individual family members justify non-intervention; for example, the rights of the family member forcing the person in question to marry, but also the rights of other family members.[99] In practice, while the claimant can argue that his/her bodily integrity is at risk and thus claims the right to respect for private life, the perpetrator can reply by arguing that state intervention forms an interference with his/her right to respect for private and family life. As put by Shazia Choudhry, 'it would therefore be possible to make an argument that the rights of the abuser, or perhaps even the victim, justify the state in not intervening in an Article 8 case'.[100] The balancing exercise concerns not only the right to family life of each individual family member but also their rights to private life.[101] An argument against state intervention could also be based on the 'right to autonomy' of the (potential) victim when he/she refuses to, for example, initiate criminal proceeding against the family, as this would breach his/her right to private and family life; she/he might only be willing that coercion to marry stops, but further the victim wants to continue enjoying family life with the family.[102] In contrast, arguments in favour of state intervention can be based on the notion of 'suspension of rights' in the spirit of article 17 ECHR; i.e. the rights (private and family life) of the perpetrator become suspended and then restored when there is no longer a threat to forced marriage.[103]

96 S. Choudhry, 'Forced marriage: the European Convention on Human Rights and the Human Rights Act 1998', in: A. Gill and S. Anitha (eds), *Forced Marriage: Introducing a Social Justice and Human Rights Perspective*, London: Zed Books Ltd 2011, pp. 67-89, at p. 73-74.
97 *Ibid* at p. 80-83.
98 *Ibid* at p. 79-80.
99 *Ibid* at p. 80-81.
100 *Ibid*.
101 *Ibid*.
102 S. Choudhry & J. Herring, Righting Domestic Violence, *International Journal of Law, Policy and the Family*, April 2006, at p. 7-9.
103 *Ibid* at p. 14 and further.

This shows that when the state is facing a situation in which forced marriage is or could be at paly, it has to deal with the possible clash between individual rights (in particular private life) and the right to family life of involved individuals. The relevant legal-dogmatic question in this respect is: should the balancing exercise come down in favour of the (potential) victim and thus justify state intervention in the family? Or should it come in favour of non-intervention because of the other rights at play? This illustrates the dilemma that is central to this thesis, namely: how to do justice, through law, to individual freedoms without jeopardizing family life, and vice versa? As will be explained in the next paragraph, within the Dutch debate on marriage migration and integration, the balance came down in favour of state intervention.

### 1.2.2 Regular migration law and domestic law

The question as to whether the state has a duty to provide protection when an individual faces forced marriage had been, since 2004, the subject of political and legal debate in the Netherlands.[104] The Green Left party propelled the issue into the parliament[105] and various NGOs[106] played an important role in maintaining the issue on the political agenda[107]. Along with this political debate, an important amount of policy-oriented as well as academic research had been conducted into partner choice, arranged marriages and forced marriages among migrants residing in the Netherlands.[108] Within this debate, forced marriage is understood as a violation of individual human rights, as part of foreign culture and regularly placed within the context of 'honour-based' violence.[109] The debate resulted in the introduction of various policy measures addressing forced marriages.

In 2004, an age requirement was introduced, increasing the sponsorship age and determining the minimum age for marriage migration at twenty-one years old.[110] Although this requirement was introduced along with a large number of measures that aimed to

104 M. de Koning & E. Bartels, *Over het Huwelijk gesproken: partnerkeuze en gedwongen huwelijken bij Marokkaanse, Turkse en Hindostaanse Nederlanders*, Amsterdam: VU 2005, p. 6.

105 *Handelingen II* 2003/04, 92, pp. 5931-5978, at p. 5942.

106 For example: 'Stichting Kezban'; 'Inspraakorgaan Turken'; 'Joint Organization of Moroccan Dutch'; 'Femme For Freedom'; and 'Platform Islamitische Organisaties Rijnmond'.

107 G. Yurdakul & A.C. Korteweg, 'Gender equality and immigrant integration: Honor killing and forced marriage debates in the Netherlands, Germany, and Britain', *Women's Studies International Forum*, vol. 41 (2013), pp. 204–214, at p. 206-208; S. Musa & E. Diepenbrock, *Verborgen vrouwen: een vergeten groep. Een verkennend onderzoek naar aard, omvang en aanpak van de problematiek van verborgen vrouwen in de deelgemeente Delfshaven (Rotterdam),* Den Haag: Stichting Femmes For Freedom 2013, p. 111; M. Vorthoren, *Hand in hand tegen huwelijksdwang. Een project van Stichting Platform Islamitische Organisaties Rijnmond*, Rotterdam: SPIOR 2008.

108 For a literature review, see: E.S. van Waesberghe, I. Sportel, L. Drost, E. Van Eijk & E. Diepenbrock, *Zo zijn we niet getrouwd. Een onderzoek naar omvang en aard van huwelijksdwang, achterlating en huwelijkse gevangenschap*, Utrecht: Verwey-Jonker Instituut 2014, p. 24-31. [Hereafter: Van Waesberghe et al 2014]

109 *Ibid*, at p. 25-26. See also: *Kamerstukken II* 2011/12, 32 175, nr. 35 and *Kamerstukken II* 2012/13, 32 175, nr. 50. See also: G.E. Schmidt & C.R.J.J. Rijken, *Juridische aspecten van Gedwongen Huwelijken,* Den Haag: Asser Instituut 2005, p. 9; and: S. Rutten, 'De Strijd tegen huwelijksdwang', *A&MR*, vol. 08-09 (2014), pp. 320-327, at p. 320.

110 'Besluit van 29 september 2004 tot wijziging van het Vreemdelingenbesluit 2000 in verband met de implementatie van de Richtlijn 2003/86/EG van de Raad van 22 september 2003 inzake het recht op gezinshereniging (PbEG L 251) en enkele andere onderwerpen betreffende gezinshereniging, gezinsvorming en openbare orde', *Stb.* 2004, 496, p. 1-2.

improve immigrants' integration, it was basically justified by its potential to prevent forced marriages. In the government's view, the age requirement ensures that the decision to migrate as a marriage partner is made on the basis of a voluntary choice. The idea is that as of the age of twenty-one, individuals are able to escape the influence of the family.[111] In this sense, age is considered as a protective factor based on the idea that forced marriage affects predominantly younger persons.[112]

In 2013, a law that aims to extend criminal prosecution of forced marriages, polygamy and female genital mutilation entered into force.[113] In this context, the criminalisation of 'forced continuation' of marriage was from that date onwards incorporated in article 284 of the Dutch Criminal Code. Forced (continuation of) marriage can be prosecuted and perpetrators can be punished with two years in prison. If a citizen or an immigrant residing in the Netherlands forces someone abroad to marry, s/he can be prosecuted in the Netherlands even if forced (continuation of) marriage cannot be prosecuted in that other country.[114]

In 2014, the Law Against Forced Marriage was adopted.[115] The most pertinent provision of this law is that cross-cousin marriages are forbidden except when both partners declare that they act out of free choice.[116] The idea behind this provision is that cross-cousin marriages could be forced.[117] In this context, a circular was sent to the municipalities and included instructions on how to act when they detect cases of forced marriage.[118]

These measures illustrate how the Dutch state ascribed itself the positive obligation to protect (potential) victims of forced marriage. This approach is not unique, as forced marriage is generally understood in European countries as harm to be prevented by the state and as part of foreign culture.[119] The British response is worth mentioning, in particular the criminalization of forced marriage in the United Kingdom and the introduction of the British 'Forced Marriage Unit' that has various roles including rescuing victims of forced marriage.[120]

111 *Stb*. 2004, 496, p. 11.

112 This approach is criticized in the literature, for example in: G. Gangoli & K. Chantler, 'Protecting Victims of Forced Marriage: Is Age a Protective Factor?', *Feminist Legal Studies*, vol. 17(3) 2009, pp. 267-288.

113 'Wet van 7 maart 2013 tot wijziging van het Wetboek van Strafrecht, het Wetboek van Strafvordering en het Wetboek van Strafrecht BES met het oog op de verruiming van de mogelijkheden tot strafrechtelijke aanpak van huwelijksdwang, polygamie en vrouwelijke genitale verminking', *Stb.* 2013, 95. See also *Kamerstukken II* 2010/11, 32 840, nr. 3.

114 *Kamerstukken II* 2012/13, 32 840, nr. 8.

115 Wet Tegengaan Huwelijksdwang: 'Wet van 7 oktober 2015 tot wijziging van Boek 1 en Boek 10 van het Burgerlijk Wetboek betreffende de huwelijksleeftijd, de huwelijksbeletselen, de nietigverklaring van een huwelijk en de erkenning van in het buitenland gesloten huwelijken', *Stb*. 2015, 354. See also Van Waesberghe et al 2014, *supra* note 87 at p. 19, 24, 122 & 138.

116 Article I(C) of the Law Against Forced Marriages.

117 *Kamerstukken II* 2009/10, 32 175, nr. 1, p. 6 & 11. See also: Rutten 2014, *supra* note 109, at p. 323.

118 *Handelwijze bij vermoedens van huwelijksdwang en achterlating, onttrekking van kinderen aan overheidstoezicht en medische verklaring* (d.d. 18 december 2013). It entered into force as of 6 January 2014.

119 Dauvergne & Millbank 2010, supra note 95, at p. 61-66. For a detailed discussion of the development in Europe, see: A. Sabbe, M. Temmerman, E. Brems & W. Leye, Forced marriage: an analysis of legislation and political measures in Europe, Crime Law and Social Change, 2014, vol. 62, issue 2, pp. 171-189.

120 I. Haenen, *Force & Marriage: The criminalisation of forced marriage in Dutch, English and international criminal law*, Cambridge-Antwerp-Portland: Intersentia 2014, at. p. 57, 247-258 and 289.

In sum, during the period between 2004 and 2014, forced marriage gained considerable political and legal attention in the Netherlands. The issue was understood within the Dutch debate as part of foreign culture and primarily of state concern. The debate resulted in the introduction of policy and legal measures aiming to protect individuals who (potentially) face forced marriage. This proactive role shows that the state considers itself as the principal agent of protection. Within this policy, migrants are represented as vulnerable and in need of state protection on the basis of human rights. This policy articulates the individualistic approach to family ties: the individual is the unit of the analysis, not the family; the individual comes to stand in a direct relation to the state. This shows that the balancing exercise of the different rights contained in article 8 ECHR came down in favour of state intervention. This policy targeted women and men residing in the Netherlands and migrants wishing to enter the Netherlands through marriage migration. What about those seeking refugee protection in the Netherlands because of a (threatening) forced (continuation of) marriage in their country of origin? Did the balance in their case come down in favour of state intervention in the form of refugee protection or, rather, in favour of non-intervention? The next paragraph introduces the issue of forced marriage in refugee law.

### 1.2.3 Refugee law

Although the issue of forced marriage in the asylum context is excluded from the political debate over the period between 2004 and 2014, the Netherlands received a considerable number of refugee claims based on forced marriage. (Ch1, par. 5.2) These claims were processed on the basis of article 29(1)(a) of the Aliens Act.[121] This provision stipulates that a refugee residence permit is granted to a person who is a refugee in the sense of the Refugee Convention.[122] The asylum seeker must demonstrate that the claim falls under the refugee definition included in article 1(A)(2) of the Convention:

> 'a person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.'

121 Article 29 of the Dutch Aliens Act also implements what the EU Qualification Directive (Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted) calls 'subsidiary protection', which is also a ground to gain asylum protection when the requirements of the refugee definition are not met. It concerns here article 3 ECHR and other persons in need of international protection as defined in the EU Qualification Directive.

122 UN General Assembly, *Convention Relating to the Status of refugees*, 28 July 1951, United nations, Treaty Series, vol. 189, p. 137, as amended by UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267.

This definition involves a set of considerations but basically consists of three key requirements: (i) a well-founded fear of being persecuted; (ii) demonstrable failure of state protection; (iii) that is causally connected to at least one of the persecution grounds cited in the definition.[123] In addition to these requirements, the state may determine that an asylum seeker is not in need of state protection if he/she has an internal relocation alternative (iv) or when the asylum claim is not credible (v).

*(i) Well-founded fear of being persecuted:* according to the EU Qualification Directive[124], to be considered as an act of persecution, the act in question must 'be sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, (…); or be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner (…)'.[125] Persecution can take, for example, the form of acts of physical or mental violence, including acts of sexual violence[126] and it can emanate from states and non-state actors.[127] It is the sustained or systematic failure of state protection in relation to one of the core entitlements, which has been recognized by the international community.[128] Besides the qualification of an act as persecution, the refugee definition requires the asylum seeker to demonstrate that the fear of being persecuted is well-founded. Basically, this means that it should be made plausible that upon return to the home country the asylum seeker will be victim of persecution.[129]

*(ii) Failure of state protection:* this requirement reflects the surrogate role of refugee protection that operates as a back-up to the protection to be offered by the state in the country of origin. When national state protection is available, it takes precedence over refugee protection.[130] Refugee protection comes therefore into play when it is demonstrated that the state in the country of origin is unable or unwilling to offer protection. The actors of protection are outlined in article 7 of the EU Qualification Directive that stipulates that protection against persecution can only be provided '(a) by the state; or (b) parties or organizations, including international organizations, controlling the state or a substantial part of the territory of the state, provided they are willing and able to offer protection'.[131] The second paragraph of

123 For a detailed discussion of the refugee definition, see: J. Hathaway & M. Foster, *The Law of Refugee Status*, Cambridge: Cambridge University Press 2014.

124 From a normative legal view, the EU Qualification Directive is not binding with regard to asylum claims submitted before the implementation deadline of October 2006 set by the Directive. The directive was recast in 2011: 'Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted'.

125 Article 9(1) EU Qualification Directive.

126 Article 9(2) EU Qualification Directive.

127 Article 6 EU Qualification Directive.

128 J. Hathaway & M. Foster, 'Failure of State Protection', in: Hathaway & Foster 2014, *supra* note 123, pp. 288-361.

129 J. Hathaway & M. Foster, 'Well-founded fear', in: Hathaway & Foster 2014, *supra* note 123, pp. 91-181. See also S.G. Goodwin-Gill & J. McAdam, *The Refugee in International Law,* Oxford: Oxford University Press, Incorporated, 2007.

130 UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, Geneva: UNCHR 2011, par. 106.

131 Article 7(1) EU Qualification Directive.

article 7 prescribes that the protection must be effective and of a non-temporary nature: 'such protection is generally provided when the actors mentioned under points (a) and (b) of paragraph 1 take reasonable steps to prevent the persecution or suffering serious harm, *inter alia*, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and when the applicant has access to such protection.'

*(iii) 'Persecution for reasons of':* after having satisfied the persecution requirement and demonstrated the failure of state protection, the asylum seeker must further establish a connection between the well-found fear of being persecuted and at least one of the five persecution grounds enumerated in the refugee definition, namely race, religion, nationality, membership of a particular social group or political opinion. The EU Qualification Directive states that there must be a causal link between the persecution grounds and the acts of persecution or the absence of protection against such acts.[132] It is not required to prove the causal link but only to make it 'plausible'. It is also considered sufficient if it is plausible that the well-founded fear of being persecuted is partly caused by the persecution ground, and not that the latter is the main cause of the former; having a link is sufficient.[133] Given that the choice of whether, and whom, to marry is incorporated in various international law instruments as a fundamental human right strongly connected to the right of self-determination, and given the understanding of forced marriage in the context of marriage migration, civil law and criminal law, one would expect that forced marriage would be seen in the asylum context as persecutory harm.[134]

*(iv) Relocation alternative:* according to article 8 (1) of the EU Qualification Directive, 'the state may determine that a claimant is not in need of protection if in a part of the country of origin, he or she (a) has no well-founded fear of being persecuted or is not at real risk of suffering serious harm; or (b) has access to protection against persecution or serious harm as defined in Article 7; and he or she can safely and legally travel to and gain admittance to that part of the country and can reasonably be expected to settle there'.

*(v) Credibility:* in addition, the asylum seeker should make a plausible claim. The Refugee Convention makes no mention of what should be understood under credibility and how it can be assessed. In Dutch asylum law, credibility has, however, a key and crucial role in decision-making as its assessment determines the facts to be used when examining the previous requirements.[135] Generally speaking, a claim is credible when (a) the declarations

132 Article 9(3) EU Qualification Directive.
133 J. Hathaway & M. Foster, 'Nexus to civil or political status' in: Hathaway & Foster 2014, *supra* note 123, pp. 362-461. See also Goodwin-Gill & McAdam 2007, *supra* note 129.
134 This reading follows J. Hathaway & M. Foster, 'Serious harm' in: Hathaway & Foster 2014, *supra* note 123, pp. 182-287.
135 For a detailed discussion of the credibility assessment in Dutch asylum law, see E. Metselaar, The motivation of the Dutch credibility assessment in return decisions and its judicial review in the light of relevant standards in international and EU

of the asylum seeker are consistent; and (b) the asylum account is in line with country of origin information.[136] Further, according to article 4 of the EU Qualification Directive, when aspects of the statements are not supported by other evidence such as documents, it is not necessary to confirm those aspects when, *inter alia*, the general credibility of the asylum seeker is established.

The above-outlined legal framework helps organize and follow the discussion of refugee cases that form the lion part of the data my second case study draws on. We will see that the balance that should be made, when the state faces a situation of forced marriage, came down in favour of state non-intervention. This suggests that the state approach to forced marriage in refugee law stands in disjuncture with its approach in regular migration law. This disjuncture is also visible if we bear in mind that while forced marriage is incorporated into regular migration law, criminal law and civil law, it is excluded from refugee law. Indeed, over the period between 2004 and 2014, no policy change regarding forced marriage in refugee law occurred. There has thus been a situation of social stagnation. How did such a situation come about? This and other questions are addressed in chapter 3 that presents my second case study I draw on to analyse how the dilemma of doing justice, through law, to individual freedoms without jeopardizing family life, and vice versa, is negotiated.

## SECTION 2: RESEARCH AIM

By taking a broader and deeper look at how the dilemma under study is negotiated, I aim to contribute to the thinking of family life and individual freedoms in refugee law. My contribution consists in presenting insights in the ways in which involved actors negotiate the dilemma as well as into the negotiation process. Obviously, the two examined family-related claims are merely parts of the broader debate on family-related asylum claims. They do not articulate the whole 'landscape' of the asylum debate on family relations. Nevertheless, examining both in one study can be seen as a 'representative photograph' because each of both exemplifies one of the possible two forms in which family relations can figure in asylum law, namely as 'protection' or as 'oppression'. The two case studies can therefore be seen as paradigmatic as they represent the two 'opposite' concerns that are at play when refugee law overlaps with the family.[137] Juxtaposing the two at once in a comparative analysis helps identify which understandings and processes are absent in one case but may appear in the other. To this aim, I adopt insights from critical framing theory. As explained below, this tool

law, (*master thesis*), Tilburg University, 2017. See in particular p. 72 and further.

136 See par. C1/1.2 & C1/3.2.1 of the Aliens Circular (as applicable in 2005) and par. C1/4.4.1 of the Aliens Circular (as applicable in 2019).

137 Compare Bassel's study in which she focuses on two case studies that are supposed to represent two 'opposite' models within the debate on refugee women: L. Bassel, *Refugee Women, beyond gender versus culture*, London and New York: Routledge 2012, at p. 3-4.

promotes understanding how involved actors view the issues at stake, helps appreciate what happens within the debate and facilitates fruitful cross-issue comparisons. So, before specifying my research questions, it is necessary to regard critical framing theory.

## SECTION 3: THEORETICAL MODEL

In this section, I present the theoretical model through which I analyse the ways in which the dilemma under study is negotiated. This model draws on a selection on the basis of a variety of theoretical concepts discussed within the literature on critical framing theory. The conceptual choices I made are a result of my inductive reading of the data. This does, however, not mean that other theoretical approaches based on the critical framing theory should be excluded. The variety of approaches should be seen as complementing, not as excluding, each other.[138] During the reading process and when formulating my research questions, I did not totally disregard the critical framing theory. I started with reading my data and then developed theoretical explanations for the patterns I observed via a number of theoretical hypotheses based on the critical framing theory. In other words, I generated meanings from the data to identify relationships and then build my theoretical model, but the critical framing theory was not totally ignored.[139] In what follows, I present three theoretical concepts: framing (par. 3.1), frames (par. 3.2), and the framing process (par. 3.3).

### 3.1 Framing

Framing theory originates from social movement, media and public policy studies. Kitzinger provides us with an accessible definition of framing:

> 'If you take a photograph you are literally 'framing' the scene – freezing an image of a moment in time, from a particular perspective. Through the view finder you select your focus, decide what to foreground and what to leave in the background, and exclude some aspects of the scene from the frame altogether. The resulting photograph does not show the whole of the landscape, it necessarily 'frames' a particular view'.[140]

138 M. Lieshout, N. Aarts & C. van Woerkum, *De straat is van ons allemaal! Een studie naar conflicten in publieke ruimtes en de rol van de overheid,* Wageningen: Wageningen Universiteit en Researchcentrum Communicatiewetenschap 2006, at p. 34. [Hereafter: Lieshout et al 2006] See also: C. Kruizinga, *What's in the Frame? Een case studie naar het ontwikkelingsproces van de UB op het Amsterdamse Binnengasthuisterrein: een framing analyse naar de frames van de Universiteit van Amsterdam, de VOL-BG en het stadsdeel Centrum,* (MSc Thesis Wageningen) 2014, at p. 77.

139 For a detailed discussion of 'inductive research', see for example: J. Dudovskiy, Inductive Approach (Inductive Reasoning), *Research Methodology Portal*, 2018, available at: https://research-methodology.net/research-methodology/research-approach/inductive-approach-2/

140 J. Kitzinger, 'Framing and Frame Analysis' in: E. Devereux (ed), *Media Studies: Key Issues and Debates*, London: Sage 2007, pp. 134-161, at p. 134.

Framing is a process during which reality is organized through 'categorizing events in particular ways, paying attention to some aspects rather than others, deciding what an experience or event means or how it came about'.[141] Journalists can be seen as popular framers as they frame stories and events. As put by Kitzinger:

> '(…) by selecting the 'relevant' facts and placing an event in what they consider to be the appropriate context. (…) They portray key players in the drama in particular ways (…). They also represent implicit and explicit ideas about causes, and solutions, to the problem.'[142]

In the view of Entman, framing is 'to select some aspects of a perceived reality and make them more salient in a communicating text in such a way as to promote a particular problem definition, causal interpretation, moral evaluation, and/or treatment recommendations'.[143] Framing is strongly connected to the specific norms, values, goals, interest, convictions and knowledge of involved actors.[144] It is a 'meaning work' and a process within which social movements are 'engaged as agents in a struggle over the production of mobilizing and counter-mobilizing ideas and meanings'.[145] In this sense, framing is viewed as a contentious process involving the production of frames differing from and possibly challenging already existing frames.[146]

Within social movement scholarship, a distinction is made between *legal framing* (i.e. framing within courtrooms) on the one hand, and *political framing* (framing beyond courtrooms) on the other: while legal framing is constrained by precedent, political framing is not.[147] In this context, Hilson observes that

> 'there may be a need for a cultural fit in order for political frames to be resonant; however, the precedential fit required of legal frames in addition to this cultural fit is more demanding. If the only precedents you have to go on are all based on a privacy right, it will be difficult to persuade a court to reframe this into, say, an equal protection frame: the court will typically feel constrained by the need to follow the previous judicial decisions based on privacy'.[148]

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141 *Ibid*.
142 *Ibid*.
143 R.M. Entman, 'Framing: Towards Clarification of a Fractured Paradigm', *Journal of Communication*, vol. 43(4) 1993, pp. 51-58, at p. 52.
144 N. Aarts & C. van Woerkum, 'Frame Construction in Interaction', in: N. Gould (eds) *Engagement. Proceedings of the 12th MOPAN International Conference*. Pontypridd: University of Glamorgan 2006, pp. 229-237, at p. 229.
145 R. Benford & D. Snow, 'Framing Processes and Social Movements: An Overview and Assessment' *Annual Review of Sociology,* vol. 26(1) 2000, pp. 611-639, at p. 613.
146 *Ibid* at p. 614.
147 C. Hilson, '*Legal Framing and Social Movement Research: An Overview and an Assessment*', 2009 (Unpublished Draft Paper), p. 11, available at: <https://ecpr.eu/Filestore/PaperProposal/695ed3d4-eaa4-440a-b90e-5f2bdf85476a.pdf> (last accessed 2 January 2019).
148 *Ibid* at p. 11. In this context, Hilson refers to: E. Andersen, *Out of the Closets and Into the Courts: Legal Opportunity Structure*

Hilson further notes that legal framing does not exclusively take place within courtrooms, but also within society in general in the form of 'legal narratives'.[149] In his view, ''such 'legal narrative' approaches, adopt a decentred, non- instrumental and social constructionist view of law, rather than placing the courts centre-stage as many lawyers are inclined to.''[150] Hilson adds that 'legal mobilisation in the courts has often been preceded and followed by attempts at political lobbying to have the relevant rights enshrined within state legislation'.[151] In terms of the nature of 'legal framing', Benford & Snow viewed 'civil rights' as a type of 'master frames' operating as a generic 'master algorithm' working across various movements from which frames of specific collective movements derive.[152] In the view of Pedriana, besides rights, 'law' itself is a 'master frame' since law, in his view, is ''a central meaning-making institution within which challengers do 'interpretative work' (…) and socially construct their grievances, identity and objectives''.[153] Pedriana emphasises that legal framing is a dynamic process involving contestation and interaction between and within movements:

> 'Because law's dominant symbolic framework of rules, rights and obligations sets boundaries on how collective actors conceive of their grievances and goals, on-going disputes over the proper construction of legal symbols is likely to take place both within a given movement itself and between the movement and its external environment. Disputes over the meaning or existence of rights provide perhaps the best illustration of such contested processes.''[154]

In terms of frame analysis, Hilson observes that when analysing legal framing it is necessary to proceed below the meta-level of the 'master frame' of 'rights' and 'law'.[155] In his view, legal framing is not necessarily and exclusively about violations of rights because there are other important aspects of legal frames beyond rights and not all legal frames are rights frames.[156]

According to Kitzinger, framing analysis in social movements studies is employed, for example, to analyse the strategies adopted by feminists and campaigners for worker's rights or lesbian and gay equality.[157] The question in such an analysis is 'how those questioning the status quo are able to negotiate shared understandings of some problems, articulate an alternative approach and urge others to join them'.[158] Framing analysis would thus help

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*and Gay Rights Litigation*, Ann Arbor: The University of Michigan Press 2005.

149 *Ibid* at p. 11-12.

150 *Ibid* at p. 12.

151 *Ibid* at p. 12.

152 Benford & Snow 2000, *supra* note 145, at p. 618.

153 N. Pedriana, 'From Protective to Equal Treatment: Legal Framing Processes and Transformation of the Women's Movement in the 1960s.' *American Journal of Sociology,* vol. 111(6) 2006, pp. 1718-1761, at p. 1723.

154 *Ibid* at p. 1728.

155 Hilson 2009, *supra* note 147, at p. 11.

156 *Ibid* at p. 14.

157 Kitzinger 2007, *supra* note 140, at p. 136.

158 *Ibid*.

to analyse how social change took place in the context of family reunion for foster children, on the one hand, and why it did not in the context of forced marriage in asylum law, on the other. It would enable me to analyse the dynamic within both contexts and to draw lessons for the future.[159] Further, the analysis of legal and political framing therefore, as a consequence, helps to find out whether legal framing is always constrained by precedent; whether legal framing was preceded and/or followed by political framing; and to analyse the interaction between both processes.

## 3.2 Frames

In framing scholarship there is no single and uniform definition of the concept of the 'frame'. Writers generally agree that this concept is vague and can be used in different ways. Instead of viewing this as weakness, they generally agree that the vagueness of this concept makes it very useful rather than the opposite.[160]

*Definitions*

Goffman defined the frame by referring to systems allowing us to 'locate, perceive, identify and label' the various events in our lives.[161] Frames are also defined as principles composed of 'little tacit theories about what exists, what happens, and what matters'[162]; and as 'cognitive windows' through which events are viewed.[163] Frames are also viewed as providing 'maps indicating various points of entry'; 'signposts at various crossroads'; highlighting 'the significant landmarks'; and as warning 'of the perils of other paths'.[164] In the context of public policy, Verloo and Lombardo define the policy frame as an 'organising principle that transforms fragmentary or incidental information into a structured and meaningful *problem,* in which a *solution* is implicitly or explicitly included' (emphasis in original).[165] This definition provides the two basic dimensions of the frame, namely the problem (diagnosis) and the respective solutions (prognosis). When defining the problem, it is also implicitly or explicitly established whose problem it is and who is responsible for

159 S. Kaufman, M. Elliott & D. Shmueli, "Frames, Framing and Reframing." *Beyond Intractability*. Eds. Guy Burgess and Heidi Burgess. Conflict Information Consortium, University of Colorado, Boulder. Posted: September 2003 <http://www.beyondintractability.org/essay/framing> (last accessed 31 December 2018). [Hereafter: Kaufman et al 2003]

160 Kitzinger 2007, *supra* note 140, at p. 138.

161 E. Goffman, *Frame Analysis: An Essay on the Organization of Experience*, New York: Harper & Row 1974.

162 T. Gitlin, *The Whole World is watching: Mass Media in the making and Unmaking of the New Left*, Los Angeles/London: University of California Press/Berkeley 2003, p. 6.

163 Z. Pan & G.M. Kosicki, 'Framing Analysis: an Approach to News Discourse', *Political Communication*, vol. 10(1) 1993, pp. 55-75, at p. 59.

164 W. Gamson, *Talking Politics*, Cambridge: Cambridge University Press 1992, p. 117.

165 M. Verloo & E. Lombardo, 'Contested Gender Equality and Policy Variety in Europe: Introducing a Critical Frame Analysis Approach' in: M. Verloo (ed), *Multiple Meanings of Gender Equality, A Critical Frame Analysis of Gender Policies in Europe*, Budapest-New York: Central European University Press 2007, pp. 21-49, at p. 33. See also: M. Verloo, 'Reflections on the Concept and Practice of the Council of Europe Approach to Gender Mainstreaming', *Social Politics*, vol. 12(3) 2005, pp. 344–365.

it; and when defining the respective solutions, it is established who should take action.[166] In the context of media studies, van Gorp situates frames as 'part of a culture' and localizes them 'quite independently of individuals'.[167] The frame, as such, is meta-communicative as it 'gives the receiver instructions or aids in his [or her] attempt to understand the message included within the frame'.[168] In the context of social movements, Snow and Benford define the frame as 'an interpretive schemata that signifies and condenses the "world out there" by selectively punctuating and encoding objects, situations, events, experiences, and sequences of actions in one's present or past environment'.[169]

*Frame paradigms: cognitive vs. interactive frames*

In the framing literature, distinction is made between two frame paradigms: '*cognitive*' and '*interactive*' frames. The key difference between both paradigms is that cognitive frames are pre-existing cognitive representations of reality (knowledge structures), whereas interactive frames are created during human interaction (interactional framing).[170] Cognitive frames are relatively static elements in comparison with interactive frames.[171] They are cognitive representations of the knowledge pre-stored in memory and which is linked to new situations. As Minsky put it:

> 'when one encounters a new situation (or makes a substantial change in one's view of the present problem), one selects from memory a structure called a 'frame'. This structure is a remembered framework to be adapted to fit reality by changing details as necessary.'[172]

Cognitive frames function as cognitive structures that help organize and interpret incoming information by linking them to pre-existing frames with regard to the perceived reality.[173] Within such frames, ''meaning is located 'between the ears' of each individual and ultimately depends on their private understandings and interpretations of information communicated and processed''.[174] In contrast, interactive frames are dynamic in nature: i.e. they are social constructions developed by involved individuals based on the meaning they give to actions

166 Verloo & Lombardo 2007, *supra* note 165, at p. 34.
167 B. van Gorp, 'Where is the Frame? Victims and Intruders in the Belgian Press Coverage of the Asylum Issue', *European Journal of Communication*, vol. 20(4) 2005, pp. 484–507, at p. 487.
168 *Ibid* at p. 487.
169 D.A. Snow & R.D. Benford, 'Master Frames and Cycles of Protest' in: A.D. Morris & C.M. Mueller (eds), *Frontiers in Social Movement Theory*, New Haven CT: Tale University Press 1992, pp. 133-155, at p. 137.
170 A. Dewulf, B. Gray, L. Putnam, R. Lewicki, N. Aarts, R. Bouwen & C. van Woerkum, 'Disentangling approaches to framing in conflict and negotiation research: A meta-paradigmatic perspective', *Human Relations*, vol. 62(2) 2009, pp.155-193, at p. 156 & 158-165. [Hereafter: Dewulf et al 2009]
171 *Ibid*, at p. 159.
172 M. Minsky, 'A framework for representing knowledge', in: P.H. Winston (ed.) *The psychology of computer vision*. New York: McGraw-Hill, 1975, pp. 211-277, at p. 211.
173 *Ibid*.
174 Dewulf et al 2009, *supra* note 170, at p. 162.

and events in which they are involved.[175] Within interaction, specific frames are constructed by integrating past experiences, expectations regarding the future and the current context within which the interaction takes place.[176] The emphasis is on the meaning 'located between the noses of people' during the interactional process within which frames are constructed.[177] According to Dewulf et al:

> 'Frames are communicative devices that individuals and groups use to negotiate their interactions. Within this approach, the term *framing* [emphasis in original] may be more appropriate, since it captures the dynamic processes of negotiators' or disputants' interactions'. [178]

Within this interactive view, frames are 'built up piece-by-piece' and 'constituted of an innumerable number of elements, amalgamated during the on-going process of interaction'.[179] Since specific aspects of issues are defined during interaction, frames may develop and shift during interaction.[180] Frames are (re)constructed during interaction but on the other hand, they also determine the form of interaction. [181] The choice for a particular frame is determined not only by frames pre-existing in memory but also by explicit and implicit indications during interaction.[182] These frames are consciously and unconsciously used to achieve specific aims or to secure interests during interaction.[183]

*Frame types: characterisation frames and process frames*

Besides frame's paradigms, frames are also classified in various types: i.e. 'what it is that gets framed'.[184] For the purpose of my study, two frame types are relevant: the *characterisation* frame and the *process* frame.[185]

Characterisation frames are expressions of individuals or groups about 'the way in which they see the other': i.e. 'statements made by individuals about how they understand someone *else*

175 N. Aarts & C. van Woerkum, *Strategische Communicatie. Principes en Toepassingen*, Assen: Van Gorcum 2008, p. 39; Aarts & van Woerkum 2006, *supra* note 144, at p. 230; N. Aarts, C. Steuten & C. van Woerkum, *Strategische Communicatie. Principes en Toepassingen*, Assen: Koninklijke Van Gorcum 2014.

176 Aarts & van Woerkum 2006, *supra* note 144, at p. 230; N. Aarts, M. van Lieshout & C. van Woerkum, 'Competing Claims in Public Space: The Construction of Frames in Different Relational Contexts', in: W. Donohue, R. Rogan & S. Kaufmann (eds) *Framing Matters. Perspectives on Negotiation Research and Practice in Communication,* New York: Peter Lang 2011, pp. 234-253, at p. 236.

177 Dewulf et al 2009, *supra* note 170, at p. 162.

178 *Ibid* at p. 160.

179 G. Gonos, 'Situation' vs. 'Frame': The 'interactionist' and the 'structuralist' analysis of everyday life, *American Sociological Review*, vol. 42 (1977), pp. 854-867, at p. 860 cited in Dewulf et al 2009, *supra* note 170, at p. 160.

180 Dewulf et al 2009, *supra* note 170, at p. 160-161.

181 Aarts & van Woerkum 2006, *supra* note 144, at p. 230 & 232; Aarts & van Woerkum 2008, *supra* note 175, at p. 64.

182 B. Gray, 'Framing of Environmental Disputes', in: R.G. Lewicki, B. Gray and M. Elliott (eds), *Making Sense of Intractable Environmental Conflicts: Concepts and Cases*, Washington DC: Island Press 2003, pp. 11-34, at p. 13.

183 Aarts & van Woerkum 2006, *supra* note 144, at p. 230.

184 Dewulf et al 2009, *supra* note 170, at p. 165.

185 For an overview see: Dewulf et al 2009, *supra* note 170, at p. 165-175. See also: Kruizinga 2014, *supra* note, 138, at p. 26-28.

to be; that is, who are *they*?' [Emphasis in original][186] They are 'positive, negative or neutral depictions of other disputants and their attitudes'; they function as 'shorthand ways of describing people and making judgments about them'; and they 'contain explicit or implied expectations about how others should behave'.[187] These frames answer the question of 'who are they?' and give a reduced reflection on the character of other individuals or groups.[188] According to Shmueli et al, characterisation frames are closely related to stereotyping: they are 'reductionist labels, associating positive or negative characteristics with individuals or groups'.[189] They ''may undermine opponents' legitimacy, cast doubt on their motivation, or exploit their sensitivity''.[190] Within these frames, characterisation of the 'other' serves to reinforce the identity of the framing actor and to justify actions towards the 'other'.[191] In other words, the way in which the 'other' is viewed significantly differs from the way the 'framing actor' views itself.

With regards to process frames, they refer to the ways issues can be solved and involve differing views on the best possible way to solve the problem. As explained by Kaufman et al: 'Because of the wide complexity of possible actions and the uncertainty of their consequences, groups with shared interests and values may draw significantly different conclusions as to the best course of action within a particular dispute.'[192] For example, one party may argue that the involvement of a third 'neutral' party in the role of mediator can lead to the best solution. The other party can maintain that a court decision is necessary and leads to the fairest result.[193] As commented by Shmueli et al:

> 'Disputants' conceptions of power (the basis upon which social decisions are/should be made) (…) and conflict management (the legitimacy of particular approaches to resolving differences) are important in conflict dynamics. These frames shape disputants' assessment of which forms of power are legitimate and which are likely to advance their own position'.[194]

This shows why frame analysis is suitable for this study. Unpacking existing frames and reflecting on them in terms of paradigms and types would allow understanding how involved actors viewed the issues at stake and would provide relevant insights for future negotiations of the dilemma under study. Besides understanding existing views, critical

186 Gray 2003, *supra* note 182, at p. 23-24.
187 Dewulf et al 2009, *supra* note 170, at p. 168.
188 D. Shmueli, M. Elliott & S. Kaufman, 'Frame changes and the Management of Intractable Conflicts', *Conflict Resolution Quarterly*, vol. 24(2) 2006, pp. 207-218, at p. 211. [Hereafter: Shmueli et al 2006]
189 *Ibid*.
190 *Ibid*.
191 *Ibid*.
192 Kaufman et al 2003, *supra* note 159.
193 *Ibid*.
194 Shmueli et al 2006, *supra* note 188, at p. 211-212.

framing theory also helps, as highlighted below, to understand what happens within the debate.

## 3.3 Framing process

Besides the frame definition, paradigms and types, critical framing theory addresses the process of framing. In this context, it is not the frame that stands at the heart of the analysis but the process itself. In this vein, the following concepts need to be highlighted: the voice/silence dimension (par. 3.3.1); frame alignment and reframing (par. 3.3.2); and frozen frames (par. 3.3.3).

### 3.3.1 The voice/silence dimension

In addition to identifying and analysing frames, critical framing theory addresses the question of 'who speaks' within the framing process. The analysis includes the dimension of 'voice' besides the two dimensions of 'problem' and 'solution'. This critical dimension facilitates the identification of processes of inclusion and exclusion in terms of participation in the debate.[195] According to Lombardo et al, critical frame analysis is critical because it identifies 'who has a voice in defining problems and solutions in official policy documents enabling the detection of which actors are included or excluded from the possibility of framing an issue'.[196] When we add the voice dimension, frame analysis becomes a critical tool that not only aims to investigate the frames through establishing what the problem is and what possible solutions are, but also asks who speaks when defining them.[197]

Besides the question of which actors are speaking and what they 'say' during the framing process, it is also critical to pay attention to 'silences' of involved actors in order to identify the issues that have been excluded from and/or un-problematized during the debate.[198] This dimension enables the identification of processes of exclusion in the sense of 'silencing' issues. Obviously, when involved actors are silent about an issue or they mention it but they un-problematize it, this means that the 'voices' of persons/groups concerned with the issue and who might have the interest in including the issue in the debate can be seen as not 'heard'. This is a power issue. According to Lukes, the most effective and insidious use of power is to prevent conflicts and issues from arising.[199] In the words of Verloo & Lombardo

195 Verloo & Lombardo 2007, *supra* note 165, at p. 34.
196 E. Lombardo, P. Meier & M. Verloo, 'Stretching and bending Gender Equality: a Discursive Politics Approach', in: E. Lombardo, P. Meier & M. Verloo (eds) *The Discursive Politics of Gender Equality: Stretching, bending and policy making*, London: Routledge 2009, pp. 1-18, at p. 10.
197 Verloo & Lombardo 2007, *supra* note 165, at p. 34. See also Bassel 2012, *supra* note 137, at p. 30.
198 Verloo & Lombardo 2007, *supra* note 165, at p. 36. See also: G. Jones, *Tussen Onderdanen, Rijksgenoten en Nederlanders* (doctoral dissertation Amsterdam VU), 2007, p. 47-48.
199 S. Lukes, *Power. A Radical View,* London: Palgrave Macmillan 2005, at p. 27 & 111.

referring to Lukes: 'one of the levels at which power operates is precisely the situation in which an issue is unquestioned to the extent that it is not even formulated in the actors' minds nor openly discussed in political debates.'[200]

Both dimensions of 'voices' and 'silences' would enable me to identify not only strategies enhancing legal and policy change (social change) but also strategies reaffirming and reproducing the status quo (social stagnation).

### 3.3.2 Frame alignment and reframing

Frame alignment is a concept originating from the theory of social movement, within which it is considered as an important element of social mobilization: it occurs when separated frames are connected in equal or complementary frames and it is aimed at establishing connections between groups and/or individuals.[201] Frame alignment has therefore the potential to enhance major social changes. To quote Snow et al, 'frame alignment is a necessary condition for movement participation, whatever its nature or intensity'.[202] Frame alignment can occur in the form of frame bridging; frame transformation; or frame amplification.[203]

Frame *bridging* includes bridging frames or linking two or more unrelated similar ideologies regarding a specific problem or issue. It occurs when involved actors are able to expand or widen their target group through mobilizing individuals and/or groups with similar voices into action; frames of these actors are connected with each other and alliances are formed.[204] Frame *amplification* serves to clarify, reinforce or reanimate a pre-existing frame with respect to a particular topic, problem or events. Amplification concerns reinforcing of the aims of the actor in question as well as the beliefs and ideal cognitive elements that lead to concrete action.[205] Frame *transformation* is important when pre-existing norms, values and beliefs of a party do not match those of the other party.[206] In such cases, new values need to be developed and old meanings must be thrown away so that frame transformation takes place in order to fit within the frames of other parties.[207] In this vein, frame transformation bears similarities with the process of *reframing*, presented hereafter.

200 Verloo & Lombardo 2007, *supra* note 165, at p. 36-37.
201 D.A. Snow, E. Burke, S.K. Worden & R.D. Benford, 'Frame Alignment Processes, Micromobilization, and Movement Participation', *American Sociological Review*, vol. 51(4) 1986, pp. 464-481, at p. 464. [Hereafter: Snow et al 1986]
202 *Ibid* at p. 464 & 467.
203 *Ibid* at p. 467.
204 *Ibid* at p. 467-469.
205 *Ibid* at p. 469.
206 *Ibid* at p. 473-474.
207 *Ibid*.

During the process of negotiation, shifts can occur in both the frames themselves and the relative impact frames have on the dynamic of negotiation. This process is called *reframing*.[208] As observed by Mayer, 'reframing is the process of changing the way a thought is presented so that it maintains its fundamental meaning but is more likely to support resolution efforts'.[209] According to Gray, reframing 'occurs when disputants change their frames; that is, when they develop a new way of interpreting or understanding the issues in the dispute or a new way of appraising one or more of the other parties in the conflict.'[210] This involves 'standing back, observing, and reflecting on the fact that there is more than one way to view the issue'.[211] As stressed by Spangler: 'The ultimate goal of reframing is to create a common definition of the problem acceptable to both parties and increase the potential for more collaborative and integrative solutions'.[212] According to Kaufman et al, reframing 'may pave ways for resolving, or at least better managing, a dispute'.[213]

Frame analysis can be seen as a method that allows better understanding of the dynamics of past negotiations and better managing of existing and future negotiations.[214] According to Kaufman et al:

> 'Knowing what types of frames are in use and how they are constructed allows one to draw conclusions about how they affect the development of a conflict, and can be used to influence it. Thus, analysing the frames people use in a given conflict provides fresh insight and better understanding of the conflict dynamics and development. With such insight, and with the help of reframing, stakeholders may find new ways to reach agreements.'[215]

This can play a role in this research: when it appears that involved actors employ frames standing in the way of constructive and a positive processes, the insights into these frames can stimulate reframing.[216] In addition, frame analysis enables the detection of past frame alignment. Since social change occurred in the context of the debate regarding foster children, it is hypothetical that frame alignment took place. Moreover, since there was social stagnation in the context of the debate on forced marriage in asylum law, it is hypothetical that frame alignment did not occur.

208 Kaufman et al 2003, *supra* note 159.
209 B. Mayer, *The Dynamics of Conflict Resolution*, San Francisco: Jossey-Bass Publishers 2000 cited in: B. Spangler, "Reframing." *Beyond Intractability.* Eds. Guy Burgess & Heidi Burgess, Conflict Information Consortium, University of Colorado, Boulder. Posted: November 2003 <http://www.beyondintractability.org/essay/joint-reframing> (last accessed 4 January 2019).
210 Gray 2003, *supra* note 182, at p. 32.
211 *Ibid* at p. 32.
212 Spangler 2003, *supra* note 209.
213 Kaufman et al 2003, *supra* note 159.
214 *Ibid*.
215 *Ibid*.
216 Compare Kruizinga 2014, *supra* note 138, at p. 24.

### 3.3.3 Frozen frames

Frozen frames have the characteristic that they appear repeatedly in negotiations because they underline certain interests, reinforce arguments or in some way give a 'safe feeling'.[217] They are 'expressed by a lot of stereotyping or even stigmatizing and literally repeating arguments in different situations'.[218] Because people experience various uncertainties during negotiations, they stick to safe and well-known frozen frames that are continuously put forward during negotiations.[219] In such cases, they make use of 'simple heuristics, serving one specific goal'.[220] In the words of Dewulf et al:

> 'At the interactional level, individuals may move from their own frames towards a common framing that they share with the other parties. However, in the case of a perceived threat, individuals not only stick to their own frames, but they reinforce them, resulting in frozen frames.'[221]

Frames are frozen when there is no dynamism in the framing process. Frozen frames prevent involved parties from leaving their own frames and as there is no dynamic process stagnation can occur.[222] In this vein, we can say that frozen frames are cognitive frames and not interactive. Admittedly, when there is interaction and dynamism within the debate the chance that frozen frames emerge would be small. In contrast, when involved parties communicate very little or they do not communicate, the emergence of frozen frames is stimulated: due to the lack of communication, frozen frames are rarely nuanced or corrected.[223] In view of the social stagnation regarding forced marriage in asylum law, it is hypothetical that frozen frames exist within that debate. By having insights into these frames, the process of frame alignment and reframing can be stimulated: involved actors release their own frames or perspective with possible development of new perspectives and or shared perspective.[224]

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217 B. Gray, Freeze-framing: 'The timeless dialogue of intractability surrounding Voyageurs National Park', in: R. Lewicki, B. Gray & M. Elliot (eds), *Making sense of intractable environmental conflicts: Concepts and cases,* Washington, DC: Island Press 2003, pp. 91–125. [Hereafter: Gray 2003a].

218 Aarts & van Woerkum 2006, *supra* note 144, at p. 234.

219 *Ibid* at p. 233-234.

220 *Ibid* at p. 234.

221 Dewulf et al 2009, *supra* note 170, at p. 184. In this context, Dewulf et al refer to Gray 2003a, *supra* note 217.

222 Kruizinga 2014, *supra* note 138, at p. 23. In this context, Kruizinga refers to Aarts & van Woerkum 2008, *supra* note 175 and to S. Kaufman, 'Using Retrospective Frame Elicitation to Evaluating Environmental Dispute Resolution', in: L.E. Bingham, *Evaluating Environmental Dispute Resolution.* Washington, D.C: Resources for the future 2003.

223 Lieshout et al 2006, *supra* note 138, at p. 52.

224 Kruizinga 2014, *supra* note 138, at p. 23.

## SECTION 4: RESEARCH QUESTIONS

Before outlining my research questions, it is important to note here that the present study is legal, but it does not adopt a legal-dogmatic approach. I analyse legal questions, but not in the same way the judge would do.[225] Instead, it is the legal-dogmatic reasoning involved actors conduct when negotiating the dilemma under study that I address through a qualitative approach drawing on the critical framing theory.

In light of the previous sections, my main research question is the following:

- *How is the dilemma of doing justice, through law, to individual freedoms without jeopardizing family life, and vice versa, negotiated within the Dutch debate on family-related asylum claims?*

In the first section of this chapter, I introduced two case studies on the basis of which I wish to address my overreaching research question. In the first case, refugees claim that their family relations need to be protected against interference by the state (foster children of refugees) while in the second situation asylum seekers claim they need the protection of the state against the violence in their family relations (forced marriage). In order to address my main research question, I first need to have insight into the debate on both issues. This has led me to two sub-questions.

My first sub-question concerns foster children and stipulates as follows:

1. *How are asylum claims based on family life between refugees and their foster children negotiated within the Dutch political and legal debate?*

As explained above (par. 1.1.2), the debate surrounding family reunion for foster children of refugees was centred around two main issues: the definition of the family bond, on the one hand, and reunification interviews, on the other. This has led me to ask two questions: how are family bonds based on foster care viewed? How are reunification interviews negotiated? These questions are addressed in chapter 2 that reconstructs the political and legal debate on foster children over the period between 2009 and 2013.

225 In 2011, I conducted a legal-dogmatic research into how the dilemma under study should be addressed in a specific case within Dutch marriage migration policy, see Y. Arbaoui & H. Battjes, *Noodzaak en juridische haalbaarheid inzage in antecedenten aspirant-(huwelijks)partners*, Den Haag-Amsterdam: WODC-VU 2011.

My second sub-question concerns asylum claims based on forced marriage and stipulates as follows:

2. *How are asylum claims based on forced marriage negotiated within the Dutch political and legal debate?*

In this context, two questions are discussed: how is forced marriage approached within the political asylum debate? How are asylum claims based on forced marriage negotiated within courtrooms? These questions are addressed in chapter 3 that reconstructs the political and legal asylum debate on forced marriage over the period between 2004 and 2014.

The answers to my first and second sub-question should allow me to address my overreaching research question. In other words, chapter 2 and 3 should enable me to analyse how the dilemma under study is negotiated within the Dutch debate on family-related asylum claims. Because I wish to analyse the two debates in their interrelation through the critical framing theory, I address in chapter 4 the following three sub-questions:

3. *Which frames are constructed within the two debates?*
4. *To what extent are the identified frames aligned?*
5. *Are there differences in frames and degrees of frame alignment across the two debates?*

When answering the third sub-question, I analyse the frames by discussing how the issues at play are viewed and how involved asylum seekers and refugees are portrayed. When addressing the fourth question, I analyse the framing process by discussing the extent to which the identified frames are aligned, whether there are frozen frames and the extent to which involved asylum seekers have had voices within the debate, and how. Finally, through answering the fifth question, I comparatively juxtapose the two debates by reflecting on the identified frames as well as on the framing process. The answers to these three sub-questions form all together the answer to my overreaching research question.

## SECTION 5: DATA COLLECTION

The analysis of the two examined debates draws on three types of primary sources: policy documents; case law; reports of NGOs and reports of monitoring/advisory institutions. In this way, I guaranteed that the subject of my study was examined on the basis of several data sources. In this section, I explain how I collected and then selected the examined texts concerning the debate on foster children (par. 5.1) and those regarding forced marriage in asylum law (par. 5.2).

## 5.1 Foster children

The focus is on the debate over the period between 2009 and 2013 within which social change took place. This period should be seen as a particular episode in the history of Dutch asylum law that is put under examination. In what follows, I describe how I collected policy documents (A), case law (B) and other sources (C).

***A. Policy documents***

Policy documents include government policy letters, transcripts of parliamentary debates and the Guidelines of the INS (Immigration and Naturalization Service)[226] published by the three governments that took office between 2009 and 2013.[227] These documents are collected via the government's official database.[228] In terms of search words, I made use of the word part '*narei**', as the policy governing family reunification for refugees is named 'nareisbeleid'.[229] This search resulted in a considerable number of documents. By means of a quick scan of the collected texts, I selected those concerning family reunifications for foster children, while excluding texts on the reunification of other family members such as biological children, adult children and (marriage) partners. Since my aim was to examine the evolution of the debate around the requirement of the 'actual family bond' in the case of foster children, if a text discusses the definition of the family bond and/or the way in which it should be examined (burden of proof) in the case of foster children, the document in question was included in the selection of texts to be examined. This means that I excluded texts addressing other requirements, which should be met besides the actual family bond in order to be eligible for reunification.[230] Notably, the resulted selected documents exclusively concern Somali foster children wishing to be reunited with their parents holding asylum status in the Netherlands.

***B. Case law***

Regarding case law, the examined cases include judgments of Dutch regional courts (*Rechtbanken (Rb)*, hereafter: courts) and those of the Administrative Jurisdiction Division of the Dutch Council of State (*Afdeling Bestuursrechtspraak van de Raad van State (ABRvS)*,

226 These Guidelines are policy documents containing working instructions (*werkinstructies*) for decision-makers.

227 In 2009, the cabinet Balkenend IV was at office. It consisted of a coalition between three political parties: the Christian-Democratic Appeal (CDA), the Labour Party (PvdA), and the Christian Union (CU). As of February 2010, the PvdA left the cabinet after a political crisis. In October 2010, the cabinet Rutte-I took office until 2012. It consisted of the People's Party for Freedom and Democracy (VVD), the CDA and the Party for Freedom (PVV) as a 'tolerated coalition partner'. Because of a cabinet crisis, the PVV left the cabinet in 2011 and in April 2012 the cabinet resigned. In November 2012, the cabinet Rutte II took office until Marsh 2016. This cabinet consisted of a majority coalition between the VVD and the PvdA. See for more information: '*Kabinetten 1945-heden*', available at: <https://www.parlement.com/id/vh8lnhrp1x03/kabinetten_1945_heden> (last accessed 4 January 2019).

228 '*Officiële Bekendmakingen*', available at: <https://www.officielebekendmakingen.nl>.

229 I made use of the word-part '*narei**' in order to detect the texts in which the following words are cited: 'nareisbeleid', 'nareizen', 'nareist', 'nareisde', and 'nareisden'.

230 I excluded the following requirements: 'nationality'; 'travel term' (*nareistermijn*); and the 'consent-declaration' (*toestemmingsverklaring*, see WBV 2009/18, at p. 3/par. C2/6.1).

hereafter: Council of State) published between 2009 and 2013. Judgments are collected through three national databases.[231] A search through these three databases resulted in an overlap but also in new cases. In terms of search words, I made use of the term '*gezinsband*' (family bond). This search resulted in a considerable number of cases in which this key word is mentioned. Through a quick scan of the collected set, I selected solely cases on family reunification for foster children of refugees and I excluded cases regarding the reunification of other family members such as biological children, (marriage) partners and major children. In addition, I excluded cases addressing other requirements, which should be met to allow families to reunite.[232] Further, I consulted two national jurisprudence journals[233] in order to verify whether I did not miss relevant jurisprudence. This search did not result in any new findings. Notably, the resulted selected set of cases exclusively concerns applications submitted by Somali families.

***C. Other sources***

In addition to policy documents and case law, the second chapter of this study also draws on reports of NGOs and those of monitoring and advisory institutions involved in the debate between 2009 and 2013. I limited my collection and selection to reports which reached the legal and political debate; i.e. reports mentioned in transcripts of parliamentary debates and case law. As to NGOs, one report is identified and included in the analysis. It concerns a joint report published by Defence for Children International (DCI) and the Dutch Refugee Council (DRC).[234] Regarding monitoring and advisory institutions, I included relevant reports of the Children's Ombudsman (*Kinderombudsman,* KOM) and the Advisory Committee on Migration Affairs (*Adviescommissie voor Vreemdelingenzaken*, hereafter: ACVZ). The Children's Ombudsman is an independent institute that monitors whether children's rights are adhered to by the state and provides advice to the government and parliament regarding laws and policies concerning children's rights.[235] I included the 2013 KOM report on family reunification for children of refugees.[236] The ACVZ is an independent committee that advises the Dutch government and parliament on immigration law and policy. The ACVZ advisory reports are directed primarily at the government and are generally debated in parliament.[237] I included the 2014 ACVZ report on family reunion for children of refugees.[238] Although this

231 The database of the Dutch Refugee Council is available at: <www.vluchtweb.nl>; the database of the Council of State is available at: <www.rvs.nl> and the general national jurisprudence database is available at: <www.rechtspraak.nl>.

232 *Supra* note 230.

233 It concerns: 'Jurisprudentie Vreemdelingenrecht' (*JV*) and 'Rechtspraak Vreemdelingenrecht' (*RV*).

234 B. van den Berg, C van Os & A. Den Uyl, *Hoelang duurt het nog voordat we naar onze moeder kunnen? Barrières bij de Gezinshereniging van Vluchtelingen,* Leiden/Amsterdam: Defence for Children International (DCI) & Dutch Refugee Council (DRC) 2012 (Report available at: <www.vluchtweb.nl>). [Hereafter: DCI & DRC 2012]

235 See the website of Ombudsman for Children, available at: www.dekinderombudsman.nl.

236 KOM/003/2013, *supra* note 79.

237 See the website of the ACVZ, available at: www.acvz.nl

238 Adviescommissie voor Vreemdelingenzaken (ACVZ), '*Na de vlucht herenigd, advies over de uitvoering van het beleid voor nareizende gezinsleden van vreemdelingen met een verblijfsvergunning asiel*', Den Haag: ACVZ 2014. [Hereafter: ACVZ 2014]

report is published in 2014, and therefore outside the time frame of this study, it is included in the analysis because it is considered in the political debate as being a 'second opinion' on the 2013 Children's Ombudsman report. Notably, like in policy documents and case law, the collected reports of NGOs and monitoring/advisory institutions basically concern Somali children.

Finally, in July 2012, I was able to visit the Dutch embassy in Addis Ababa and witnessed two reunification interviews conducted with Somali children. My observations during these interviews are included in this study in order to give the reader a look into the interview setting and into the embassy context in which such interviews are conducted.

## 5.2 Forced marriage

The focus is on the period between 2004 and 2014. I have chosen this time frame for two reasons: the political debate on forced marriage started in 2004; and in the subsequent ten years (i.e. until 2014) there has been a considerable political and legal awareness of forced marriage in the context of marriage migration and integration. This made me wonder whether those developments are echoed in the asylum context over the same period. It can already be revealed here that this is not the case. In particular, there has been no political debate on forced marriage in the asylum context (A). For this reason, chapter 3 largely draws on country of origin information reports (B) and a large set of case law (C).

***A. Lack of political debate***

My search did not identify any policy letters or transcripts of parliamentary debates specifically addressing forced marriage in asylum law. I consulted the government's official database[239] by making use of the search phrase 'forced marriage' (*gedwongen huwelijk)*. This initial search resulted only in documents dealing with forced marriage in the context of marriage migration, integration and emancipation policy. I subsequently made use of the terms 'marry off' (*uithuwelijken*), 'marrying off' (*uithuwelijking*), 'married off' (*uitgehuwelijkt*). This search resulted in a repetition in terms of documents dealing with the issue in the context of marriage migration and integration, but it also detected two parliamentary debates in which the issue of forced marriage (*uithuwelijking*) is mentioned in the asylum context. However, the issue within these two single documents is only mentioned in passing and exclusively in the context of the debate on asylum protection for 'westernized' girls.[240]

239 '*Officiële Bekendmakingen*', available at: <https://www.officielebekendmakingen.nl>.
240 *Kamerstukken II* 2010/11, 19 637, nr. 1443; *Kamerstukken II* 2010/11, 19 637, nr. 1434.

Within these two parliamentary documents the issue of forced marriage is not thematized as being the subject of the debate but merely mentioned in passing.[241]

Besides the lack of policy letters and transcripts of parliamentary debates, NGO's reports specifically on forced marriage in asylum law are lacking. My search in the database of the Dutch Refugee Council in the way explained above did not result in the identification of any report dealing with the issue. In addition, my search in the government's official database in the same way did not result in the identification of any report of monitoring/advisory institutions addressing forced marriage in asylum law.

I then consulted the database of the ACVZ. This search resulted in the identification of four ACVZ publications dealing with forced marriage: three advisory letters (ACVZ 2010, 2012 and 2013) [242] dealing with forced marriage in the context of marriage migration and integration; and one advisory report (ACVZ 2005)[243] dealing with forced marriage in the context of marriage migration and *briefly* with the issue in the asylum context. This ACVZ 2005 report is based on two academic pre-studies (both published in 2005) commissioned by the ACVZ. The first pre-study aimed to comparatively investigate the place forced marriages occupy in the process of choosing a spouse (among Turks, Moroccans and Hindustani in the Netherlands) and does not pay any attention to forced marriage in asylum law.[244] The second pre-study aimed to review the legal aspects of forced marriage and deals *briefly* with forced marriage in asylum law.[245] Although this second pre-study was commissioned by the ACVZ, it is not included in my data collection as a 'policy-oriented document' because the views and opinions expressed in it are those of the authors and do not necessary reflect the position of the ACVZ. Instead, I considered this pre-study as an academic publication to which I refer when it is relevant.

The lack of political interest in forced marriage in the asylum context can further be illustrated by two key policy-oriented reports in which the issue in the asylum context is invisible. The first concerns the 2014 report published by the Verwey-Jonker Institute, in collaboration with the University of Maastricht and the NGO *Femmes for Freedom*.[246] This study was commissioned by the Dutch Ministry of Social Affairs and Employment and aimed

241 *Kamerstukken II* 2010/11, 19 637, nr. 1443, p. 2, 6 & 23; *Kamerstukken II* 2010/11, 19 637, nr. 1434, p. 7 & 29.

242 Adviescommissie voor Vreemdelingenzaken (ACVZ), *'Briefadvies huwelijks- en gezinsmigratie'* (nr. ACVZ/ADV/2010/004), Den Haag: ACVZ 2010; Adviescommissie voor Vreemdelingenzaken (ACVZ), *'Advies over het conceptwetsvoorstel tegengaan huwelijksdwang'* (nr. 001/2012), Den Haag: ACVZ 2012; Adviescommissie voor Vreemdelingenzaken (ACVZ), *'Briefadvies verhoging leeftijdsvereiste Nederlandse referent naar 24 jaar'* (nr. ACVZ/ADV/2013/007), Den Haag: ACVZ 2013.

243 Adviescommissie voor Vreemdelingenzaken (ACVZ), *'Tot het huwelijk gedwongen: een advies over preventieve, correctieve en repressieve maatregelen ter voorkoming van huwelijksdwang'*, Den Haag: ACVZ 2005. [Hereafter: ACVZ 2005]

244 M. de Koning & E. Bartels, *Over het Huwelijk gesproken: partnerkeuze en gedwongen huwelijken bij Marokkaanse, Turkse en Hindostaanse Nederlanders*, Amsterdam: VU 2005.

245 Schmidt & Rijken 2005, *supra* note 109, at p. 62-65.

246 Van Waesberghe et al 2014, *supra* note 108.

to gain insight into the scope of the problematic of forced marriages in the Netherlands. The report does not pay any attention to forced marriage in the asylum context. While the literature review[247] included in that report mentions a number of policy-oriented reports in the context of marriage migration and integration, it does not include the above-mentioned 2005 ACVZ report that briefly deals with forced marriage in asylum law. Further, although the Verweij-Jonker report refers to a study published by the NGO '*Vluchtelingen Organisaties Nederland'* (VON, Refugee Organizations Netherlands))[248], the latter addresses forced marriages among asylum seekers and refugees staying in asylum reception centers and the problems they face in terms of marriage migration, but nothing is mentioned about forced marriage in asylum law.[249]

The second illustration of the lack of political interest concerns the 2008 INS report titled 'Evaluation of Gender-Related Policy in the Netherlands'.[250] This report evaluates gender-related migration and asylum policy. It addresses human trafficking, 'honour-based' violence (HBV), domestic violence, female genital mutilation (FGM), homosexuality and transgender,[251] but over the whole report forced marriage is not mentioned at all.

The lack of political interest is further reflected in the absence of forced marriage in the Dutch Aliens Circular. While forced marriage is incorporated in the marriage-migration part of the Aliens Circular, it is invisible in the asylum part of this policy document. In addition, while forced marriage is not incorporated, other family-related claims, in particular female genital mutilation (FGM) and 'honour-based' violence (HBV), are thematized in the asylum chapter of the Aliens Circular.

In brief, policy-oriented documents (policy letters, transcripts of parliamentary debates) and NGOs report are lacking. Reports of advisory institutions are very scarce. There is only one single report identified (ACVZ 2005) and included in the analysis. We thus note a lack of political interest in forced marriage in the asylum context over the period between 2004 and 2014. This political *silence* can be seen as my first finding and is in contrast with the political attention paid to forced marriage in the context of marriage migration and integration (see par. 1.2.2 above).

247 *Ibid* at p. 24-31.
248 E. K. Szepietowska, A.F. Dekker & F. Özgümüş, *De Doos van Pandora. Huwelijksmigratie onder vluchtelingengroepen in Nederland,* Amsterdam: Vluchtelingen-Organisaties Nederland (VON) 2011.
249 For a short summary of the VON-report, see Van Waesberghe et al 2014, *supra* note 108, at p. 28.
250 Immigratie-en Naturalisatiedienst (IND), '*Evaluatie Gendergerelateerd Vreemdelingenbeleid in Nederland. Uitvoeringsbeleid, praktische invulling en gevolgen voor de vreemdeling'*, IND Informatie- en Analyse Centrum (INDIAC), July 2008.
251 *Ibid* at p. 9-10.

***B. Country of origin information reports (COI)***

Country reports are a collection of information from a variety of sources and are produced by the Dutch Ministry of Foreign Affairs. Although they are not policy-debate-oriented documents, they play an important role in the asylum procedure in terms of evidence and for this reason they are included in the analysis. In terms of collection, I consulted the database of the Dutch Refugee Council (DRC) because this database systematically includes all country reports published by the state.[252] I collected and selected all published country reports between 2004 and 2014. Besides 'General state reports' (*Algemeen ambtsberichten*) I also collected Thematic country reports (*Thematische ambtsberichten*) and the Terms of Reference (TOR) reports. While general state reports contain general information, thematic reports communicate information on a specific theme, such as the situation of women. While the Minister of Foreign Affairs drafts general and thematic reports, the INS drafts the Terms of Reference (TOR) reports. A TOR report consists of questions relevant for decision-making from the perspective of the INS. In practice, refugee NGOs, such as the DRC, are consulted and asked to provide their input when the INS is drafting the TOR report. The INS then submits the TOR report to the Minister of Foreign Affairs who subsequently incorporates the answers into the next general report. TOR reports are thus meant to 'actualize' existing country reports.

All collected reports were submitted to a quick scan in order to identify those in which forced marriage is thematized. To this aim, I employed two word parts ('*huw'* and '*trouw'*) in order to detect the reports mentioning (i) the phrase 'forced marriage' (*gedwongen huwelijk)*, (ii) the phrase 'force(d) to marry (*dwang om te trouwen/huwen; gedwongen om te trouwen/huwen)*, or (iii) the terms 'marry off' (*uithuwelijken*), 'marrying off' (*uithuwelijking*), 'married off' (*uitgehuwelijkt*) and 'to marry off' (*uit te 'huwelijken'*). This search showed that except three general country reports on Nigeria, one thematic country report on Nigeria and three TOR reports on Nigeria, all other country reports published between 2004 and 2014 on the DRC's database do not thematize forced marriage. That is, they do not contain a separate (sub)-section named 'forced marriage'.

***C. Case law***

The remarkable political silence on forced marriage in asylum law does not mean that over the period between 2004 and 2014 there have been no asylum applications on the basis of forced marriage. Indeed, Dutch case law databases[253] do contain a considerable pool of judgments in which forced marriage is part of the asylum claim. In search terms, I initially made use of the phrase: 'forced marriage' (*gedwongen huwelijk)*. This initial search

252 This database is available at: <www.vluchtweb.nl>.

253 Consulted databases are: the database of the Dutch Refugee Council, available at: <www.vluchtweb.nl>; the database of the Council of State, available at: <www.rvs.nl>; the general national jurisprudence database, available at: <www.rechtspraak.nl>; and the Migration-web database, available at: <www.migratieweb.nl>.

resulted in very few cases in which the phrase 'forced marriage' is mentioned as such. I then made use of the verb 'marry' (*trouwen* and *huwen*) to cover cases in which forced marriage is termed in the phrase 'force(d) to marry; *'dwang om te trouwen/huwen; gedwongen om te trouwen/huwen'*. I subsequently made use of the terms 'marry off' (*uithuwelijken*), 'marrying off' (*uithuwelijking*), 'married off' (*uitgehuwelijkt*) and 'to marry off' (*uit te 'huwelijken'*). These search terms produced some repetitions in cases but other judgements also emerged. Further, I also surveyed two national jurisprudence journals[254] in order to make sure I did not overlook any key judgements. This search did not, however, result in any relevant national case law on forced marriage in the asylum context published in the period between 2004 and 2014. It deserves to be mentioned that the majority of collected cases concern female applicants who are presumed to be heterosexual. I only found one case concerning a lesbian claimant and three cases concerning male applicants among whom one is homosexual. In terms of selection of case law, once a judgment 'mentions' forced marriage as part of the asylum account, it is included in the analysis. This means that I did not only include cases in which forced marriage is thematized as the main part of the claim and legal debate. Cases in which involved actors are silent on forced marriage, while it is part of the asylum account, are also included in the analysis. Further, it deserves to be noted that 'Higher Appeal Briefs' submitted by lawyers or the INS are often annexed to the judgments of the Council of State. These juridical procedural documents are also included in the selected data.

## SECTION 6: DATA ANALYSIS

In the light of my research questions, I analyzed my data to identify frames and the extent to which these frames are aligned. In this section, I explain how I achieved this aim in six steps combining inductive and deductive analysis. This section also helps to have insight into how I developed my theoretical model.

***Step 1: deconstruction of the data***

I started by reading my data through the two basic frame dimensions: diagnosis (what is the problem?) and prognosis (what are the proposed solutions?). In addition, I paid attention to the voice/silence dimension through answering two other questions when reading each text: who speaks within the text when defining the problem and respective solutions? Which issues are (un-) problematized within the text? Based on this first reading of the data, each text is deconstructed into three dimensions: diagnosis, prognosis and voice/silence.[255] This provided first insights into the two debates.

254 *Supra* note 233.
255 Compare the '*sensitizing questions*' in Verloo & Lombardo 2007, *supra* note 165, at p. 35.

***Step 2: looking for patterns within the debate***

After having deconstructed my data, I identified which frames are articulated within the problem definitions, on the one hand, and within the definition of solutions, on the other. I then elaborated a research report divided into two sections: frames within the diagnosis; frames within the prognosis. It appeared that there is an overlap between the two sequences in terms of frames, while other frames are articulated only within one of both. When the first scenario is the case, I regrouped the diagnosis and the prognosis under one frame. In this way, I was able to elaborate a research report presenting the identified frames deconstructed into sequences of diagnosis and/or prognosis. The resulted picture was, however, fragmented so that we cannot see the wood for the trees. With regard to the voice/silence dimension, I re-read the elements I identified on the basis of my first reading and then elaborated a research report explaining how family reunion for foster children became problematized, while forced marriage remained un-problematized, and by whom. These preliminary findings provided, together with the fragmented frames, further insights into the framing process within both debates.

***Step 3: back to theory and looking for broader patterns***

Because the identified frames provided us with a fragmented picture, I took distance from them and returned to the theory on critical frame analysis to look for explanations for my first findings. I then re-read the fragmented frames to revise them. To this aim, I adjusted my set of reading questions to include, besides the diagnosis and the prognosis, the question of 'how involved asylum seekers are represented within the problem definition and within solutions'. When reviewing the fragmented frames, I looked for aspects beyond law and rights. This is important because, as mentioned above, when analysing legal material, it is important to proceed below the meta-level of the 'master frame' of 'rights' and 'law', as legal framing is not necessarily and exclusively about violations of rights.[256]

In addition, I took into account four other criteria.[257] First, I paid attention to explicit understandings repeatedly appearing across the fragmented frames. This criterion concerns the frequency of the frame, but it is, however, not quantitative as it is based on my own perception of the occurrence of certain articulations. Second, I looked for implicit understandings in order to detect 'hidden' frames. Paying attention to implicit frames, which seem like common sense, is critical because they are the most powerful frames, as they come across as a transparent representation of reality.[258] Third, I looked within the fragmented frames for understandings articulated by different actors but for different aims. This criterion concerns the complexity of the frame in the sense that different actors

256 Hilson 2009, *supra* note 147, at p.11 & 14.
257 These criteria partly draw on those adopted in Verloo & Lombardo 2007, *supra* note 165, at p. 36.
258 Kitzinger 2007, *supra* note 140, at p. 151.

construct the same frame for different aims. Fourth, I took note of understandings telling us a story (about asylum seekers) across the fragmented frames. This criterion concerns the wideness of the frame: it does not only tell how the problem should be defined and what should be the solution, but also a representation of the asylum seekers who are the heart of the debate.[259] This analysis resulted in identifying three broader frames probably guiding the two debates. I then established theoretical explanations for these frames in terms of frame paradigms and frame types.

Regarding voices and silences, I first returned to the theory to look for theoretical explanations in terms of variants of frame alignment for the processes I already identified, namely: problematization within the debate on foster children, on the one hand, and un-problematization processes within the debate on forced marriage. It appeared that since social change was achieved within the debate on foster children, frame alignment probably took place between the frames of different actors. In contrast, since social stagnation occurred within the debate on forced marriage, such a frame alignment probably did not occur, and, instead, frozen frames flourished.

***Step 4: hypothesis***

The previous analysis led me to the following hypothesis: (i) the three identified frames probably guide both debates and (ii) alignment between the frames of different actors took place within the debate on foster children, while within the debate on forced marriage it did not. To test my hypothesis, I first reconstructed the two examined debates.

***Step 5: reconstructing the two debates***

I re-read the data through the following questions: What is the problem articulated within the text and how it is defined? Which solutions are proposed within the text to the articulated problem? Who speaks within the text when defining the problem and respective solutions? Which issues are (un) problematized? This re-reading also helped to check whether what I previously saw within the texts is indeed what the texts tell us. Based on the answers to those questions, I elaborated summaries for each text. These summaries also comprised the context and pertinent quotations from the examined text. In this way, the context and the framing dimensions (problem; solution; voice; silence) of the text are kept visible in the summaries. This helped to minimize the risk of presenting a pre-framed reconstruction of the debate.

The summaries concerning the debate on foster children are subsequently regrouped around two main themes: the family bond, on the one hand, and reunification interviews,

259 Verloo & Lombardo 2007, *supra* note 165, at p. 36.

on the other. I then organized both themes in a way that articulates the evolution of the debate. When doing this, I distinguished between the legal and political debate. The resultant reconstruction is presented in chapter 2. Regarding the summaries concerning the debate on forced marriage, they were regrouped around the key elements of the refugee definition and then organized in a way that distinction is made between the political and the legal debate. The produced reconstruction is presented in chapter 3.

In both chapters, I included the quotations as contained in the original texts. Quotes serve as original articulations of the problem definition and respective solutions. They also provide information about the actors speaking within the text and help the reader to have insight into the origin and context of each articulation. In addition, quotations in qualitative research reinforce the analysis and reliability of the results as well as the imitability of the research.[260]

***Step 6: test of the hypothesis***

After having reconstructed the two debates, I read chapter 2 and 3 to look for the three guiding frames through three questions: what is the problem and how is it defined? What solutions are proposed? How are foster children and their parents, on the one hand, and women fleeing forced marriage, on the other, portrayed within the problem definition and the proposed solutions? This analysis resulted in the identification of the three guiding frames and thus confirmed the first part of my hypothesis. These frames are presented in the first section of chapter 4. Further, based on the identified frames and on a second deductive reading of chapter 2 and 3 through the voice/silence dimension, I analyzed the relation between the three frames as well as the framing process. On the one hand, I identified frame alignment that has led to legal change within the debate on foster children. On the other hand, I identified silencing processes within the debate on forced marriage, which prevented legal change and allowed frozen frames to flourish. These findings confirm the second part of my hypothesis. The analysis of the framing process is presented in the second section of chapter 4.

## SECTION 7: OUTLINE OF THE THESIS

Besides the Prologue and the present introductory chapter, this thesis consists of three other chapters and an Epilogue. Chapter 2 describes how asylum claims based on family life between refugees and their foster children are negotiated. Chapter 3 reconstructs how asylum claims based on forced marriage are negotiated. In the light of my theoretical model, I

260 S.L. Morrow, 'Quality and trustworthiness in qualitative research in counseling psychology', *Journal of Counseling Psychology*, vol. 52(2) 2005, pp. 250–260; Kruizinga 2014, *supra* note 138, at p. 34 & 77.

first present in chapter 4 a critical frame analysis of the two debates and then discuss whether there are differences in frames and degrees of frame alignment across the two debates. This fourth chapter also presents the overall conclusion of the thesis, methodological reflections and suggestions for further research. In the Epilogue, I first present a broader look at the ways in which the dilemma under study is negotiated by contrasting the state approach to family ties in refugee law with its approach in regular migration law. I then close this book by sharing a personal reflection.

# 2

# Chapter 2

## Reconstructing the debate on foster children

This chapter answers my first research question by reconstructing the debate on family reunion for foster children of refugees. The focus is on the period between 2009 and 2013 during which key legal and policy changes occurred. I recreate how family bonds based on foster care are viewed (section 1) and how reunification interviews with foster children are negotiated (section 2). In concluding, I summarize the debate and then conclude (section 3). It is important to recall that the present chapter functions, like the next chapter, as the text on the basis of which I tested my hypothesis. In addition, as will be discussed in the concluding section, this chapter enables contrasting state approach to family ties in regular migration law (par. 1.1.1, Ch1), on the one hand, and its approach in refugee law as described in this chapter, on the other. This contrast will enrich our broader look, presented in the Epilogue, at how the dilemma under study is negotiated.

## SECTION 1: THE DEBATE ON THE FAMILY BOND

This section reconstructs the political debate (par. 1.1) and the legal debate (par. 1.2) on the family bond in the case of foster children.

### 1.1 Political debate

In March 2009, the government communicated that the influx of Somali asylum seekers had markedly increased in 2008 in comparison with 2007. The government referred in particular to the increasing number of foster children reuniting with Somali refugees residing in the Netherlands. As a result of suspicion, the state secretary decided to investigate whether Somali refugees had been abusing the family reunion procedure.[261] Since the state secretary identified fraud (par. 1.1.1), she decided to introduce policy measures to prevent it (par. 1.1.2). Although these measures were criticized within parliament (par. 1.1.3) the government decided to introduce them with high refusal rates as a result (par. 1.1.4).

#### 1.1.1 Fraudulent parenthood

During the parliamentary debate on the increasing influx of Somali asylum seekers, the sate secretary referred to the difficulty of checking the real existence of the family bond in the case of Somali refugees, because there were no competent authorities in Somalia who could provide documentary evidence of the family bond. The government advised that although parental DNA testing had regularly been used in the case of biological children, it was not helpful in the case of foster children, with the consequence that the Immigration

261 *Handelingen II* 2008/09, 58, pp. 4686-4689, at p. 4686.

and Naturalisation Service (INS) depended on the declarations of family members during reunification interviews. The state secretary presents the issue as follows:

> To know who is a family member of an admitted asylum seeker has been difficult since 1991. This has been a reason for me to investigate what is exactly going on and whether fraud and abuse are at play. (…) My research shows that in such cases we are very dependent upon the statements of concerned persons. We must be aware of this as a risk. I found sufficient indications in my research to say that measures should be taken to mitigate this risk. I do not say that I will investigate whether there is a problem; I say that I have indications that there is a problem. The measures to be taken will be communicated in the Somalia Letter.[262]



In April 2009, the state secretary communicated the policy letter called the 'Somalia Letter' [263] to the parliament. The government first advises that Somalis form the largest group of asylum seekers in the Netherlands and that the increasing asylum flow over the period 2007-2008 continued in 2009. Second, the government stated that within this Somali influx: the percentage of family reunification applications was strikingly high; and the number of family reunification applications submitted by Somalis increased by 75% in 2008 in comparison with 2007.[264] Further, the government reported that 60% of adult Somali refugees in the Netherlands declared to have one or more foster children. The government added that Somalis who applied for asylum in January 2009 reported during the asylum interview to have, all together, around 500 foster children.[265] In the view of the state secretary, even if we take into account that the high number of foster children can partly be clarified by the war situation in Somalia, where many children lost their parents and for this reason become integrated as foster children in another family, the number of foster children reported by Somali refugees is still high.[266]

Additionally, the government communicated that there were indications that the family reunion procedure for foster children had been abused. The state secretary observed that it was striking that, in contrast to earlier behaviour, Somali refugees began to report having foster children left behind in the country of origin. This increase in the number of reported foster children started in 2007 when the INS began to routinely apply parental DNA testing to establish the family bond in the case of biological children.[267] The government considered this sudden increase in the number of foster children as a trend showing that abuse persists

262 *Handelingen II* 2008/09, 58, pp. 4686-4689, at p. 4686-4687.
263 *Kamerstukken II* 2008/09, 19 637, nr. 1261.
264 *Kamerstukken II* 2008/09, 19 637, nr. 1261, p. 1.
265 *Kamerstukken II* 2008/09, 19 637, nr. 1261, p. 3-4.
266 *Kamerstukken II* 2008/09, 19 637, nr. 1261, p. 3.
267 *Kamerstukken II* 2008/09, 19 637, nr. 1261, p. 2.

and changes according to the measures taken by the INS, such as parental DNA testing.[268] The state secretary reiterated that because DNA testing is not applicable for foster children and because there are no competent authorities in Somalia, the INS depended on the declarations of involved family members. The state secretary further stated:

> The definite impression is that foster children reported to be family members had not been in all cases belonging to the family of the sponsor before this person left Somalia. One reason for this suspicion is the high numbers of reported foster children.[269]

In May 2009, the parliamentary debate on the so-called 'Somalia Letter' was held.[270] During this debate, the Christen Union party (CU) observed that although it is absolutely understandable that people flee Somalia, the Netherlands cannot accept the procedure being abused. The CU stated that each introduced measure was met with a new phenomenon to circumvent it, referring to the sudden increase in the number of foster children when parental DNA testing was introduced.[271] The Christian Democratic Appeal party (CDA) expressed considerable anxiety about the high asylum influx and about the stories of people arriving with large numbers of foster children.[272] The People's Party for Freedom and Democracy (VVD) referred to stories from the asylum reception centres about fraud and child smuggling and stressed that 'the reality is unfortunately that we have been cheated on all sides'.[273] Due to the suspected fraud and abuse, the government communicated in the 'Somalia Letter' that specific measures should be taken to ensure that only foster children who belong to the family of the sponsoring parent are granted family reunification.[274]

### 1.1.2 Fraud measures

In the 'Somalia Letter', the government first communicated that foster children who are not reported during the asylum interview, by the would-be parent, would not be granted family reunification. In the government's view, it is reasonable to expect that a parent would report all his/her foster children during the asylum interview. In addition, the foster child and the parent will be simultaneously interviewed in order to avoid fraud when examining the family bond. Further, the burden of proof would be stricter: parents should do everything to demonstrate that the foster child actually belonged to the family. Besides, the would-be family bond between parents and foster children would *not easily* be accepted, and when the foster child is *housed* in another family *after* the foster parent fled the country of origin, the family bond will be considered as ceasing to exist.[275]

268 *Kamerstukken II* 2008/09, 19 637, nr. 1261, p. 7.
269 *Kamerstukken II* 2008/09, 19 637, nr. 1261, p. 3.
270 *Handelingen II* 2009/09, 83, pp. 6453-6486.
271 *Handelingen II* 2009/09, 83, pp. 6453-6486, at p. 6460.
272 *Handelingen II* 2009/09, 83, pp. 6453-6486, at p. 6457.
273 *Handelingen II* 2009/09, 83, pp. 6453-6486, at p. 6453-6454.
274 *Kamerstukken II* 2008/09, 19 637, nr. 1261, p.4.
275 *Kamerstukken II* 2008/09, 19 637, nr. 1261, p. 4-5.

The Aliens Circular implementing these measures stated that the foster child should have been part of the parent's family until departure of the latter from the country of origin.[276] In the case of foster children, it is sufficient that the foster child is *housed* in another family to conclude that the family bond ceased to exist.[277] The Aliens Circular further prescribes that when the foster child is *housed* into another family *after* the parent fled the country of origin to seek asylum in the Netherlands, the family bond between the foster child and the parent is considered to be broken.[278] Regarding the burden of proof, the Aliens Circular stipulates that because the family bond between foster children and parents cannot be examined through parental DNA testing, the parent and the child should make plausible the view that the child indeed belonged to his/her family in the country of origin. The burden of proof lies on the parent and since documents are not available or not admitted in the case of Somalis, the parent and child should provide, during reunification interviews, plausible and consistent declarations on the family bond.[279] While the parent is interviewed in the Netherlands, the child is usually interviewed at the Dutch embassy in the country of origin.[280] In the case of Somali children, these interviews often take place at the Dutch embassy in Addis Ababa or Nairobi. It is finally worthy of note that the Aliens Circular that implements the fraud measures mentions that this policy 'will be applicable for all foster children and not only in the case of Somali foster children'.[281]



### 1.1.3 Problematizing fraud-measures

During the parliamentary debate on the 'Somalia Letter', the Socialist Party (SP) maintained that the proposed fraud-measures include the risk that real foster children would be excluded from reunification.[282] The SP stressed that solving the identified problem should not mean that it would be totally impossible for Somali refugees to be reunited with their foster children:

> In war areas, there are certainly people having foster children and they should be welcome here. How would the state secretary separate the wheat from the chaff? How would she distinguish between fraud and human trafficking, on the one hand, and cases of legitimate foster children, on the other hand? (…) It is unclear how people can demonstrate that the children are their foster children in a country where no national authority exists. The risk thus exists that foster children will no longer be able to reunite.[283] (SP)

276 Besluit van de Minister van Justitie van 24 juli 2009, nr. 2009/18, houdende Wijziging van de Vreemdelingencirculaire 2000, *Staatscourant* 2009 nr. 12691, 24 augustus 2009 [Decision to amend the Aliens Circular 2000] (hereafter: *WBV 2009/18*).
277 *WBV 2009/18*, p. 1-2.
278 *WBV 2009/18*, p. 1-2.
279 *WBV 2009/18*, p. 2.
280 *Kamerstukken II* 2008/09, 19 637, nr. 1261, p. 5.
281 *WBV 2009/18*, p. 6.
282 *Handelingen II* 2009/09, 83, pp. 6453-6486, at p. 6468.
283 *Handelingen II* 2009/09, 83, pp. 6453-6486, at p. 6456 & 6476.

Similarly, the Christian Union party (CU) emphasizes that since Somalia is lawless, it is unclear how to demonstrate that a foster child indeed belongs to the family and stresses the need to find out how this can be proved:

> The state secretary wants to put the burden of proof for foster children on the parents: they should do everything to demonstrate that foster children indeed do belong to the family. What does this concretely mean? In the Somalia country report, we can read that a national authority is absent in Somalia. What can we expect from the burden of proof if documentary evidence is impossible or is almost standardly accompanied with fraud?[284] (CU)

Like the SP and the CU, the Green Left party (GL) stresses that since there are no formal authorities in Somalia, it is difficult for people to prove that they have foster children:

> The problem of the high numbers of foster children has obviously to do with the high number of children who lost their biological parents due to the on-going war. In such situations, the extended family has an important function regarding them. If there are no formal organizations in Somalia, people with such problems cannot demonstrate that those children are their foster children. (…) How would you demonstrate that somebody is your foster child when there is no registration? This question is unfortunately not concretely answered by the government.[285] (GL)

The SP adds that 'the state secretary is trying to refine the filter in order to exclude fraudulent Somalis, but what about people who are indeed in need of protection? Are they still welcome?' [286] In response, the state secretary maintained as follows:

> 'You are talking about a filter. I think that it unfortunately appears that the filter in the case of Somalis contains large holes, which we will close. I heard some MPs' concerned about the risk that 'real' foster children would be victim of this policy. Unfortunately, I cannot guaranty that this would not be the case. Because many people have been fraudulent with foster children, I say that the burden of proof is fully on those people. (…) My first commitment is to prevent that those children are brought into the Netherlands. For this reason, we have made the policy for foster children very tight and strict. We know that returning Somalis is very difficult once they are here. "Prevention is better than cure" is certainly applicable here.' [287]

284 *Handelingen II* 2009/09, 83, pp. 6453-6486, at p. 6460.
285 *Handelingen II* 2009/09, 83, pp. 6453-6486, at p. 6464 & 6473.
286 *Handelingen II* 2009/09, 83, pp. 6453-6486, at p. 6468.
287 *Handelingen II* 2009/09, 83, pp. 6453-6486, at p. 6468 & 6473.

Although this quote fits into the above presented fraud approach, it puts emphasis more on preventing foster children from entering the Netherlands. This quantitative approach is also reflected when the government communicated the effect of the 2009 policy, namely: high refusal rates.

### 1.1.4 Effects of fraud-measures



In April 2010, the INS published a report evaluating the 2009 restrictive policy and concluded that the introduced measures had not yet have the anticipated effect, namely 'decreasing the number of family visas granted to children'.[288] In August 2010, the government revealed that although those measures had probably started to have an effect, it was too early to draw any conclusion about their effect.[289] In July 2011, the government communicated[290] that both the number of Somali asylum applications and the number of Somali family visa applications had been continuously decreasing since August 2009. While in 2007 and 2008 more than 50% of the requested family visas were granted, this percentage reached 30% in 2009 and in 2010 it even decreased to less than 25%. In the first six months of 2011, this percentage continued to decrease to 10%.[291] The government considered this effect as evidence for the effectiveness of the 2009 fraud-measures and advised as follows:

> The most visible trend is the sharp drop in the acceptance rates of family visa applications of Somalis since the measures entered into force. These figures do not only show that there was good reason to introduce them, but also that they have been effective. A second trend is that since the second half of 2009, there has been a decrease in the number of family visa applications by Somalis. (…) The fraud-approach engendered good results and led to less asylum and family visa applications and more refusals of family reunion applications. I think it is important to continue the same path now this has proven to be successful. Those measures will therefore be maintained. [292]

This quote suggests that, besides fraud, the high acceptance rates and the increasing number of family members, including foster children, had been the problem faced by the state. The effectiveness of the fraud measures is to be seen in the decrease of the number of applications, decreasing acceptance rates and high refusal rates.

288 Immigratie- en Naturalisatiedienst, '*Evaluatie beleidswijzigingen Somalië*', Den Haag: IND Informatie en Analyse Centrum (INDIAC) 2010.
289 *Kamerstukken II* 2009/10, 19 637, nr. 1359.
290 *Kamerstukken II* 2010/11, 19 637, nr. 1439.
291 *Kamerstukken II* 2010/11, 19 637, nr. 1439, p. 1 & 3.
292 *Kamerstukken II* 2010/11, 19 637, nr. 1439, p. 3.

## 1.2 Legal debate

This paragraph first presents the debate on the question regarding 'breaking the family bond' (par. 1.2.1). As the legal debate also included the question of the existence of the family bond, the second paragraph below (par. 1.2.2) illustrates how this question is addressed in the case of foster children.

### 1.2.1 Breaking the family bond

The cases discussed in this section concern foster children who were left behind with another family after the parent left the country to seek asylum in the Netherlands. The application was rejected because the INS considered the family bond between the parent and the child as ceasing to exist. I present how (A) the INS defended this practice and how (B) lawyers and courts reacted. We will also see that a landmark judgement of the Council of State (C) resulted in policy change (D).

***A. Decision-making***

When defending the strict policy regarding breaking the family bond before the courts, the INS regularly maintained that its strict interpretation was justified because of 'the difficulty and complexity of establishing the family bond in the case of foster children'.[293] The INS also put forward that this strict policy was justified by the established fraud and the increasingly high number of Somali foster children. In this context, the INS referred to the political debate on Somali foster children:

> The policy measures regarding foster children are the consequence of the high number of applications submitted by Somali foster children as well as of previous suspicion of fraud and abuse of the reunification procedure by Somalis. When there are indications that the foster child is taken into another family after the flight of the parent, the child is to be often considered as no longer belonging to the family.[294]

In addition, the INS regularly referred to the difference between biological children and foster children. In its view, the strict interpretation of the family bond was justified because the Aliens Circular stipulated that the mere fact that there is 'housing' into another family forms a reason to refuse reunification in the case of foster children, whereas for biological children, reunification is refused when the child is 'definitively integrated' into another family.[295] This reasoning was replicated in many decisions of the INS.[296] In this context, the

293 Rb. Dordrecht 13 July 2012, nr. AWB 11/32550, par. 2.4.4.
294 ABRvS 10 October 2012, nr. 201112315/1/V1, par. 4.
295 See par. 4.3-4.5 in the INS's Higher Appeal Brief in: ABRvS 8 December 2011, nr. 201106109/1/V1.
296 ABRvS 10 October 2012, nr. 201112315/1/V1; ABRvS 25 May 2011, nr. 201012162/1/V1; Rb. Amsterdam 26 November 2010, nr. AWB 10/22533; Rb. Utrecht 16 December 2011, nr. 11/2715; Rb. Amsterdam 8 March 2012, nr. AWB 11/36636.

INS argued that due to the strict formulation of the requirement of the actual family bond, the duration of the integration of foster children into another family as well as the parent's intention are not relevant. The INS maintained as follows:

> The text of the policy, in particular the sentence stipulating that 'the family bond is to be considered as broken', shows that a very strict interpretation is consciously adopted by the government. The mere fact that the foster child is taken into another family after the flight of the parent is sufficient to consider the actual family bond as ceasing to exist. The duration of the housing into the other family and the parent's intention are irrelevant. The policy does not offer any margin due to its strict formulation.[297]



Besides the irrelevance of the duration of the integration into another family and the parent's intention, the particular circumstances of the case, such as the reasons behind leaving the foster child behind were irrelevant in the INS's view.[298] In its opinion, the idea behind this policy had to do with the fact that foster children do not belong to the nuclear family; so, when another person takes on childcare in the country of origin, there is 'no necessity to admit the foster child into the Netherlands'.[299] This reasoning is replicated in many decisions of the INS.[300]

This shows that the fraud-approach as articulated by the state secretary in the political debate is reproduced in decision-making. The strict interpretation of the actual family bond in the case of foster children is justified by (i) the difficulty in assessing the family bond in the case of foster children, (ii) the related risk of fraud and abuse, (iii) the increasing number of Somali foster children, and by (iv) the distinction between foster and biological children. In this context, the INS takes into account neither the reason behind leaving the child behind, nor the intention of the parent to reunite as soon as possible with the child. In its opinion, since foster children do not belong to the nuclear family, when another person takes on childcare in the country of origin, it is not necessity to admit the foster child into the Netherlands. As will be described below, lawyers have been successful in contesting this decision-making with policy change as a result.

***B. Lawyers and courts***

When contesting the decision-making practice outlined above, lawyers argued that the separation was involuntary and that the decision to separate with the child should not

297 Rb. Amsterdam 8 March 2012, nr. AWB 11/36636, par. 3.1.
298 Rb. Utrecht 16 December 2011, nr. AWB 11/2715, par. 2.16; ABRvS 29 June 2010, nr. 201002886/1/V2; Rb 's-Gravenhage 24 February 2010, nr. AWB 09/35242 MVV; Rb. Dordrecht 10 May 2011, nr. AWB 10/36732.
299 See par. 4.3-4.5 in the INS's Higher Appeal Brief in: ABRvS 8 December 2011, nr. 201106109/1/V1.
300 ABRvS 10 October 2012, nr. 201112315/1/V1; ABRvS 25 May 2011, nr. 201012162/1/V1; Rb Amsterdam 26 November 2010, nr. AWB 10/22533; Rb. Utrecht 16 December 2011, nr. 11/2715; Rb. Amsterdam 8 March 2012, nr. AWB 11/36636.

be seen as an irrevocable parental decision. This argument was seen as persuasive to the courts, which consistently agreed with the lawyers. When the issue reached the Council of State, this latter qualified the distinction between foster and biological children in terms of breaking the family bond as being unjustified and unlawful. The following cases illustrate this practice.

*Case 1*

In the first case[301], the lawyer maintained that the children were sheltered in the house of the neighbour, who merely provided temporary accommodation, rather than parental care. This was upon request of the parent in order to avoid that the children disappear into the streets.[302] The court agreed with the lawyer and maintains that the INS did not put forward the idea that the mother should have made another choice, and found that the foster children's residence by the neighbour cannot be seen as a reason to conclude that there was no longer a family bond:

> Given the general situation in Somalia and the age of claimants (15, 13 and 9 years old), the court does not see any basis for such a decision. Residence by the neighbour is from the beginning meant to be temporary, and it can hardly be expected from the parent to let the children be vagabonding in the street.[303]

In this case, the court also found that the INS's argument (stipulating that the distinction between foster children and biological children was justified because the examination of the family bond was difficult in the case of foster children) does not clarify why in the case of foster children other criteria are employed when the family bond is already established between the foster child and the parent.[304] The court found that the INS's restrictive interpretation could neither be drawn from the Aliens Circular nor from article 29 of the Aliens Act that aims to facilitate family reunification of foster children.[305]

*Case 2*

In a case[306] concerning three foster children who were left behind with a neighbour, the lawyer argued that the neighbour merely acted as a 'baby-sitter' and that considering the family bond as broken is an excessive formalism.[307] The court agreed and maintains that 'it is logical that minor children should be looked after by someone else when their parents

301 Rb. Dordrecht 13 July 2012, nr. AWB 11/32550.
302 Rb. Dordrecht 13 July 2012, nr. AWB 11/32550, par. 2.3.
303 Rb. Dordrecht 13 July 2012, nr. AWB 11/32550, par. 2.4.1.
304 Rb. Dordrecht 13 July 2012, nr. AWB 11/32550, par. 2.4.3.
305 Rb. Dordrecht 13 July 2012, nr. AWB 11/32550, par. 2.4.1.
306 Rb. Middelburg 5 April 2012, nr. AWB 11/38100.
307 Rb. Middelburg 5 April 2012, nr. AWB 11/38100, par. 3.

are absent' and found that the departure of the parent is not sufficient to conclude that the family bond is broken.[308]

*Case 3*

In another case[309], the lawyer argues that the housing of the children into the other family should be seen as 'emergency shelter'. The lawyer adds that given the age of the children it is necessary that someone takes on childcare, food and sheltering financed by the parent.[310] The court granted appeal also on the basis of the fact that the parent took efforts to accelerate the reunification procedure.[311] In other words, in the court's view, the intention and taking action to be reunited as soon as possible show that the family bond is not broken. The intention to reunite is seen by the lawyer and the court as expression of responsible parenthood and continuity of the bond.



*Case 4*

Reference to the parent's intention is also reflected in another case[312] in which the lawyer argued that it was logical that the children should remain somewhere to be cared for them, while contact between the child and parent was maintained with the intention to be reunited:

> When it appears from the circumstances of the case that the parent continuously has the intention to be reunited with the child, it cannot be concluded that the child belongs to another family. After being recognized as a refugee, the parent directly applied for reunification. Further, the parent exercises an actual custody on the child, as she takes important decisions for her, such as where she can stay. They also had regular phone contact and she transferred money to her.[313] (Lawyer)

The court disagreed with the INS because it did not react to these elements put forward by the lawyer during the objection procedure.[314]

*Case 5*

Similarly, in a case[315] concerning a brother and two sisters wishing to reunite with their foster mother, the lawyer argued that the housing in another family was involuntary and was meant to be temporary.[316] The court took into account the intention to reunite and the efforts taken by the parent to that aim:

308 Rb. Middelburg 5 April 2012, nr. AWB 11/38100, par. 8.
309 Rb. Dordrecht 21 February 2012, nr. AWB 11/31682.
310 Rb. Dordrecht 21 February 2012, nr. AWB 11/31682, par. 2.3.
311 Rb. Dordrecht 21 February 2012, nr. AWB 11/31682, par. 2.4.6.
312 Rb. Amsterdam 26 November 2010, nr. AWB 10/22533.
313 Rb. Amsterdam 26 November 2010, nr. AWB 10/22533, par. 4.2.
314 Rb. Amsterdam 26 November 2010, nr. AWB 10/22533, par. 5.4.
315 Rb. Haarlem 6 July 2011, nr. AWB 11/3109.
316 Rb. Haarlem 6 July 2011, nr. AWB 11/3109, par. 2.3.

> Claimants were adopted perforce by another family because of the departure of the sponsor, while there had continuously been an intention to reunite. This is confirmed by the fact that claimants urgently submitted an application to be reunited. In Ethiopia, claimants stay with a Somali woman who is paid in exchange for looking after the children.[317]

*Case 6*

In a similar vein, the next case[318] involved a father wishing to be reunited with his foster child. His wife and biological children stayed behind with the foster child but they were granted a family visa and then travelled to the Netherlands, while leaving the foster child with the neighbours in Yemen. The lawyer argued that the child was left behind involuntary but that family reunion was the intention:

> When the other family members were obliged to leave Yemen in order to use the granted family visa, the claimant was adopted into the neighbour's family because she could not stay alone. As of October 2011, this neighbour could not anymore take care of claimant. So, the claimant was adopted once again into the family of a friend who was paid in exchange of childcare.[319]

In this case, the court granted the appeal and argued that the INS should have examined whether there were practical circumstances urging family reunion.[320]

Besides the involuntariness of the separation and the intention to reunite, lawyers also regularly referred to the continuation of the family bond during the separation.

*Case 7*

In this case,[321] the lawyer argued that the wife of the sponsor was obliged to leave the children with a woman in Ethiopia because she and her biological children travelled to the Netherlands because the term of their granted family visa would expire.[322] The lawyer then stressed the continuation of the family bond in spite of the distance between the parent and the child:

317 Rb. Haarlem 6 July 2011, nr. AWB 11/3109, par. 2.4.
318 Rb. Amsterdam 8 March 2012, nr. AWB 11/36636.
319 Rb. Amsterdam 8 March 2012, nr. AWB 11/36636, par. 1.5.
320 Rb. Amsterdam 8 March 2012, nr. AWB 11/36636, par. 3.2.
321 Rb. Utrecht 16 December 2011, nr. 11/2715.
322 Rb. Utrecht 16 December 2011, nr. 11/2715, par. 2.8.

> The claimants argue that the sponsor and his wife still take care of the child's education and care. Claimants maintain that their foster parents feel responsible, they call every week and they transfer monthly financial support.[323]

The court granted appeal because it found that the INS failed to take these circumstances into account in its decision.[324]



This shows how lawyers succeeded to contest the strict 2009 policy regarding breaking the family bond. However, this success failed to engender any policy change. That had to wait until the issue reached the Council of State as below.

***C. The Council of State***

The case[325] concerned two foster children wishing to be reunited with their mother. After she fled the country, the children stayed with an unknown Somali family in Addis Ababa. The INS considered the bond between the children and their foster mother as ceasing to exist because they were housed in another family after the departure of their mother. The court ruled that the mere fact that the children were housed somewhere else did not justify the conclusion that the children were integrated into another family nor that the family bond was broken.[326] The INS submitted a higher appeal against this court's ruling.[327] The INS maintained that housing a foster child somewhere else was sufficient to conclude that the bond was broken. As usual, the INS refers to the distinction between foster and biological children: when another person takes care of the foster child, there is no need to bring the child to the Netherlands.[328] During the setting before the Council of State, the INS referred to the 'Somalia Letter' in order to justify its strict interpretation.[329] The Council first referred to the parliamentary history[330] of article 29 of the Aliens Act and observed that this provision forms an implementation of chapter VI of the UNHCR Handbook.[331] The Council refers in particular to paragraph 186 of this Handbook according to which:

> '[T]he principle of the unity of the family does not only operate where all family members become refugees at the same time. It applies equally to cases where a family unit has been temporarily disrupted through the flight of one or more of its members.'[332]

323 Rb. Utrecht 16 December 2011, nr. 11/2715, par. 2.17.
324 Rb. Utrecht 16 December 2011, nr. 11/2715, par. 2.19.
325 Rb. Arnhem 25 October 2011, nr. 11/16134.
326 Rb. Arnhem 25 October 2011, nr. 11/16134, par. 6.
327 ABRvS 10 October 2012, nr. 201112315/1/V1.
328 ABRvS 10 October 2012, nr. 201112315/1/V1, par. 6.
329 ABRvS 10 October 2012, nr. 201112315/1/V1, par. 4.
330 *Kamerstukken II* 1999/2000, 26 732, nr. 7, p. 47-48.
331 UN High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, Geneva: UNCHR 2011.
332 *Ibid* at par. 186.

The Council stated that in such cases the actual family bond should not be considered broken even when it concerned foster children.[333] The Council of State found the distinction between foster and biological children regarding breaking the family bond in contradiction with the law. In the Council's view, such a policy ignored the principle that persons depending on the refugee, such as foster children, should be granted residence on the basis of article 29 of the Aliens Act even when the family is temporary disrupted because of the flight of one or more family members including the sponsor.[334] In the Council's view, the mere housing of foster children somewhere else does not mean that they are integrated into another family.[335]

***D. Policy change***

The Council's judgement was issued in late 2012, that is, after three years of successful appeals after the introduction of the restrictive policy in 2009. Since then, breaking the family bond in the case of foster children should be similar to the case of biological children: integration into another family should be definitive in order to speak about breaking the family bond. This Council's judgement was subsequently incorporated into the Aliens Circular (2013) in which explicit reference is made to it.[336] It is mentioned in the Aliens Circular that foster and biological children should not be treated differently regarding breaking the family bond and that the circumstances under which the family bond is considered as broken should be similar for both foster and biological children.[337] Since the Aliens Circular (2013) also communicated that the interpretation of the actual family bond should be in line with article 8 ECHR in the case of biological children, this would also be applicable in the case of foster children. This means that the family bond ends only in very exceptional situations, for example when the child is living independently, or when the child has formed his/her own family.[338]

***E. In sum***

The INS strictly implemented the 2009 version of the requirement of the actual family. When doing this, it regularly and explicitly referred to identified fraud among Somalis. However, lawyers succeeded through courts and the Council of State to drive policy with the effect that foster children and biological children are treated equally when it comes to breaking the family bond. A social change was therefore achieved.

333 ABRvS 10 October 2012, nr. 201112315/1/V1, par. 6.1.
334 ABRvS 10 October 2012, nr. 201112315/1/V1, par. 6.2. See also ABRvS 13 February 2013, nr. 201201118/1/V2; ABRvS 26 June 2013, nr. 201204978/1/V4 and ABRvS 22 February 2013, nr. 201110321/1/V3.
335 ABRvS 10 October 2012, nr. 201112315/1/V1, par. 6.2.
336 Besluit van de Staatssecretaris van Veiligheid en Justitie van 30 mei 2013, nummer WBV 2013/13, houdende Wijziging van de Vreemdelingencirculaire 2000, *Staatscourant* 2013 nr. 15221, 7 juni 2013 [Decision to amend the Aliens Circular] (hereafter: *WBV 2013/13*), p. 5.
337 *WBV 2013/13*, p. 5.
338 *WBV 2013/13*, p. 2/par C2/4.3. see also: *Kamerstukken I* 2012/13, 31 549, nr. M, p. 8.

### 1.2.2 The existence of the family bond

According to article 29 of the Aliens Act, children can be reunited only with the head of the family to which they belong before the family head left the country of origin. It is thus important to know who the head is of the family to which the child belongs. This question is not subject of political debate and it is not regulated in the Aliens Circular. For this reason, involved actors were indirectly given a margin to define and decide who the head of the family is in concrete cases.



For example, in a case[339] concerning two foster children wishing to be reunited with their uncle (the sponsor), the court formulated three criteria to answer this question. In this case, the foster children joined the family of the sponsor when their biological mother passed away. Their biological father also joined them and their grandparents (i.e. parents of the sponsor) made also part of the sponsor's household. The biological father as well as the grandfather of the foster children passed away later. In the INS's view, the grandmother (i.e. the sponsor's mother) was the head of the family as the house belonged to her and not to the sponsor.[340] The lawyer replied in appeal as follows:

> After the death of his father, the sponsor gained the position of the head of the family. The sponsor is in charge of child-care, since their biological father passed away later. The sponsor's mother lived with the sponsor and not vice versa. Moreover, the children and their grandmother had no income and they were dependent on the sponsor. In addition, the grandmother cannot care for the claimants, given her old age and illness.[341]

The court first observed that the question regarding the family head should be addressed following the general meaning of the word because the policy did not contain any definition of it. The court then rejected the INS's argument referring to the ownership of the house and maintained that when determining who is the head of the family, the actual situation is decisive. In this context, the court refers to three criteria: (i) how child-care tasks are divided between the sponsor and the grandmother; (ii) who takes the important decisions regarding the children; and (iii) who cares financially for them. The court did not answer these questions, but granted appeal because it found that the INS should have addressed them in its decision.[342] This case shows that, by lack of a policy definition, when determining

339 Rb. 's-Gravenhage 24 February 2010, nr. AWB 09/35242 MVV.
340 Rb. 's-Gravenhage 24 February 2010, nr. AWB 09/35242 MVV, par. 6.1.
341 Rb. 's-Gravenhage 24 February 2010, nr. AWB 09/35242 MVV, par. 2.
342 See ABRvS 29 June 2010, nr. 201002886/1/V2. In paragraph 6.1 and 6.2 of this case, the INS argues that the children and the sponsor were living with the grandmother and refers to the contradiction in the declarations of the sponsor (par. 2.2; see also par. 3.4 and 3.5 in the INS's Higher Appeal Brief). The Council maintains that on the basis of established contradictions about the involvement of the sponsor, the mother of the sponsor (grandmother of claimants) is the head of the family (par. 2.2.2 and 2.2.3).

who is the head of the family, courts may rely on three criteria: the division of child-care between involved adults; the ability to take important decisions regarding the child such as the place of residence and education; and the breadwinner position. The court's use of these criteria in this single case did not, however, mean that other courts must similarly apply them.

In what follows, I reconstruct how the issue is addressed in other cases. It deserves to be noted here that a careful reading of the collected cases on this question showed that the way in which the 'head of the family' is defined did not change over time. For this reason, and because my approach is not quantitative, I selected a limited set of five rich cases to be presented below. Like in the previous case, these cases concern Somali families within which more than two adults share the responsibility for the foster child. They generally consist of the following persons:

- The sponsor: the refugee who wishes to reunite with the foster child.
- His/her spouse,
- Their biological children,
- Foster children, and
- Parent(s) of the sponsor: either biological parent(s) of the foster child (i.e. the sponsor and the foster child are brothers/sisters) or grandparents of the foster child (i.e. the sponsor is a paternal uncle/aunt of the foster child).

The central question in these cases is whether the sponsor can be seen as the head of the family in order to be legally qualified as parent and thus allowed to reunite with the foster child.

*Case 1*

The first case[343] involved three foster children wishing to reunite with their mother (sponsor). One of the foster children is a sister of the sponsor, while the two others were her nieces (daughters of her brother). The sponsor, her sister and their mother (i.e. the grandmother of the two nieces) lived together in one house. When the biological mother of the nieces passed away and their biological father (i.e. brother of the sponsor) was kidnapped, the nieces joined the house of the sponsor. The sponsor declared that she looked after them, fed them and gave them bath. When she fled the country, the foster children stayed behind with the grandmother.[344]

In the INS's view, the grandmother was the head of the family because she was the 'final responsible' parent. The INS maintained that the division of custody and the ability

343 Rb. Middelburg 30 October 2014, nr. AWB 14/14554.
344 Rb. Middelburg 30 October 2014, nr. AWB 14/14554, par. 8.

to take decisions regarding children were decisive when determining who was the head of the family.[345] In reply, the lawyer maintained that the sponsor was the head of the family because she was responsible for child-care, housekeeping, daily meals, family income and family decisions. In this context, the lawyer added that the grandmother was sick and not able to care for the children.[346] However, the court rejected this lawyer's reasoning and agreed with the INS when maintaining that custody and the competence to take family decisions are decisive and not child-care. The court maintains as follows:



> It appeared from the statements of the sponsor that her mother took the important decisions: she decided that the family would move to Mogadishu; that the sponsor would leave Somalia; and that she would not take her nieces with her. The court agreed with the INS that the custody relationship and the competence to take decisions within the family, and not the question of who carries out care tasks, are determinant when establishing who is the head of the family.[347]

In this case, the court excluded two of the three criteria outlined by the court in the case discussed above. It excluded the child-care and the breadwinner questions, while it focused on the third element, namely the ability to take important decisions regarding the child. This suggests that this latter question was decisive in the court's view.

*Case 2*

The second case[348] involved two foster children wishing to reunite with their foster mother (sponsor). The first was an underage sister of the sponsor, while the other was her niece. They all lived in one house together with the parents of the sponsor. Her husband and biological children also lived with them. However, her husband disappeared and her father was subsequently killed. Since then, the sponsor and her mother (i.e. the grandmother of the niece) were the adults who shared the responsibility for the children.

The INS was of the opinion that the mother of the sponsor (i.e. the grandmother) was the head of the family. The INS maintained that when the sponsor got married she formed her own family, while her sister and niece were not part of that new family because they remained part of the family of their respective mother and grandmother.[349] In reply, the lawyer argued that since her husband disappeared, the sponsor acted as the breadwinner for the family, through selling vegetables in the market in Mogadishu. Because the sponsor's parents were aged, she was responsible for financial resources and child-care. Thus, in the

345 Rb. Middelburg 30 October 2014, nr. AWB 14/14554, par. 4.
346 Rb. Middelburg 30 October 2014, nr. AWB 14/14554, par. 3.
347 Rb. Middelburg 30 October 2014, nr. AWB 14/14554, par. 8.
348 Rb. Groningen 13 March 2012, nrs. AWB 09/41396 and AWB 09/41397.
349 Rb. Groningen 13 March 2012, nrs. AWB 09/41396 and AWB 09/41397, par. 2.1.

view of the lawyer, after the disappearance of her husband and subsequent death of her father, the sponsor became the family head.[350]

The court agreed with the lawyer and maintained that the INS did not explain why the grandmother was responsible for childcare and education. Although the court agreed with the INS that being the breadwinner is not decisive, the court found that without further arguments from the side of the INS, it was not convinced why the grandmother should be seen as the head of the family.[351] The court maintains as follows:

> The report of the asylum interview did not directly show that her mother was responsible for the care and education of claimants. The sponsor stated in the first asylum interview that she sold vegetables in the market and that she had been responsible for earning daily bread for her children. It is therefore plausible that her income was meant for the family members with whom she lived.[352]

*Case 3*

This case[353] concerns two foster daughters wishing to reunite with their uncle (sponsor). The INS rejected the application because the foster children belonged to the family of the sponsor's parents (i.e. the grandparents of the children).[354] The INS observed that when the father of the children passed away and their mother disappeared in 2002, the sponsor was not yet married. The sponsor thus still belonged to the family of his parents who had custody of the two foster daughters. Regarding the period after the sponsor got married, the INS stated as follows:

> The sponsor formed his own family when he got married, but this does not mean that custody of claimants changed. Moreover, there are contradictions in the statements about who had the responsibility and who was the breadwinner. It did not appear that the parents of the sponsor had health problems or that they were not able to care for claimants. The circumstance that the sponsor and his wife were partly in charge of childcare does not mean that they have the finale responsibility on claimants.[355]

The lawyer maintained that the sponsor was the head of the family because at the moment of departure he and his wife were responsible for the children. The lawyer referred to the financial responsibility of the sponsor and to the fact that he and his wife were in charge of childcare as well as the care for the grandparents. The lawyer states as follows:

350 Rb. Groningen 13 March 2012, nrs. AWB 09/41396 and AWB 09/41397, par. 2.2.
351 Rb. Groningen 13 March 2012, nrs. AWB 09/41396 and AWB 09/41397, par. 2.10.
352 Rb. Groningen 13 March 2012, nrs. AWB 09/41396 and AWB 09/41397, par. 2.10.
353 Rb. Zutphen 19 March 2013, nr. AWB 12/32080.
354 Rb. Zutphen 19 March 2013, nr. AWB 12/32080, par. 2.5.
355 Rb. Zutphen 19 March 2013, nr. AWB 12/32080, par. 2.7.

> The sponsor is the person who was in charge of the shop when his parents became old and sick. He financially supported the whole family. The sponsor's father was killed in 2008 before the sponsor left the country, while his mother was aged and had health problems before she passed away in 2009. It is not comprehensible that the INS concluded that the sponsor did not have the final responsibility.[356] Somalis take care of their parents when they are aged and disabled and it is not acceptable to abandon them. Given this responsibility, the sponsor stayed after his marriage in the same house with his parents. The sponsor and his wife were in charge of the care for his parents, their own children and the foster children.[357]



The court first observed that the INS was mistaken when taking the situation in 2002 as decisive, while the relevant time is the departure moment, namely November 2008. The court then observed that at that moment the sponsor already had his own family, as he already got married in 2003. The court agreed with the lawyer when justifying the stay of the sponsor in the house of the grandparents due to his responsibility towards them. In addition, the court took into account the breadwinner role of the sponsor and maintains as follows:

> It is not disputed that the sponsor was in charge of the shop as of 2003. It should be observed that his father passed away before the departure moment and therefore it cannot be said that the children at the relevant moment still belong to the family of their grandparents. There was still only one parent (grandmother) who had health problems and who passed away shortly later.[358]

In this case, the court took into account the element of the breadwinner (shop) and child-care, while the question regarding the ability of taking important decisions was not evoked. In addition, the court took into account the responsibility of Somalis towards their aged and disabled parents.

*Case 4*

The case[359] concerned three foster children (2 boys and 1 girl) wishing to reunite with their brother (sponsor). The INS rejected the application because the children became part of the sponsor's family after he left the country of origin.[360] In reply, the lawyer argued that the children and the sponsor always lived together in the same family and that the sponsor was responsible for family income. The lawyer argued as follows:

356 Rb. Zutphen 19 March 2013, nr. AWB 12/32080, par. 2.6.
357 Rb. Zutphen 19 March 2013, nr. AWB 12/32080, par. 2.6.1.
358 Rb. Zutphen 19 March 2013, nr. AWB 12/32080, par. 2.8.3.
359 Rb. Amsterdam 5 January 2010, nrs. AWB 09/26177 and AWB 09/38971.
360 Rb. Amsterdam 5 January 2010, nrs. AWB 09/26177 and AWB 09/38971, par. 1.3 and 4.1.

> Since 2002, the sponsor was responsible for family income because his father could not work anymore due to health problems. In 2006, the sponsor's wife joined the family. In March 2007, the sponsor's father was killed. After this, the sponsor, who is the eldest son, became the head of the family. In early April 2007, the sponsor fled, while the rest of the family stayed behind in Somalia. Claimants, their mother and the sponsor's wife travelled in 2008 to Ethiopia, but the mother of claimants (and sponsor) was lost on the way. Since then, the sponsor's wife took on the full care of the children.[361]

In its judgement, the court distinguished between three periods of time when determining who is the head of the family. (i) *Before the death of the father of the children (and the sponsor)*: the court found that the children belonged to the family of their parents. Although the sponsor was the breadwinner since 2002, and although they all lived together as one family, this did not mean that the children belonged then to his family: they belonged to their parent's family, given that the parents had their own house and a piece of farmland. The court added that although the sponsor formed his own family when he got married in 2006, this did not bring any change in the actual family bond between the children and their biological parents.[362] (ii) *Between the death of the sponsor's father and the disappearance of his mother*: the court found that his mother was the family head. In this context, the court maintained that after the death of his father, the mother of the sponsor helped him to hide and arranged his flight. Moreover, she sold the house and the farmland in order to finance the burial of her husband. The children were thus still living with their mother who took important decisions for the family, including for the sponsor.[363] (iii) *After the disappearance of the sponsor's mother*: the court found that the sponsor was the head of the family and maintained as follows:

> Since the missing of their mother, the sponsor's wife cared for and educated claimants with financial support of the sponsor from the Netherlands. It is true that the sponsor lives in the Netherlands since claimants belonged to his family, but claimants lived since then with the sponsor's wife who cared for and educated them. In order to have an actual family bond in the country of origin, it is not necessary that the whole family lived together.[364]

In higher appeal[365], the INS refers to the parliamentary history of article 29 of the Aliens Act and maintains that what is decisive is the family composition at the departure moment:

361 Rb. Amsterdam 5 January 2010, nrs. AWB 09/26177 and AWB 09/38971, par. 2.
362 Rb. Amsterdam 5 January 2010, nrs. AWB 09/26177 and AWB 09/38971, par. 4.2.
363 Rb. Amsterdam 5 January 2010, nrs. AWB 09/26177 and AWB 09/38971, par. 4.3.
364 Rb. Amsterdam 5 January 2010, nrs. AWB 09/26177 and AWB 09/38971, par. 4.4.
365 ABRvS 19 October 2010, nr. 201001188/1/V1.

children should have belonged to the sponsor's family before departure.[366] Since the children only joined the sponsor's wife after he had left Somalia, the Council agreed with the INS and maintained that the departure time is decisive.[367]

*Case 5*

The final case[368] concerns two brothers: the younger wished to reunite with the older (sponsor). After his father passed away in 1999, the younger brother lived in one family with his mother, the sponsor, the sponsor's wife and their biological children. Both the sponsor and his mother cared financially for the claimant. In 2007, their mother passed away. Seventeen days later, the sponsor left the country. His younger brother stayed with the sponsor's wife who cared and educated him. The wife and the biological children reunited with the sponsor, but the young brother stayed behind in Ethiopia.[369]

The INS maintained that the sponsor and his wife never had parental custody of the young brother. In its view, the period of seventeen days was too short to build an actual family bond.[370] The INS adds that the eventual financial contribution of the sponsor and the fact that he felt responsible for the education of his young brother was not sufficient to admit that their mother did not have the responsibility for her minor son (i.e. the young brother).[371] In reply, the lawyer argued that the sponsor and his young brother lived together until the departure moment. Moreover, when the sponsor got married, his young brother lived with the sponsor's wife and their biological children.[372] The lawyer added that after the death of his father, the sponsor was together with his mother responsible for the whole family. In addition, after the death of their mother, the sponsor and his wife took on the responsibility for care and education of his young brother.[373] The court first observed that the young brother could be seen as a foster child, if he was cared for and educated by the sponsor and his wife before the sponsor left the country. In its reasoning, the court distinguished two periods of time.

(i) *Before the death of the sponsor's mother*: the court maintained that the claimant, his mother, the sponsor and his nuclear family lived as one family. The sponsor supported the family financially and he and his mother were responsible for claimant. The court then referred to the position of women in Somalia and argues that since the sponsor is the oldest male family member, he is the head of the family. The court stated as follows:

366 See par. 3.10 in the INS's Higher Appeal Brief in: ABRvS 19 October 2010, nr. 201001188/1/V1.
367 ABRvS 19 October 2010, nr. 201001188/1/V1, par. 2.5.1.
368 Rb. Roermond 26 April 2010, nr. AWB 09/30430.
369 Rb. Roermond 26 April 2010, nr. AWB 09/30430, par. 2.16.
370 Rb. Roermond 26 April 2010, nr. AWB 09/30430, par. 2.17.
371 Rb. Roermond 26 April 2010, nr. AWB 09/30430, par. 2.19.
372 Rb. Roermond 26 April 2010, nr. AWB 09/30430, par. 2.18.
373 Rb. Roermond 26 April 2010, nr. AWB 09/30430, par. 2.18.

> As generally known and also appears from the general country report on Somalia, women are in the patriarchal Somali community subordinated. It is therefore plausible that in the Somali community, after the death of the male family head (the father), not the widow but an adult son, such as the sponsor, who becomes the head of the family.[374]

Within this reasoning, the court did not assess the three key criteria, but based its conclusion on culture-based evidence as included in the Somalia country report.

(ii) *After the death of the sponsor's mother*: the court maintained that it is established that after that moment, the younger brother was integrated into the family of the sponsor until his departure in 2008. The court added that after his departure, his wife took on the care and education of the younger brother during one year under the financial support of the sponsor.[375] The court further explained that it should not be overlooked that the sponsor and the rest of the family lived together within a 'three-parents family'. The court added that although the sponsor travelled to Netherlands seventeen days after the death of the mother, his younger brother lived before that time in one family together with him and this continued after the death of the mother and after the sponsor left the country.[376] Within this reasoning, the court took into account the three relevant criteria. Regarding childcare, the court took into account the role of the sponsor's wife after he left the country. It is further important to note that the court gave considerable weight to the fact that involved family members lived together for a long period of time within a 'three parent family'.

The INS did not agree and submitted (in higher appeal)[377] that the sponsor cannot have the role of a parent because he was still dependent, like his young brother, on his mother. In this context, the INS qualified the role of the mother within the family as being considerably important: she arranged via clan members that the sponsor would not have a problem with the man who killed his father.[378] The INS was of the opinion that when his mother passed away, the young brother was under custody of his mother, and shortly after her death the sponsor left the country. The INS then observed that it is unclear what the court meant when stating that the younger brother belonged to a 'three-parent family'.[379] Regarding financial support, the INS argued that even if it was accepted that the sponsor supported the family financially, his mother was still responsible for the family and, therefore, she had parental custody on the young brother. The INS added the following:

374 Rb. Roermond 26 April 2010, nr. AWB 09/30430, par. 2.19.
375 Rb. Roermond 26 April 2010, nr. AWB 09/30430, par. 2.20.
376 Rb. Roermond 26 April 2010, nr. AWB 09/30430, par. 2.20.
377 ABRvS 7 February 2011, nr. 201005131/1/V2.
378 See par 4.3 in the INS's Higher Appeal Brief in: ABRvS 7 February 2011, nr. 201005131/1/V2.
379 See par 4.3 in the INS's Higher Appeal Brief in: ABRvS 7 February 2011, nr. 201005131/1/V2.

> It should be emphasised that it is difficult to admit that when a family member financially supports other family members on the basis of personal reasons, the relationship between those family members should be seen as being a foster child-parent relationship. Such behaviour should be seen rather as reasonable and expected between family members that they will support each other for whatever reason.[380]



In a similar vein, the INS explicitly rejected the interpretation of family bonds on the basis of family norms in the country of origin. The INS stated as follows:

> It is of great importance to note that the question of whether there is an actual family bond should be answered on the basis of Dutch standards and not on the basis of the standards in the country of origin. It cannot be accepted that in similar cases the question whether reunification should take place depends on the way in which the society in the country of origin is structured.[381]

The INS further observed that when the sponsor was released, he was then exclusively busy with preparing his flight that took place shortly after. In the INS's view, it could not be accepted that the younger brother, during such a short and busy period, belonged to the sponsor's family.[382] The Council of State found the period of seventeen days too short to build a child-parent bond especially because the sponsor was in those days in detention and after his release he was only busy with arranging his flight.[383] The Council of State observed that the fact that the sponsor's wife cared for him after the sponsor's departure was not relevant because the family bond concerns the period before the flight.[384]

***In sum***

Although the family structure of involved Somali families reflects a family model within which more than two adults act as parents of the foster child (so called 'multi-parent families'), the above-presented examples show that the INS, lawyers, courts (case 5 above is an exception) and the Council of State promote the idea that there is always a family head and that there can only be 'one head'. Overall, three criteria are assessed when determining the family head: who is in charge of childcare; who is the breadwinner; and who has the ability to take important decisions regarding the children. Further, it is required that the parent should have been the family head before he/she fled the country of origin.

380 See par 4.3 in the INS's Higher Appeal Brief in: ABRvS 7 February 2011, nr. 201005131/1/V2.
381 See par 4.4 in the INS's Higher Appeal Brief in: ABRvS 7 February 2011, nr. 201005131/1/V2.
382 See par 4.4 in the INS's Higher Appeal Brief in: ABRvS 7 February 2011, nr. 201005131/1/V2.
383 ABRvS 7 February 2011, nr. 201005131/1/V2, par. 2.4.1. See also ABRvS 22 February 2013, nr. nr. 201110321/1/V3. In this case the Council of State found the period of three months sufficient.
384 ABRvS 7 February 2011, nr. 201005131/1/V2, par. 2.4.1.

## SECTION 2: THE DEBATE ON REUNIFICATION INTERVIEWS

The present section first highlights the interview setting (par. 2.1) and then presents the legal debate (par. 2.2) and the political debate on reunification interviews (par. 2.3).

### 2.1 Interview setting

Reunification interviews are conducted at Dutch embassies in order to examine the family bond between the foster child and the parent. They are decisive in the case of foster children for two reasons. First, an interview is the only way, by lack of documents, to prove the family bond. Second, the interview report forms the basis for the INS's decision besides the declarations of the parent.[385] The interview questions are based on a list of questions drafted by the INS and on the report of the parent's asylum interview. The INS sends both documents to the embassy officer who is in charge of the interview with the child.[386] Sometimes, the parent is interviewed during the reunification procedure in order to ensure reliable results. In such cases, the parent and the child are often simultaneously interviewed.[387] Regarding how interviews should take place, there were no policy guidelines on which embassy officer can rely. The Aliens Circular, in particular, does not mention any guidelines. Although the INS's Guidelines do contain a one-page section on reunification interviews, they do not incorporate any guidelines, except that children younger than 12 years old should not be interviewed, unless when there are fraud indications.[388] In July 2012, I was able to visit the Dutch embassy in Addis Ababa and witness two reunification interviews. In what follows, I give an overview of my observations. My aim is not to analyse the interviews I observed but to give the reader a look into the interview setting and how it takes place.

#### 2.1.1 Before the interviews:

After a security check and after having explained the purpose of my visit, the embassy security agents gave me permission to enter the embassy compound. The compound includes the main embassy building and two interview rooms in the garden. Moreover, there are two counters close to the main embassy building. One counter is reserved only for Somali applicants because their number is high. The second counter is reserved for applicants from countries other than Somalia. After a short while of waiting, two embassy officers came and welcomed me. One officer is an employee of the embassy and the other is part of the INS decision-makers staff and was detached to the embassy in order to cope with

385 It deserves to be noted that the asylum interview is not conducted during the family reunion procedure, but before. It namely takes place when the sponsor (parent) enters the Netherlands and applies for asylum.
386 IND-werkinstructie 2008/3, p. 9; IND-werkinstructie nr. 2011/12 (AUB), p. 6; IND-Werkinstructie nr. 2012/6 (AUA), p. 6.
387 IND-werkinstructie 2008/3, p. 9; IND-werkinstructie nr. 2011/12 (AUB), p. 6; IND-Werkinstructie nr. 2012/6 (AUA), p. 6.
388 IND-werkinstructie 2008/3, p. 9; IND-werkinstructie nr. 2011/12 (AUB), p. 6; IND-Werkinstructie nr. 2012/6 (AUA), p. 6.

the high numbers of Somali family visa applications. After a while, the interpreter (a man from the Ethiopian Somali region) entered the main building and then we went outside to the waiting space and picked up a Somali girl. We went back into the main building and then we walked into the working room of the officer to conduct the interview.



### 2.1.2 First interview:

The interviewed child was a Somali girl of fifteen years old from Mogadishu. She applied together with her younger brother and her mother for family reunification. A family member or a third person did not accompany the child during the interview. The room where the interview was held was a working room and not one of the regular interview rooms located in the garden. Before starting with the questions, the officer explained to the child who I was and asked if she had an objection against my presence. The girl smiled and agreed with my presence. The officer asked question after question and noted down into the computer file the answers of the applicant. The climate of the interview is like an oral exam during which the examiner (officer) takes a while to write down the answers of the girl. The officer asked the child around forty very detailed questions; for example about: domestic life, meal times and who prepared food, colours of domestic objects such as the colour of the Koran, father's job, family situation and family members, school, neighbours, dates of family events, etc. The questions were conducted in English. The interpreter re-asked the questions in Somali. The child answered in Somali. Then, the interpreter translated into English. The officer translated these reported answers into Dutch and typed them instantly on the computer. The child was not able to answer many questions especially those about dates and time. In such cases, the interviewer continued in rephrasing and changing the questions in order to get an answer. But the child said continually: I do not know. In addition, there was one misunderstanding during the interview: it concerned the expression 'food preparation'. The child understood 'preparation of table', while the officer meant 'cooking'. This misunderstanding required a second check by the officer and the interpreter. On average, almost two hours were spent on this interview including one break during which the child was allowed to spend ten minutes in the garden of the embassy compound. Just before asking the last three interview questions, the child asked the interviewer if he could close the interview because she felt tired. It was clear that she was exhausted. However, the interviewer continued the interview after having explained that only three questions remained to finish. After closing the interview, the child was accompanied into the waiting area in the garden.

### 2.1.3 Second interview:

After a short while, I went outside the main building with the other officer to pick up the twelve years old younger brother of the first interviewed girl. We went back into the main building and then we walked into another working room, together with a female interpreter.

The officer sat down in front of the computer screen and tried to adjust his seat at the same level as the boy. Before starting with the questions, the officer explained to the child who I am and if he had an objection against my presence. The timid boy agreed with my presence. The boy received cakes and water during the interview. There were around twenty questions. On average, almost one hour was spent on this interview including one break of almost ten minutes. The boy was very timid and answered some of the questions with a very low voice, but he could not answer the majority of them. The officer then expressed his doubts about the boy's age and presumed that the child is younger than twelve years old. The officer stopped with the interview because it is not allowed to interview children below that age.

This illustrated the context in which reunification interviews are conducted and exemplified how an interview can take place. Obviously, the observations presented above do not show the whole interview practice, but the description gives the reader insight into the interview setting and embassy context. In the following paragraphs, I articulate the legal and political debate on this practice.

## 2.2. Legal debate

Lawyers continuously argued that the interview practice is child unfriendly, and that the interview officers and interpreters were not qualified. Although some regional courts agreed with this, the Council of State consistently found that interviews were adequately conducted. For example, in a case[389] concerning the brother and two sisters of the sponsoring mother, the court agreed with the lawyer that the interviews with the children did not take into account the children's age because of the long duration of interviews and the non-qualification of the interviewer. The court states as follows:

> It does not appear from the interview reports that sufficient account is taken with the young age of claimants. This appears from the fact that the interviewer did not continue asking about the answers given by claimants, while there is a reason to do that in the case of children (12 years old at the time of the interview) in comparison with adults. The court also takes into consideration the long duration of the interviews. Under these circumstances it cannot be said that the interviews were conducted carefully.[390]

However, the Council of State[391] agreed with the INS when arguing that there were no concrete elements showing that the interviews were inappropriately conducted. The

389 Rb. Haarlem 14 July 2011, nr. AWB 11/3109.
390 Rb. Haarlem 14 July 2011, nr. AWB 11/3109, par. 2.5.
391 ABRvS 10 October 2012, nr. 201108774/1/V1.

Council maintained that based on the interview reports, it appeared that the interviews were adequately conducted:

> (1) Claimants declared that they understood the questions well and that they were satisfied about the interview. (2) They did not explain in which way the contradictions could be clarified by the way in which the interview took place or by the method of translation; for example by concretely indicating which questions and declarations diverge from the questions asked by the interpreter and the answers they gave. (3) It does not appear that claimants and the officer misunderstood each other and it is not demonstrated that the officer asked the questions incompetently. It did further not appear that claimants did not have a sufficient opportunity to answer the questions. (4) The interview report shows that the officer explained the aim of the interview and verified whether claimants and the interpreter understood each other. (5) It also shows that the officer asked the questions in simple words about basic subjects such as family constitution, age of the children, and school. The officer asked further questions when the answer was not complete, unclear or contradictory. (6) Failing to further ask questions regarding one of the answers and the long duration of the interview do not mean that the essential contradiction can be justified.[392]

In a similar case[393], although the court ruled that the interview was not adequately conducted, the Council of State granted higher appeal to the INS by replicating the same statement as above.[394] A similar consideration was replicated in other judgements of the Council and courts.[395] In response, lawyers referred to article 12 of the CRC and the General Comment (No. 12).[396] For example, a lawyer argued that the interviews were not child-friendly because the vulnerable situation of the children is not taken into account and that the way in which the interview is conducted is not in line with article 12 and the General Comment.[397] However, the Council of State rejected this argument.[398] The Council maintained that article 12 does not oblige the state to ensure in the case of interviews with minor children more guarantees than those applicable in the case of adults. Regarding the General Comment, the Council held that this does not allow concluding that the interviews were inadequately conducted because the General Comment merely contains non-binding recommendations.[399] This statement is replicated in another case in which the child was

392 ABRvS 10 October 2012, nr. 201108774/1/V1, par. 5.1.
393 Rb. Amsterdam 16 December 2011, nr. 11/7546.
394 ABRvS 10 October 2012, nr. 201200425/1/V1.
395 See for example ABRvS 23 January 2013, nr. 201200919/1/V1 and Rb. Assen 27 February 2013, nr. AWB 12/13463.
396 General Comment No. 12 of the UN Committee on the Rights of the Child, 'The right of the child to be heard' (GRC/C/GC/12), 2009.
397 Rb. Rotterdam 20 December 2012, nr. 11/39127 and 11/39130. See also ABRvS 12 March 2014, nr. 201301105/1/V1, par. 6-7.
398 ABRvS 12 March 2014, nr. 201301105/1/V1, par. 6.
399 ABRvS 12 March 2014, nr. 201301105/1/V1, par. 6.1.

not even interviewed.[400] Lawyers also criticized the use of underqualified interpreters.[401] However, the Council of State consistently rejected this critique by arguing that the involved interpreters had the required experience and that it was not essential to be fully qualified in order to interpret.[402] This statement was repeated in another case.[403] Finally, lawyers also referred to the critical reports of NGOs when criticizing the interview practice.[404] However, the Council of State found that those reports were irrelevant because they did not concern the interviews in the case under review.[405]

In short, although lawyers continuously criticized the interview practice and emphasized the need to implement article 12 of the CRC, the Council of State refused to admit this critique and continuously stood on the side of the INS. However, as will be illustrated below, lawyers collaborated with NGOs and the Children's Ombudsman and succeeded to push the implementation of article 12 into the INS Guidelines.

## 2.3 Political debate

The restrictive policy of the government was first criticized by a coalition between lawyers and NGOs (par. 2.3.1) and then by the Children's Ombudsman (par. 2.3.2). In response to this critique, the government argued that the way in which interviews are conducted is adequate and ensures the prevention of fraud, child abduction and child trafficking (par. 2.3.3). However, the critique persisted with the result that the government requested the ACVZ to advise upon the issue (par. 2.3.4). This consultation resulted in a key policy change (par. 2.3.5).

### 2.3.1 Critique from lawyers and NGOs

In July 2011, Defence for Children International (DCI) submitted a request for information on the basis of the Government Information (Public Access) Act[406] to disclose the figures on family reunification for children.[407] In its press release,[408] DCI communicated that the disclosed information confirmed the dramatic increase in refusal rates regarding family reunification for children of refugees. DCI was of the opinion that one of the key reasons behind these

400 ABRvS 2 May 2011, nr. 201011016/1/V1, par. 2.2.2.
401 Rb. 's-Hertogenbosch 27 February 2012, nrs. AWB 11/34844, AWB 11/34845 and AWB 11/34846.
402 ABRvS 10 October 2012, nr. 201200426/1/V1.
403 ABRvS 10 October 2012, nr. 201200907/1/V1.
404 ABRvS 9 September 2013, nr. 201211793/1/V1.
405 ABRvS 9 September 2013, nr. 201211793/1/V1, par. 7.1.
406 Wet Openbaarheid van Bestuur, *Stb.* 1991, 703.
407 Letter from the Minister of Immigration and Asylum to Defence for Children, '*Wob verzoek tbv gezinshereniging*', 13 December 2011, nr. 5711168/11.
408 Defence for Children International, *Kind in het buitenland mag bijna nooit naar ouder in Nederland*, Press release 5 January 2012

figures is the interview practice at embassies. It particularly referred to the long duration of interviews and the lack of qualified interviewers/interpreters. It further explained that the questions during interviews were neither adapted to the age and development level of the child, nor to possible past traumatic experiences. This practice increased, in its view, the risk of misunderstandings during the interview and contradictions in the interview report. In this way, it rendered family reunification for children almost impossible. DCI argued for the state positive obligation implying a full commitment to children rights:



> The policy aiming to prevent fraud resulted in closing the door for all children. The state should, in contrast, actively help those children. If a parent has gained asylum status in the Netherlands and it appears that he/she has a child somewhere in the world, the Dutch state should assist the parents to be reunited as soon as possible with the child, instead of rendering reunification impossible.[409]

DCI's criticism triggered parliamentary questions about interviews at embassies.[410] During the parliamentary debate, the Christian Union (CU) plead for rendering the policy for Somali children flexible, through simplifying and assisting the children in understanding the questions.[411] The Green Left (GL) submitted a parliamentary motion requiring the state to improve interviews by taking into account the age and vulnerable position of children and to humanly and expeditiously deal with reunification applications.[412]

In April 2012, DCI and the Dutch Refugee Council (DRC), in collaboration with lawyers, conducted a field mission to the Dutch embassy in Addis Ababa in order to investigate how the interviews take place.[413] Upon return from Addis Ababa, lawyers communicated in the media[414] that children are subjected to long interviews during which almost two hundreds questions are asked in a high tempo:

> Any inconsistence or contradiction has consequences. In spite of this enormous importance, minimum legal safeguards are not met, even though you should be extra careful in this case because it concerns vulnerable children who are displaced and traumatized.[415]

409 *Ibid.*
410 *Aanhangsel Handelingen II* 2011/12, nr. 1602.
411 *Kamerstukken II* 2011/12, 30 573, nr. 98, p. 13 & 33.
412 *Kamerstukken II* 2011/12, 19 637, nr. 1503.
413 DCI & DRC 2012, *supra* note 234, at p. 4. In addition to this collaboration, lawyers initiated a mailing-list group (*Nareisgroep*) aiming to exchange information, comparative cases and arguments on on-going cases concerning family reunification for refugees, in particular children. The mailing-group included not only lawyers but also members of NGO's, in particular DRC and DCI. During my research, I took part in that group.
414 R. Pietersen, 'Ieder kind wordt als leugenaar behandeld', *Trouw* 25 May 2012.
415 *Ibid.*

The field mission resulted in a critical report published in late 2012.[416] It presented the vulnerable situation[417] of children waiting for reunification in Addis Ababa and concludes that the interviews at embassies took place under controversial conditions.[418] The report refers to long interviews without sufficient breaks, high numbers of questions, lack of qualified interviewers/interpreters and inadequate interview rooms.[419] The report recommends the implementation of article 12 of the CRC in the procedure to render the interviews child-friendly.[420] In addition, the report refers to the General Comment (No. 12) aiming to assist states when implementing article 12 of the CRC.[421]

### 2.3.2 Critique from the Children's Ombudsman

The critical voices from the side of lawyers and NGOs invited the Children's Ombudsman to investigate how interviews take place at embassies. In May 2012, he announced that the right to family reunification for children of refugees has probably been violated and that, for this reason, he decided to examine the reunification procedure.[422] Besides observation of interviews at embassies, the Ombudsman organised a focus group with lawyers in order to discuss the problems they face when representing their clients. In this context, lawyers provided him with a number of files and case studies.[423] In 2013, he published a critical report in which it is concluded that the state failed to protect children and that the procedure contained serious shortcomings with the effect that children did not get a full opportunity to enjoy the right to be reunited with their parents.[424] In his view, since 2008, almost 4000 children were possibly unjustifiably separated from their parents.[425] The Ombudsman was of the opinion that the 2009 strict policy in combination with INS's inadequate decision-making, resulted in violating children rights:[426]

> In recent years, the state carelessly handled family reunion applications of children wishing to reunite with their refugee parents. The INS focused too much on fraud prevention, while the child's interest was overlooked.[427]

In the view of the Children's Ombudsman, all children who were rejected between 2008 and 2013 should be offered a second chance by submitting new applications to be examined

416 DCI & DRC 2012, *supra* note 234.
417 *Ibid* at p. 4-10.
418 *Ibid* at p. 9.
419 *Ibid*.
420 *Ibid* at p. 30.
421 General Comment No. 12 of the UN Committee on the Rights of the Child, 'The right of the child to be heard' (GRC/C/GC/12), 2009.
422 J.Visser, 'Kinderombudsman vermoedt dat asielaanvragen kinderen 'bewust afgeremd' worden', *De Volkskrant* 16 May 2012, p. 3.
423 KOM/003/2013, *supra* note 79, at p. 86. See also *Kamerstukken II* 2013/14, 19 637, nr. 1747, p.7.
424 KOM/003/2013, p. 1-2.
425 *Ibid* at p. 4.
426 *Ibid* at p. 1.
427 *Ibid* at p. 4.

on the basis of an improved legislation and policy.[428] Regarding reunification interviews, like NGOs and lawyers, he found that the way in which children are interviewed did not comply with children's rights. In this regard, he recommended implementing the guidelines included in article 12 of the CRC and the General Comment (No. 12). He adds that the embassy and the INS should intensively monitor both the quality of interviewers and interpreters.[429] Finally, the Children's Ombudsman recommended providing decision makers with trainings on the child's development and the effect of traumatic experiences on the reliability of child's declarations.[430]



### 2.3.3 The Government's response

In its response to the above-mentioned criticism, the government advocated for a strict procedure to protect children from child trafficking and abduction. The state secretary begins one of his letters by maintaining that because of past experiences, there was awareness for preventing fraud. He added that preventing fraud guarantees that children are not victims of child trafficking, smuggling or abduction.[431] The state secretary further maintained that within the family reunion policy account was taken of children's rights, as the INS carefully examined whether the child was eligible for reunion, while fraud and abuse were prevented.[432] The government further states that the identification of the child and the assessment of the family bond, especially when there are no documents, are crucial elements of this examination:

> When this is not adequately regulated, the risk exists that children, coming to the Netherlands without really belonging to the family, become victims of child trafficking or smuggling and possibly end up in prostitution or other forms of forced labour. (…) Moreover, the Dutch state does not want to collaborate with child abduction whereby a child is brought to the Netherlands without the consent of the parent staying behind.[433]

In the view of the government, it was necessary to conduct a rigorous investigation of the family bond before the child was admitted to the Netherlands.[434] In its opinion, interviews were necessary, especially in the case of foster children and complex family bonds because within such families there was a risk of child trafficking and abduction.[435] The government further maintained that the Children's Ombudsman basically looks at the relation between the child and the state in the light of the CRC. The government re-emphasises that the state

428 *Ibid.*
429 *Ibid* at p. 57.
430 *Ibid.*
431 *Aanhangsel Handelingen II* 2012/13, nr. 1082, p. 1.
432 *Kamerstuk II* 2012/13, 19 637, nr. 1721, p. 44.
433 *Ibid* at p. 44.
434 *Ibid.*
435 *Ibid* at p. 46.

is taking the child's interest into consideration through preventing child smuggling and child trafficking:

> In migration policy, account is taken of the child's interest. The child's interest is taken into account when the state prevents child smuggling and trafficking. Although this means that the examination in the reunion procedure became more intensive and the procedure can be longer, this is justified due to the aim we strive towards. (…) Not taking other interests adequately into account would not serve the state priority to prevent child trafficking and smuggling, which is a reprehensible form of criminality.[436]

Similarly, the government was of the opinion that the measures taken to prevent fraud through intensification of the assessment of the family bond should be seen as an incorporation of the child's interest, as the consequences of fraud can be detrimental to the child's interest. The state secretary put it as follows:

> I conclude that the Children's Ombudsman looks at the issue from another perspective to the reunification policy, namely exclusively from the child's perspective whereby the relation between the child and the state is central. The Children's Ombudsman ignores the role of parents in the procedure. This role is in my view of great importance. With the measures aiming to prevent fraud and abuse whereby the examination became intensified, the child's interest is taken into account. Indeed, the possible consequences of abuse are difficult to be seen as being in the interest of children.[437]

In line with the state secretary, during the parliamentary debate on the report of the Children's Ombudsman, the People's Party for Freedom and Democracy (VVD) stressed that the Children's Ombudsman looks at the issue from a one-sided perspective:

> The Children's Ombudsman looks from a unilateral perspective at family reunion for refugees. The role of parents, their responsibility and the maintenance of Dutch society are ignored. The Children's Ombudsman overlooks that prevention of fraud and abuse might be in the child's interest. At any time, the Dutch state wants to render child trafficking, smuggling and abduction impossible.[438]

However, although the government's approach was supported by the VVD, its refusal to implement the recommendations of the Children's Ombudsman was heavily criticized within the parliament with policy change as result, as described below.

436 *Ibid* at p. 48-49.
437 *Ibid* at p. 50-51.
438 *Kamerstukken II* 2013/14, 19 637, nr. 1747, p. 12.

### 2.3.4 Critique from the Parliament and the ACVZ

During the parliamentary debate on the report of the Children's Ombudsman, various political parties advocated for the implementation of his recommendations, in particular those regarding interviews at embassies. The Socialist Party (SP) observed that when the state secretary disregarded the conclusions and recommendations of the Children's Ombudsman, the state secretary was standing 'above the law', which was not acceptable.[439] The Green Left (GL) referred to the child-friendly detailed guidelines, which are applicable in interviews with children in the Netherlands, and then invited the government to implement similar guidelines in the reunification procedure for children of refugees.[440] The GL added that the interview should be professionalized with clear and guiding criteria on how the interview should take place. In addition, in the view of the GL, children who were rejected on the basis of child unfriendly interviews should have new chance to reunite with their parents.[441] From the perspective of the 'Democrats 66' party (D66), the government should follow the recommendations of the Children's Ombudsman and bring the reunification policy in line with the CRC.[442] This political party emphasised that the ombudsman put forward a serious problem about violation of children's rights[443] and since there is a disagreement between the secretary of state and the ombudsman, the state secretary would have to request a second opinion from the ACVZ.[444]

In reply, the government reiterated that it disagreed with the conclusions of the Children's Ombudsman, in particular the conclusions regarding interviews.[445] The state secretary explained that interviews were adequately conducted and added that if this had not been the case, courts would not agree with the interview practice.[446] He also referred to the jurisprudence in which the Council of State ruled that interviews took place adequately.[447] The state secretary further emphasised that the Dutch state had been acting according to applicable legislation.[448] In response to the SP's observations, the state secretary stressed that the Children's Ombudsman is not the 'law' and explained that it is an institution that monitors state administration in relation to individuals. He added that such institutions monitor how the state acts, but they also have to be critically constrained.[449] The state secretary further advised that he did not have any objection in asking the ACVZ for a

439 *Ibid* at p. 41.
440 *Ibid* at p. 12.
441 *Ibid* at p. 20.
442 *Ibid* at p. 22.
443 *Ibid.*
444 *Ibid.*
445 *Ibid* at p. 39-40.
446 *Ibid* at p. 40.
447 *Kamerstuk II* 2012/13, 19 637, nr. 1721, p. 47.
448 *Kammerstukken II* 2013/14, 19 637, nr. 1747, p. 41.
449 *Ibid* at p. 42.

second opinion.[450] In late 2013, he requested the ACVZ to examine the conformity of the reunification policy regarding refugees with international and European law.[451]

In its report titled '*Reunited After the Flight*'[452], the ACVZ concluded that it did not identify any concrete evidence of fraud and abuse of the reunification procedure for refugees. The ACVZ could not confirm that the strict policy of 2009 aiming to tightening up the policy was necessary in order to prevent fraud and abuse. In this context, it advised that the term of fraud was used in the context of applications in which the INS had doubts on the family bond, while two-third of those applications were later granted.[453] Regarding decision-making, the ACVZ noted that the administrative rules were not always consistently implemented. In particular, the family bond was not always investigated with the required safeguards. The ACVZ found this practice as not conforming to the principle of good administration.[454] Regarding the re-examination of all cases since 2008 (as recommended by the Children's Ombudsman), the ACVZ communicates that two-thirds of the 200 applications it examined were granted at a later stage. In this light, and taking into account how subsequent application were processed, the ACVZ did not see any grounds for the re-examination of all applications rejected since 2008.[455] With respect to reunification interviews, the ACVZ recommended the implementation of article 12 of the CRC and the General Comment (No. 12) in the Aliens Circular.[456] The ACVZ was of opinion that, due to the particular position of minor children, their dependency and vulnerability, it is good administration when embassy officers could rely on generally accepted guidelines on interviewing children. It was not enough that interview officers were simply experienced in interviewing children. The ACVZ considered article 12 of the CRC in combination with the General Comment as authoritative and observed that these guidelines were implemented neither in legislation, regulations nor in working instructions.[457] The ACVZ's recommendation reads as follows:

> Incorporate in the Aliens Act a reference to the recommendations on interviewing children made by the UN Committee on the Rights of the Child. Indicate which aspects of these recommendations are relevant to the interviewing of children during procedures relating to the entry of family members of asylum permit-holders. Take as a basis paragraphs 41-47 of the recommendations, in which the UN Committee describes the steps it regards as necessary for effective implementation of article 12

450 *Ibid* at p. 40-41.
451 Letter from the State Secretary to the ACVZ, *'Adviesverzoek over het Nederlandse nareisbeleid'*, 30 October 2013, nr. 443776.
452 ACVZ 2014, *supra* note 238.
453 *Ibid* at p. 13.
454 *Ibid* at p. 14. The ACVZ refers here to article 41 of the EU Charter of Fundamental Rights and sections 3:46 and 3:47 of the Dutch General Administrative Law Act.
455 *Ibid* at p. 14.
456 *Ibid* at p. 69-70.
457 *Ibid* at p. 69.

of the Convention on the Rights of the Child. These relate to (1) an assessment of the child's capacity of forming her or his own views, (2) preparation for the interview, (3) the conduct of the interview and (4) the provision of information about the outcome of the procedure and an explanation of how the child's statements are taken into account.[458] (Recommendation 4)



### 2.3.5 Policy change

In his reaction to the ACVZ recommendation regarding interviews, the state secretary reiterated that interviews take place adequately. Nevertheless, he advised that the INS would incorporate the method in which interviews take place in a 'working instruction' taking into account article 12 of the CRC and the General Comment.[459] During the parliamentary debate on the ACVZ report, the CDA party advocated for implementing those guidelines in the Aliens Circular, as recommended by the ACVZ, and not in a working instruction, as the first option increases the transparency of the administration.[460] In reply, however, the state secretary did not accept.[461] Subsequently, those norms were implemented in a working instruction[462] that states that 'in order to guarantee the rights of the child, this working instruction takes, as far as possible, article of the 12 of the CRC in combination with the General Comment into account'.[463] This working instruction pays attention to preparation, conducting, reporting, and closing the interview as well as the follow-up procedure. It is also mentioned that the interview should be child-friendly.[464]

## SECTION 3: SUMMARY AND CONCLUSION

This chapter aimed to reconstruct how asylum claims based on family life between refugees and their foster children are negotiated within the political and legal debate over the period between 2009 and 2013. In this final section, I present a summary of the debate (par. 3.1-3.2) and then conclude that state approach to family ties in refugee law stands in stark disjuncture with its approach in regular migration law (par. 3.3).

458 *Ibid* at p. 137.
459 *Kamerstukken II* 2014/15, 19 637, nr. 1938, p. 6-7.
460 *Ibid* at p. 9-10 & 36.
461 *Kammerstukken II* 2014/15, 32 175, nr. 55, p. 20.
462 IND-werkinstructie nr. 2015/1 ('*Kindvriendelijk horen op de ambassade*').
463 *Ibid* at p. 1.
464 *Ibid* at p. 2.

*3.1 Family bond:* the growing numbers of Somali foster children was increasingly seen as suspect and as an indication for fraud. For this reason, the state introduced a restrictive definition of the family bond in order to prevent abuse. The family bond in the case of foster children is considered ended when the child is housed in another family even if this occurred because the parent fled the country of origin. In practice, the INS strictly implemented this policy and consistently argued that since foster children did not belong to the nuclear family, when another person takes on childcare in the country of origin, it is not necessary to admit the foster child into the Netherlands. In response, lawyers regularly argued that the separation was not voluntary and that housing into another family should be seen as an offshoot of parental responsibility because children were in need of care when the parent left. Courts regularly accepted this reasoning. When the issue reached the Council of State, it qualified the distinction between foster children and biological children in terms of breaking the family bond as unlawful. This judgment resulted in policy change. With regard to the question concerning the family head, although the family structure of involved families reflects a diversity family model (within which more than two adults act as parents of the foster child), involved actors defended the idea that there is always a family head and that there can only be 'one' head.

*3.2 Reunification interviews:* although lawyers continuously criticized the interview practice and argued for the implementation of article 12 of the CRC, the Council of State refused to accept this appraisal and continuously agreed with the INS. Within the political debate, criticism originated from NGOs and the Children's Ombudsman in collaboration with lawyers. These actors represented the state as failing to find a balance between preventing fraud, on the one hand, and respect for children rights, on the other. They also advocated for implementing article 12 of the CRC. In spite of this criticism, the government continuously defended the interview practice and referred to national jurisprudence supporting its policy. The government subsequently advanced that intensified interviews ensure the prevention of fraud, child abduction and child trafficking. However, during the parliamentary debate on the report of the Children's Ombudsman, various political parties advocated for the implementation of article 12 of the CRC. This debate resulted in the state secretary deciding to ask the ACVZ for advice. The ACVZ found that there were no concrete indications of fraud and abuse and that decision-making contained various shortcomings. Like lawyers, NGO's and the Children's Ombudsman, the ACVZ recommended implementing article 12 of the CRC. Upon this advice, the government decided to implement this provision in the INS's Guidelines.

*3.3 Contrasting state approaches to family ties:* this chapter shows that, over the period between 2009 and 2013, state approach to family ties in refugee law was in stark disjuncture with its approach in regular migration law. While article 8 ECHR is guiding in regular

migration law, it was not applicable within refugee law. While family life only ends under very exceptional circumstances in the context of regular migration, it ends easily when it comes to foster children of refugees. Further, the parent's decision to leave the child behind in the country of origin is reversible in regular migration law, while it is irreversible in refugee law. In addition, while diversity in parenthood is tolerated in the regular context, it is suspect and unwanted (fraud and child trafficking) in refugee law. Instead of diversity, the one-headed family model is promoted when the issue concerns refugees. Finally, while the family bond is viewed as 'private' in regular migration law, it is considered as a 'public' issue in refugee law.

# 3

# Chapter 3

## Reconstructing the debate on forced marriage

The present chapter reconstructs how asylum claims based on forced marriage are negotiated within the political and legal debate. The focus is on the period between 2004 and 2014 during which forced marriage gained considerable attention in regular migration law, family law and criminal law. The chapter draws on the 2005 ACVZ report[465] (section 1), country of origin information reports (section 2) and case law (section 3). In concluding (section 4), I summarize the debate and conclude. It deserves to recall that this chapter operates, like the previous chapter, as the text on the basis of which I tested my hypothesis. In addition, as will be discussed in the concluding section, the present chapter allows us to contrast state approach to forced marriage in regular migration law (par. 1.2.2, Ch1), on the one hand, and its approach in refugee law, on the other. This contrast will enrich our broader look, presented in the Epilogue, at how the dilemma under study is negotiated.

## SECTION 1: FORCED MARRIAGE IN THE 2005 ACVZ REPORT

In its 2005 report, the committee paid attention to forced marriage in various fields: family law, criminal law, migration law and asylum law. In the general section on national and international legal framework, it observes that forced marriage is not defined in national law and then refers to international law instruments.[466] The committee then qualifies forced marriage as 'human rights violation'[467]. In its view, international legal norms ascribe to the state a positive obligation to take measures against forced marriage and to ensure that the right to choose to marry is enjoyed in full freedom. In this view, the committee invited the state to take the initiative in developing policies and laws responding to forced marriages.[468] Within this reasoning, forced marriage is defined as a human rights violation, while the solution is sought in state policies oriented to protect (potential) victims of forced marriages. Further, the committee devoted a short paragraph to forced marriage in asylum law in comparison with the sections devoted to the issue in other fields of law.[469] In this context, it discussed the question regarding persecution (par. 1.1) as well as the requirement of the 'failure of state protection' (par. 1.2).

465 ACVZ 2005, *supra* note 243. See chapter 1 (par. 5.2 above) for more details on data collection.
466 *Ibid* at p. 27-28. The ACVZ refers to Article 16(2) of the Universal Declaration of Human Rights (UDHR); Article 23(3) of the International Covenant on Civil and Political Rights (ICCPR); and Article 16(1)(b) of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW).
467 *Ibid* at p. 28.
468 *Ibid.*
469 *Ibid* at p. 43-44.

### 1.1 'Persecution for reasons of'

The ACVZ views forced marriage as a form of 'domestic violence' and as such it can amount to persecution for the purpose of the refugee definition as contained in the Refugee Convention. In this context, the committee makes no explicit mention of any human rights violation. The committee is further of the opinion that in the case of domestic violence, ''belonging to a certain 'gender' can be seen as membership to a particular social group in the sense of the refugee definition''.[470] The committee then observes that when the victim is a woman, the well-founded fear of being persecuted is partly caused by being a woman. Consequently, the ground of persecution is membership to a particular social group, namely that of 'women in the country of origin'.[471]



The committee reasoning invites to make two observations. First, the committee's omission to explicitly refer to human rights violations along with the representation of forced marriage as a form of 'domestic violence', suggest that the committee does not identify forced marriage as a separate human rights violation in itself. The focus is on related harms (domestic violence occurring before or after forced marriage), while it does not address coercion to marry and the lack of 'free and full consent'. Second, the combination 'women/country of origin' in the formulation of the particular social group portrays forced marriage as being a problem that concerns a foreign culture to which foreign women are subjected.[472]

### 1.2 Failure of state protection

The ACVZ first observes that in cases of forced marriage it is not the state that persecutes but, instead, 'third persons' are the persecution agents.[473] The committee stresses that it is important in such cases to exhaust all local remedies before seeking asylum.[474] So, in order to be recognized as a refugee, the asylum seeker should demonstrate the following:

(i) The partner and/or family members can be considered as agent of persecution;
(ii) A complaint is submitted (or impossible to submit), while the authorities in the country of origin do not offer any protection;
(iii) The society in the country of origin does not offer any protection;
(iv) Other family members do not offer protection; and
(v) There is no internal relocation alternative. [475]

470 *Ibid* at p. 44.
471 *Ibid*.
472 Compare E. Arbel, 'The culture of rights protection in Canadian refugee law: examining the domestic violence cases', *McGill Law Journal* 2013, pp. 730-771, at p.761.
473 ACVZ 2005, *supra* note 243, at p. 43.
474 *Ibid* at p. 44.
475 *Ibid* at p. 43.

In the committee's view, when these attempts are not successful or when it is foreseeable that seeking local protection is senseless or dangerous, a well-founded fear of being persecuted can exist.[476]

The committee reasoning invites to make three observations. First, the requirement that the family should be considered as the persecution agent suggests that forced marriage is viewed as a form of 'family violence'. This joins the understanding that forced marriage is a form of 'domestic violence'. However, this overlooks that coercion to marry might emanate from actors outside the family and the domestic sphere. Forced marriage can indeed include members outside the family, such as community members, participating in exercising coercion to marry.[477] Second, the protection possibilities advanced by the committee do not all comply with article 7 of the EU Qualification Directive.[478] The committee mentions the 'society in the country of origin' and 'other family members' as being protection agents, while article 7 prescribes that protection can only be provided by the state, or organizations controlling the state or a substantial part of its territory.[479] Third, when the committee proposes internal relocation alternative, it proposes that the asylum seeker should first try to leave his/her residence place and move to another part in the country of origin. This reasoning considers victims of forced marriage as being able to protect themselves through evading forced marriage by changing their residence place.[480] In addition, the committee does not mention any actor of protection in the other part of the country of origin. Apparently, the idea is that since persecution is lacking in that other part of the country, protection is available.[481]

Finally, and in line with the foregoing, it deserves to be mentioned that the committee recommended the government to accept forced marriage as a valid asylum claim in the following circumstances:

> The person concerned should establish that (a) the country of origin does not offer any scope for safe residence, and that (b) all possible means of obtaining protection are exhausted. Only once those efforts have been unsuccessful or if it is clear at the outset that asking for protection is pointless or dangerous, should it be assumed that

476 *Ibid* at p. 44.
477 G. Gangoli, K. Chantler, M. Hester & A. Singleton, 'Understanding Forced Marriage: definitions and realities', in: Gill & Anitha 2011, *supra* note 96, pp. 25-45, at p. 35.
478 From a normative legal view, the EU Qualification Directive was not binding before its implementation deadline of October 2006.
479 Article 7(1) EU Qualification Directive.
480 Compare the discretion requirement in LGBT asylum claims. See for example J. Wessels, 'Discretion in sexuality-based asylum claims: an adaptive phenomenon', in: T.P. Spijkerboer (ed), *Feeling Homophobia. Sexual Orientation, Gender Identity and Asylum*, London: Routledge 2013, pp. 55-81.
481 See also H. Battjes, *De ontwikkeling van het begrip bescherming in het asielrecht* (Inaugural lecture Amsterdam VU), Migration Law Series 10, Amsterdam: 2012, p. 26.

the person concerned has a well-founded fear of persecution within the meaning of the Refugee Convention.[482]

## SECTION 2: FORCED MARRIAGE IN COUNTRY REPORTS

In terms of collection, I consulted the database of the Dutch Refugee Council and collected all reports covering the period between 2004 and 2014.[483] All reports were submitted to a quick scan[484] to identify the reports in which forced marriage is thematized. This search showed that except some Nigeria reports all other reports do not thematize forced marriage. In what follows, I first illustrate the un-thematization of forced marriage in country reports (par. 2.1). I then showcase the evolution and thematization of forced marriage within Nigeria reports (par. 2.2) and then take a closer look at what they tell us about forced marriage in terms of the problem's scope and available protection possibilities (par. 2.3).



### 2.1 Non-thematizing forced marriage

Non-thematizing forced marriage can be illustrated by means of reports concerning three countries: Guinea, Iraq and Syria. These reports are selected because they also illustrate a contrast between un-thematizing forced marriage, on the one hand, and thematizing other claims, in particular female genital mutilation (FGM), 'honour-based' violence (HBV), and homosexuality, on the other.

To begin with, the 2007 report[485] on Guinea makes no mention of forced marriage. The 2008 report[486] and 2011 report[487] refer to it under the headings of 'women' and 'minors', but no separate section is dedicated to it. Similarly, in many reports on Iraq, forced marriage is not named at all.[488] In other reports, it receives only passing attention under various headings such as 'religious groups'[489], 'single women'[490], 'violence against women and minors'[491],

482 ACVZ 2005, *supra* note 243, at p. 77.
483 The DRC database is available at: <www.vluchtweb.nl>. For more details on data collection, see chapter 1, par. 5.2 under B.
484 See chapter 1, par. 5.2 under B.
485 Ambtsbericht Guinee over huidige situatie 2007.
486 Algemeen ambtsbericht Guinee, maart 2008, p. 43, 50 & 52.
487 Algemeen Ambtsbericht Guinee, september 2011, p. 36-37.
488 Algemeen ambtsbericht Irak juli 2005; Algemeen ambtsbericht Irak december 2005; Algemeen ambtsbericht Irak december 2006; Algemeen ambtsbericht Irak juni 2007; Algemeen ambtsbericht Irak mei 2009; Thematisch ambtsbericht over de situatie van lesbiennes, homoseksuelen, biseksuelen en transgenders (LHBT's) in Irak Juni 2012.
489 Algemeen ambtsbericht Irak, juni 2008, p. 80.
490 Algemeen ambtsbericht Irak, december 2011, p. 56.
491 Algemeen ambtsbericht Irak, november 2012, p. 36, 75, 76 & 80.

'women' [492] and 'specific groups' [493]. Likewise, forced marriage is invisible in many reports on Syria[494] or only mentioned in passing[495].

Further, in the 2010 report on Guinea, child marriages are reported in passing[496], while FGM is thematized in a separate sub-section.[497] In the 2013 report, forced marriage is not at all named, while FGM receives a sub-section.[498] In the 2014 report, except mentioning that after FGM a girl might be forced to marry[499] and that child marriages do occur,[500] no further reference is made to forced marriage, while FGM is highlighted.[501] Similarly, the 2004 report on Iraq refers to forced marriage under the heading 'marriage'[502], while HBV is thematized. [503] In the 2006 report, HBV receives a separate section,[504] while forced marriage appears only in a footnote.[505] The 2009 report makes no reference to forced marriage, while HBV is included in a separate paragraph.[506] In the 2010 report, forced marriage is cited only once under the heading of 'minors',[507] while HBV is thematized.[508] In the same vein, the 2004 report on Syria makes no mention of forced marriage, while HBV is incorporated in a separate heading.[509] Finally, the 2006 report only refers to underage marriages,[510] while HBV receives a subsection.[511] Correspondingly, while homosexuality is included in a separate paragraph in Guinean reports[512], Iraqi reports[513] and Syrian reports[514], forced marriage is not thematized.

492 Algemeen ambtsbericht Irak, december 2013, p. 51, 52 & 56.
493 Ambtsbericht Veiligheidssituatie in Irak, september 2014, p. 50.
494 Algemeen ambtsbericht Syrië oktober 2007; Algemeen ambtsbericht Syrië juli 2008; Algemeen ambtsbericht Syrië september 2009; Algemeen ambtsbericht Syrië mei 2012; Algemeen ambtsbericht Syrië januari 2013; Algemeen ambtsbericht Syrië mei 2005.
495 Algemeen ambtsbericht Syrië, december 2013, p. 46-47.
496 Algemeen ambtsbericht Guinee, mei 2010, p. 45. See also p. 36.
497 Algemeen ambtsbericht Guinee, mei 2010, p. 37-40.
498 Algemeen Ambtsbericht Guinee, maart 2013, p. 38-41.
499 Algemeen Ambtsbericht Guinee, juni 2014, p. 44.
500 Algemeen Ambtsbericht Guinee, juni 2014, p. 43, 53.
501 Algemeen Ambtsbericht Guinee, juni 2014, p. 43-51.
502 Algemeen ambtsbericht Irak, december 2004, p. 32.
503 Algemeen ambtsbericht Irak december 2004, p. 18, 19 & 59.
504 Algemeen ambtsbericht Irak, april 2006, p. 65-67.
505 Algemeen ambtsbericht Irak, april 2006, footnote 262.
506 Algemeen ambtsbericht Irak mei 2009, p. 57-58. See also page 66 in which honor-based violence is mentioned under the heading 'homosexuals men and women'.
507 Algemeen ambtsbericht Irak, januari 2010, p. 57.
508 Algemeen ambtsbericht Irak, januari 2010, p. 55-56. See also p. 64 under the heading 'homosexual men and women'.
509 Ambtsbericht Syrië 2004, p.51-52.
510 Algemeen ambtsbericht Syrië, augustus 2006, p 56.
511 Algemeen ambtsbericht Syrië, augustus 2006, p 564-55. See also Algemeen ambtsbericht Syrië, oktober 2007, p. 52.
512 Algemeen ambtsbericht Guinee februari 2008; Terms of Reference voor algemeen ambtsbericht Guinee 18 februari 2009; Algemeen ambtsbericht Guinee juni 2009; Terms of Reference voor algemeen ambtsbericht Guinee 10 december 2009; Algemeen ambtsbericht Guinee Mei 2010; Algemeen Ambtsbericht Guinee 9 september 2011; Algemeen Ambtsbericht Guinee Maart 2013; Algemeen Ambtsbericht Guinee Juni 2014; Terms of Reference voor algemeen ambtsbericht Guinee 4 december 2013.
513 Algemeen ambtsbericht Irak December 2004; Algemeen ambtsbericht Irak Juli 2005; Algemeen ambtsbericht Irak December 2005; Algemeen ambtsbericht Irak April 2006; Algemeen ambtsbericht Irak december 2006; Algemeen ambtsbericht Irak juni 2007; Algemeen ambtsbericht Irak Juni 2007, ten dele geactualiseerd op 14 februari 2008; Term of Reference voor algemeen ambtsbericht Irak 18 april 2008; Algemeen ambtsbericht Irak Juni 2008; Algemeen ambtsbericht Irak Mei 2009; Algemeen ambtsbericht Irak Januari 2010; Algemeen ambtsbericht Irak Oktober 2010; Terms of Reference voor algemeen ambtsbericht Irak 28 februari 2011; Algemeen ambtsbericht Irak December 2011; Terms of Reference voor algemeen ambtsbericht Irak 16 maart 2012; Algemeen ambtsbericht Irak November 2012; Algemeen ambtsbericht Irak december 2013; Terms of Reference voor algemeen ambtsbericht Irak 11 april 2013.
514 Algemeen ambtsbericht Syrië Mei 2004; Algemeen ambtsbericht Syrië Mei 2005; Algemeen ambtsbericht Syrië

It deserves to be observed that this contrast mirrors a similar one within the Aliens Circular: while forced marriage is 'absent', FGM, HBV and homosexuality are thematized. This also mirrors the identified 'silencing' of forced marriage in case law when the claim consists of forced marriage along with FGM, HBV or homosexuality (see par. 5.5. in this chapter).

## 2.2 Thematizing forced marriage

In this paragraph, I describe the evolution of the thematization of 'forced marriage' within Nigeria reports. Between 2004 and 2014, nine country reports were published: 5 general reports, 1 thematic report, and 3 Terms of Reference (TOR) reports.[515] In the 2005 general report as well as in the 2007 general report, forced marriage is not thematized; it is only mentioned in passing under various headings.[516] In contrast, both reports do include a sub-section on FGM.[517] However, as of 2008, forced marriage started to gain a separate section in the reports. It was initially thematized in a sub-section named 'child marriages' and subsequently in a sub-section called 'forced marriage'.



*A. Child marriage:* the 2008 thematic report thematizes child marriages in a separate section named 'forced marriages of girls under 16 years old'.[518] Besides referring to legislation prohibiting child marriages, the report pays attention to existing protection possibilities such as state protection, internal relocation and existing shelters.[519] In the 2009 TOR report[520], the INS included specific questions on the extent to which forced marriages occur in Nigeria and on existing protection possibilities.[521] The aim of these questions is to update the information on the position of women in Nigeria as communicated in the previous general and thematic reports.[522] However, the subsequent 2009 general report does not contain any significant actualization, except a few extra details in terms of protection possibilities. Like the 2008 thematic report, the 2009 general report includes a similar sub-section named 'forced marriage of girls under 16 years old'[523].

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Augustus 2006; Algemeen ambtsbericht Syrië Oktober 2007; Terms of Reference voor algemeen ambtsbericht Syrië 20 februari 2008; Algemeen ambtsbericht Syrië Juli 2008; Algemeen ambtsbericht Syrië September 2009; Terms of Reference voor algemeen ambtsbericht Syrië 25 januari 2012; Terms of Reference voor algemeen ambtsbericht Syrië 25 september 2012; Terms of Reference voor algemeen ambtsbericht Syrië 4 april 2014; Algemeen ambtsbericht Syrië 26 augustus 2014; Algemeen ambtsbericht Syrië 11 december 2013; Terms of Reference voor algemeen ambtsbericht Syrië 2 september 2013.

515 See for example IND- Nigeria- Terms of Reference, June 2012, p. 1. TOR reports aim to actualise pre-existing general and thematic reports (see par. 5.2, Ch1).

516 Algemeen Ambtsbericht Nigeria, september 2005, p. 44, 46, & 50; Algemeen Ambtsbericht Nigeria, februari 2007, p. 43, 44, & 49.

517 Algemeen Ambtsbericht Nigeria, september 2005, p. 48-49; Algemeen Ambtsbericht Nigeria, februari 2007, p. 47-48.

518 Thematisch Ambtsbericht Nigeria-positie van vrouwen en minderjarigen, november 2008, p. 14-16.

519 Thematisch Ambtsbericht Nigeria-positie van vrouwen en minderjarigen, november 2008, p. 14-16.

520 IND-Terms of Reference voor Algemeen ambtsbericht Nigeria, juli 2009.

521 IND-Terms of Reference voor Algemeen ambtsbericht Nigeria, juli 2009, p. 5.

522 IND-Terms of Reference voor Algemeen ambtsbericht Nigeria, juli 2009, p. 4.

523 Algemeen Ambtsbericht Nigeria, december 2009, p. 52-54.

*B. Forced marriage:* in the 2010 TOR report[524], the INS included similar questions as communicated in the previous 2009 TOR report. In the follow up 2011 general report, forced marriage is thematized in a section named 'forced marriage'.[525] However, that section focuses on child marriages. Similarly, although the 2012 TOR report[526] includes similar questions[527] as in the previous two TOR reports, the follow up 2012 general report basically focuses on child marriages, although the issue is placed under a section named 'forced marriage'.[528]

## 2.3 Forced marriage in Nigeria reports

I take here a closer look at the 2012 Nigeria country report in which forced marriage is thematized. I outline what this report tells us about forced marriage in terms of the problem's scope (A) and protection possibilities (B).

*A. Problem's scope:* the report mentions that forced marriage frequently occurs in various parts of Nigeria, especially in the Islamic North in which very young girls are often married off to an older man, according to Islamic rules.[529] The report communicates that the Islamic North rejected the federal Child Rights Act that is adopted by 24 of 36 Nigerian States. This law prescribes the age of 18 as the minimum age to marry and prohibits forced marriage of minor children. The report mentions that this law is seen as anti-Islamic in the North.[530] Further, reference is made to the organisation named 'Women's Rights Advancement and Protection Alternative' (WRAPA) that plays an important role in campaigning against forced marriages. Due to its efforts, the number of forced marriages had been decreasing. Through dialogue and public campaigns, it tries to prevent and fight against forced marriages in collaboration with NGOs and the national Human Rights Commission. This organisation succeeded in getting annulment of forced marriages in proceedings before the Supreme Court.[531]

*B. Protection possibilities:* the report communicates that in the Nigerian States in which the Child Rights Act is adopted, women and girls can submit complaints when they are forced to marry. However, when a girl seeks police protection her complaint is often not taken seriously. Sometimes the police bring the girl back to her family. It cannot thus be assumed that the police are always able to offer protection.[532] In addition, there are no state-shelters

524 IND-Terms of Reference voor algemeen ambtsbericht Nigeria, 15 oktober 2010, p. 4-5.
525 Algemeen Ambtsbericht Nigeria, 5 april 2011, p. 54-57.
526 IND-Terms of Reference voor Algemeen ambtsbericht Nigeria, juni 2012.
527 IND-Terms of Reference voor Algemeen ambtsbericht Nigeria, juni 2012, p. 5-6.
528 Algemeen Ambtsbericht Nigeria, oktober 2012, p. 44-46.
529 *Ibid*, at p. 45.
530 *Ibid*.
531 *Ibid* at p. 46.
532 *Ibid*.

for those facing forced marriage.[533] NGOs provide a limited and temporary sheltering located in some large cities. For example, in Lagos, the NGOs 'Real Woman Foundation' and the 'Project Alert on Violence Against Women' have shelters in which women can temporarily stay for a period of six weeks.[534] However, they often return to their family after a few weeks of sheltering with the risk that they can be once again victim of violence.[535] In this context, the report communicates that the majority of victims would not always seek the help of NGOs because this means that the victim publicly protests against male family members and thus risks to be rejected by the family. Such problems are informally solved within the family and not through an institution or NGO.[536] Although it is possible for women to relocate somewhere else in Nigeria, this option appears not to be possible when the woman in question is not economically independent. The possibility to escape is also difficult when the victim is too young and/or lives in the countryside without any broad social network. Moreover, if a victim escapes, the family would trace her because the community is compact.[537]



## SECTION 3: FORCED MARRIAGE IN CASE LAW

In this section I first present three fundamental cases in which courts exclude forced marriage from the scope of the Refugee Convention and the ECHR (par. 3.1). Second, I will exemplify how forced marriage claims from Nigeria are approached (par. 3.2). These two paragraphs lay down the path to easily follow the third section in which I present a large set of case law (par. 3.3). I will subsequently showcase how the credibility of those seeking asylum because of forced marriage is negotiated (par. 3.4). I then present a number of cases in which forced marriage is part of the claim along with FGM, HBV and homosexuality and show how forced marriage can be sidelined or even erased (par. 3.5).

### 3.1 Three fundamental judgments

*Case 1*

The first case (2011)[538] concerns an Indonesian claimant. When her mother passed away, her father decided that she should marry a certain man. When she refused, her father mistreated her and forced her to quit school. Because of these problems, the claimant sought refuge

533 *Ibid.*
534 *Ibid* at p. 47.
535 *Ibid* at p. 46.
536 *Ibid.*
537 *Ibid.*
538 Rb. Groningen 20 October 2011, nr. 11/13661.

with her aunt. She stayed with her for a period of four months before her nephew, living in the Netherlands, helped her to travel to the Netherlands with a short-term visa. Two months after her arrival, she claimed asylum because of her threatening forced marriage in Indonesia.[539] The INS found the claimant's narrative credible, but it maintained that her statements were insufficiently serious to conclude that she had a well-founded fear of being persecuted, because her problems were not related to the Refugee Convention.[540] In reply, the lawyer referred to the lack of national protection and emphasized that the Indonesian legislator and community consider such parental decisions as legitimate.[541] The court dismissed the appeal and stated that:

> 'both the Refugee Convention and the ECHR do not provide for the protection of women who are married off'.[542]

In higher appeal,[543] the lawyer argued that on the basis of the 2005 ACVZ report, forced marriage could lead to refugee protection.[544] The Council of State confirmed, however, the court's decision without substantive reasoning. The Council is of opinion that the claim in higher appeal cannot lead to the annulment of the court's decision and that it does not raise questions that require answering in the interest of legal unity, legal development or judicial protection.[545]

The court's statement is breathtaking because the effects of forced marriage are often sufficient to engage article 3 ECHR, as it often involves physical and psychological harm that can amount to inhuman and degrading treatment.[546] It is also arguable that forced marriage also violates the right to respect for private life in the sense of article 8 ECHR that includes the right to bodily and psychological integrity.[547] Since forcing someone to enter marriage is a human rights violation, it can amount to persecution if the failure of state protection is established. The court's statement and the indifference of the Council of State are extraordinary if we also take into account that forced marriage is considered in the refugee law doctrine as a common and normal asylum issue.[548]

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539 Rb. Groningen 20 October 2011, nr. 11/13661, par. 2.1.
540 Rb. Groningen 20 October 2011, nr. 11/13661, par. 2.2.
541 Rb. Groningen 20 October 2011, nr. 11/13661, par. 2.3.
542 Rb. Groningen 20 October 2011, nr. 11/13661, par. 2.11.
543 ABRvS 19 January 2012, nr. 201112223/1/V1.
544 Ground nr. 1 in the lawyer's Higher Appeal Brief in: ABRvS 19 January 2012, nr. 201112223/1/V1.
545 ABRvS 19 January 2012, nr. 201112223/1/V1.
546 Choudhry 2011, *supra* note 96, at p. 73-74.
547 *Ibid* at p. 80-83.
548 T.P. Spijkerboer, *Gender and Refugee Status*, (doctoral dissertation Nijmegen) Nijmegen: s.n. 1999/2000, p. 66-68; Dauvergne & Millbank 2010, *supra* note 95; J. Millbank & C. Dauvergne, Forced marriage and the Exoticization of Gendered Harms in United States Asylum Law, *Columbia Journal of Gender and Law*, vol. 19(4) 2010, pp. 898-964; N. Honkala, *(Mis)Understanding Forced Marriage: International Law, Rights and Their Limits in Women Asylum Seekers' Cases*, (doctoral dissertation), University of Reading: 2015; K.T. Seelinger, Forced Marriage and Asylum: Perceiving the Invisible Harm, *Columbia Human Rights Law Review*, vol. 42(1) 2010, pp. 55-117.

*Case 2*

The second case (2005)[549] concerns a claimant from Afghanistan whose husband had been residing as a refugee in the Netherlands. They got married in Afghanistan in 2012 after he was naturalized to be Dutch citizen. After the marriage, he returned to the Netherlands. Because family reunification was unsuccessful after six months of marriage, the claimant's father decided, under pressure of the entourage, to force her to marry another man, namely her aunt's husband. To evade this marriage, her mother brought her to the uncle of the claimant's husband with whom she had been hiding for two months. Upon advice of the uncle, the claimant left the country and via Iran she joined her husband in the Netherlands.[550] The INS rejected the claim because her problems did not have any link with the persecution grounds.[551] In appeal, the lawyer argued that the claimant belongs to a social group but without specifying or formulating the group.[552] The court does not deal with this question, but maintains as follows:

> The INS is right when maintaining that forced marriage in itself is not a necessary reason to fear human rights violations. In the present case, it concerns however a woman who escaped forced marriage. According to country reports, it appears that women are imprisoned for this reason.[553]

This statement is rare in the collected set of cases but putting it so openly confirms the reluctance to understand forced marriage as a human rights violation in itself. The court's focus is quite on the consequences of *escaping* forced marriage rather than forced marriage itself and its direct consequences such as harm of bodily and psychological integrity.

*Case 3*

The third fundamental case (2011)[554] concerns a claimant from Iraq. In 2007, she got married with an Iraqi man living in the Netherlands but family reunification with her husband was not allowed. Because of this, her father decided she should marry another man. She refused with the consequence that her father threatened to kill her, and her brother mistreated her frequently. In 2009, she fled Iraq and applied for asylum in the Netherlands.[555] The INS found the claimant's problems as located in the private sphere without any link with the Refugee Convention.[556] The lawyer argued that the claimant, being a woman refusing to be forcibly married, belongs to a 'vulnerable group'.[557] The court found that the claimant does not

549 Rb. Haarlem 21 April 2005, nr. 04-21832.
550 Rb. Haarlem 21 April 2005, nr. 04-21832, par. 2.2.
551 Rb. Haarlem 21 April 2005, nr. 04-21832, par. 2.3.
552 Rb. Haarlem 21 April 2005, nr. 04-21832, par. 2.4.
553 Rb. Haarlem 21 April 2005, nr. 04-21832, par. 2.13.
554 Rb. Middelburg 12 May 2011, nr. 10/19117.
555 Rb. Middelburg 12 May 2011, nr. 10/19117, par. 3.
556 Rb. Middelburg 12 May 2011, nr. 10/19117, par. 4.
557 Rb. Middelburg 12 May 2011, nr. 10/19117, par. 5.

belong to a particular social group in the sense of the Refugee Convention.[558] Regarding the claim under article 3 ECHR, the court maintained as follows:

> 'Disagreement between family members cannot directly be seen as a treatment in the sense of article 3 ECHR.' [559]

In higher appeal, the lawyer maintained that ''according to common language, death threats cannot be interpreted as 'a disagreement within the family'''.[560] However, the Council of State confirmed the court's decision without substantive reasoning.[561]

This third case confirms the reluctance to viewing forced marriage as a human rights violation in itself. Although this view is uncommonly put so openly in the case set presented hereafter, it forms the basis of the assumptions in refugee law, at least from the perspective of the Dutch state. In addition, as in the first and third case, we will see in what follows that the Council of State consistently and summarily (i.e. without substantive reasoning) dismissed all higher appeals submitted by lawyers. The standard statement of the Council of State in all these cases is: the claim cannot lead to the annulment of the court's judgment; and it does not raise questions that require answering in the interest of legal unity, legal development or judicial protection.

## 3.2 Two claims from Nigeria

This paragraph draws on two cases confirming the trend identified in the three fundamental cases discussed above. They also illustrate a contrast in terms of state protection and lay down the path to the next paragraph in which other refugee cases are reconstructed. In what follows, I first present the persecution requirement (par. 3.2.1) and then the failure of state protection (par. 3.2.2).

### 3.2.1 'Persecution for reasons of':

The first case (2004)[562] concerns a young girl from Nigeria whose parents wanted to forcibly marry her off to a sixty-year-old chief in exchange for money. Because she refused, her parents mistreated her. She managed to escape to her uncle in Lagos. In the meantime, her parents reported her escape to the authorities. The police traced her and brought her back to the parents, while her uncle was accused of kidnapping. After a period of time, she

558 Rb. Middelburg 12 May 2011, nr. 10/19117, par. 9.
559 Rb. Middelburg 12 May 2011, nr. 10/19117, par. 10.
560 Ground nr. 2 in the Lawyer's Higher Appeal Brief in: ABRvS 12 September 2011, nr. 201106357/1/V1.
561 ABRvS 12 September 2011, nr. 201106357/1/V1.
562 Rb. Haarlem 28 December 2004, nr. 04/55086.

accepted to marry the chief, but she escaped again to her uncle who assisted her to flee the country.[563] The INS maintained that:

> The claimant's problems have no link with the convention grounds. Claimant's forced marriage concerns a choice made by her own father and mother and is located within the private sphere.[564]

In reply, the lawyer advanced that forced marriage is, like FGM, related to 'gender related violence' and involves violations of human rights. In the lawyer's view, since FGM can lead to refugee status on the basis of membership in a particular social group, this should also be the same for forced marriage.[565] In this sense, the lawyer argues for membership in the social group of 'women in Nigeria'. Although the lawyer referred to human rights violations, he/she failed to advance a detailed analysis for example by referring to specific human rights norms. The court found the claimant's problem not convention-related because it exclusively originates from her parents.[566] The court further maintains that the lawyer's 'general' argument based on gender-related violence and membership in the social group of women was not convincing. In this context, the court states that forced marriages are still frequent in Nigeria[567] and since it 'also affects men' it does not lead to conclude that the claimant faces persecution on the basis of membership in the social group of 'women'.[568] This reasoning is debatable because it is doubtful that forced marriage equally affects men and women.[569] The court's 'universalization' of forced marriage further suggests that it is in itself not sufficiently serious, such as FGM that affects only women, to constitute persecution.



### 3.2.2 Failure of state protection:

In the case (2004)[570] discussed above, although the police traced the claimant and brought her back to her parents,[571] the INS argued that she should have tried to seek the protection of 'higher' authorities.[572] However, the court found state protection was unavailable: it is in the court's view not clear how the claimant, being a minor, would benefit from the protection of state authorities higher than the police.[573] In this case, the court deals with state protection in the form of police protection. In another case[574] concerning a claimant whose father wanted to force her to marry, the court refers to non-state protection possibilities. In this

563 Rb. Haarlem 28 December 2004, nr. 04/55086, par. 2.6.
564 Rb. Haarlem 28 December 2004, nr. 04/55086, par. 2.7.
565 Rb. Haarlem 28 December 2004, nr. 04/55086, par. 2.8.
566 Rb. Haarlem 28 December 2004, nr. 04/55086, par. 2.11.
567 Rb. Haarlem 28 December 2004, nr. 04/55086, par. 2.11.
568 Rb. Haarlem 28 December 2004, nr. 04/55086, par 2.11.
569 According to existing research, women are more affected than men, see: Gangoli et al 2011, *supra* note 441, at pp. 34-39.
570 Rb. Haarlem 28 December 2004, nr. 04-55086.
571 Rb. Haarlem 28 December 2004, nr. 04-55086, par. 2.6.
572 Rb. Haarlem 28 December 2004, nr. 04-55086, par 2.7.
573 Rb. Haarlem 28 December 2004, nr. 04-55086, par. 2.12.
574 Rb. Maastricht 30 June 2010, nr. 09/34983.

case, the claimant escaped to Isinya city in which she stayed two years with a lady for whom she had been working. At a given moment, she was informed that a group of men was looking for her. Because of this, the lady brought her in contact with a travel agent who helped her to flee the country.[575] The court found state protection was available and refers to shelters designed for women escaping domestic violence and forced marriage, in particular those provided by the Real Women Foundation and the Project Alert organizations.[576] This approach is in line with the 2005 ACVZ's view: local protection possibilities should be exhausted before seeking asylum. In higher appeal[577], the lawyer maintained as follows: the INS should demonstrate that both organizations could offer adequate protection; available shelters are meant for temporary protection; and it is unclear what the claimant should do should she have to leave the shelter.[578] However, the Council of State confirmed the court's decision without substantive reasoning.[579]

## 3.3 Other refugee cases

In this paragraph, I describe how forced marriage is approached in a larger set of cases. I discuss the persecution requirement (par. 3.3.1) and the failure of state protection (par. 3.3.2).

### 3.3.1 'Persecution for reasons of'

The cases presented in this paragraph first confirm the trend that both the INS and courts are reluctant in accepting forced marriage as falling within the scope of the Refugee Convention. They both failed to engage in a human rights analysis that lies at the heart of the persecution requirement and rather focus on the link between forced marriage and the persecution grounds. In this context, they regularly found forced marriage as 'private', 'familial' and 'cultural' such that it has no link with the persecution grounds (A). In response, lawyers argued that forced marriage is a human rights violation, but they also failed to engage in a detailed human rights analysis. They often referred to gender-based violence and membership in a particular social group, but courts consistently found this reasoning as unconvincing (B).

***A. Forced marriage as unrelated to the Refugee Convention***

There are numerous cases in which both the INS and courts found forced marriage as not related to the Refugee Convention. In this sub-paragraph I present four illustrations.

575 Rb. Maastricht 30 June 2010, nr. 09/34983, par. 2, p. 1.
576 Rb. Maastricht 30 June 2010, nr. 09/34983, par. 2, p. 5-6.
577 ABRvS 16 November 2010, nr. 201007297/1 /V2.
578 Ground nr. 3 in the lawyer's Higher Appeal Brief in: ABRvS 16 November 2010, nr. 201007297/1/V2.
579 ABRvS 16 November 2010, nr. 201007297/1 /V2.

*Case 1*

The first case (2010)[580] concerns a claimant from Burkina Faso who had been living with her uncle after her parents passed away. Her uncle wanted to marry her off to a much older man. She managed to escape and went to a friend who helped her to flee the country.[581] The INS stated that the 'claimant's problems should exclusively be seen as belonging to the private and family sphere and, for this reason, they have no relation with the Refugee Convention.'[582] In reply, the lawyer put forward that the police would be reluctant in intervening in family affairs and, for this reason, she has a well-founded fear of being persecuted.[583] However, the court views the issue as exclusively private:

> It did not appear that the claimant was under the negative attention of the authorities because of reasons related to race, religion, nationality, political opinion or membership to a particular social group. The court agrees with the INS that her problems are exclusively belonging to the private and family sphere.[584]



This court's statement focuses on the lack of active state involvement ('under attention of the authorities') rather than the failure of the state protection that is at the heart of the persecution requirement in cases of non-state persecution. The statement simply implies that since the state is not involved, claimant's forced marriage is outside the scope of the Refugee Convention.

*Case 2*

The second case (2005)[585] concerns a claimant from Afghanistan who fled her country because a Mujahidin commandant wanted to force her to marry him. The court maintained that acts of resistance by women could lead under certain circumstances to refugee status 'when the reasons of transgression objectively originate from the persecution grounds'. This is the case, in the court's view, if the woman wants through her action to 'resist a discriminatory regime or discriminatory norms and values'. In the present case, the court found, however, the claimant's resistance to forced marriage as not being in that sense. In the court's view:

> The claimant's statements show that she refused the marriage because of personal reasons and not for example because of political reasons.[586]

580 Rb. Groningen 9 November 2010, nr. 09/43639 in: ABRvS 2 February 2011, nr. 201012092/1/V1.
581 Rb. Groningen 9 November 2010, nr. 09/43639 in: ABRvS 2 February 2011, nr. 201012092/1/V1, par. 2.1.
582 Rb. Groningen 9 November 2010, nr. 09/43639 in : ABRvS 2 February 2011, nr. 201012092/1/V1, par. 2.2.
583 Rb. Groningen 9 November 2010, nr. 09/43639 in : ABRvS 2 February 2011, nr. 201012092/1/V1, par. 2.3.
584 Rb. Groningen 9 November 2010, nr. 09/43639 in: ABRvS 2 February 2011, nr. 201012092/1/V1, par. 2.7.
585 Rb. Roermond 24 February 2005, nrs. AWB 03/25891 and AWB 03/42683.
586 Rb. Roermond 24 February 2005, nr. AWB 03/25891 and AWB 03/42683, section II, p. 3.

In this case, forced marriage is characterized as 'purely personal' and as opposed to 'political'. The court thus de-politicizes forced marriage because the action of the claimant, namely refusal to marry, is seen as based on personal preferences and for this reason there is no link with the persecution grounds.

*Case 3*

The third case (2010)[587] concerns an Armenian woman who refused forced marriage imposed by her family. When her husband threatened her with a knife, she escaped and came across police agents in the street. She reported the issue to them, but the police merely talked with her husband without any further intervention or protection. She managed to flee and entered into the Netherlands to seek asylum because of her forced marriage. Her application was rejected because, in the INS's view, there is no persecution in the sense of the Refugee Convention.[588] In response, the lawyer maintained that 'the claimant's behavior and action consisting of escaping forced marriage against the will of her husband and family and the fact that she left the country can be seen as a political opinion'.[589] The court found that the INS did not address this part of the claim in its decision and granted appeal without engaging in the persecution (grounds) analysis.[590] In higher appeal, the INS maintained as follows:

> The claimant declared that she has never been an (active) member of a political party or organisation. The claimant's problems with her husband, father and brother are located within the family sphere. She only fears problems from the side of her husband, father and brother. The claimant neither concretized why and by whom her action and behaviour would be considered as a political opinion, nor which consequences this would have. The claimant's problems are therefore merely located in the family sphere.[591]

This statement depoliticizes forced marriage and suggests that to be qualified as having a 'political opinion', the claimant's action should take place outside the private and family sphere, for example through taking part in political activities. In addition, it is not sufficient that the claimant considers her action as political. It is required that the national authorities also consider it as a political opinion. The focus is thus on the intention of the persecutor. The Council of State (2011) did not engage in this discussion but stated that persecution by non-state actors is at stake if it is plausible that the state cannot or is unwilling to offer protection. Where the failure of state protection is not made plausible, there is no need to determine

587 Rb. Zwolle 24 December 2010, nrs. 10/41581 and 10/41579.
588 Rb. Zwolle 24 December 2010, nrs. 10/41581 and 10/41579, par. 2.3.
589 Rb. Zwolle 24 December 2010, nrs. 10/41581 and 10/41579, par. 2.4.
590 Rb. Zwolle 24 December 2010, nrs. 10/41581 and 10/41579, par. 2.4.
591 ABRvS 30 March 2011, nr. 201100018/1/V2, par. 4.2.

whether the treatment concerns persecution or that is merely a problem belonging to the family sphere.[592] The Council then engaged in the analysis of state protection and found that it is available (see below, par. 3.3.2, B, case 4, Armenia).

This case shows that forced marriage is defined as a private, familial and personal problem such that it falls outside the scope of the Refugee Convention. The legal debate is dominated by the question around the link with persecution grounds and less on the question whether forced marriage can amount to persecution. It also appears that there is very little engagement in human rights analysis; forced marriage is in itself not put forward as a serious human rights violation. The focus is on the consequences of forced marriage rather than forced marriage itself. There are numerous judgements in which this trend is confirmed.[593] Along with the privatisation trend, forced marriage is also viewed as cultural and as part of family solidarity. The next case exemplifies this understanding.



*Case 4*

The case (2005)[594] concerns a claimant from Afghanistan. When her husband passed away, her brother-in-law informed her that she should marry him. She refused to be once again forced to marry. With the help of a friend and a travel agent she managed to flee the country and sought asylum in the Netherlands.[595] The INS considered her problems as merely private, familial and cultural such that it has no link with the Convention. The INS maintained as follows:

> The claimant's wish to escape cultural traditions and practices does not mean that she should be seen as a refugee. The claimant did not make plausible that her forced marriage is a consequence of persecution on the basis of one of the persecution grounds. It is not plausible that she, after the marriage with her brother-in-law, will be mistreated, obliged to fulfil the marriage obligations and thus that she will be raped. It is known that such traditions, based on religion, have to do with 'family solidarity'.[596]

592 ABRvS 30 March 2011, nr. 201100018/1/V2, par. 2.4.1.

593 **In 2004:** Rb. Alkmaar 22 March 2004, nr. AWB 02/71373 & AWB 01/34827; Rb. Middelburg 14 June 2004, nr. AWB 04/24689, 04/24692, LJN AP3500; **in 2005:** Rb. Haarlem 21 April 2005, nr. 04-21832; Rb. Haarlem 18 May 2005, nr. AWB 05/20048, AWB 05/20045, AWB 05/20049; Rb. 'S-Hertogenbosch 6 June 2005, nr. AWB 04/21435; Rb. Arnhem 10 August 2005, nr. Awb 05/33906 and Awb 05/33905; **in 2006:** Rb. Haarlem, 14 February 2006, nr. AWB 06/5180, AWB 06/5175, AWB 06/5179, AWB 06/5172, AWB 06/5178, AWB 06/5169; **in 2007:** Rb. Rotterdam 2 March 2007, nr. 06-22908; Rb. Dordrecht 27 March 2007, nr. AWB 06/9272; Rb. Zwolle, 21 December 2007, nr. 05/42582 (Council of State 3 April 2008, nr. 200800507/1); **in 2009:** Rb. Groningen 8 June 2009, nr. Awb 09/16704 & Awb 09/16703; Rb. Amsterdam 18 February 2009, nr. 09-03134; Rb. Haarlem 17 December 2009, nr. AWB 09/23206 and 09/23208; **in 2010:** Rb. Maastricht 30 June 2010, nr. 09/34983, nr. 201007297/1 /V2; Rb. Groningen, 18 October 2010, nr. 09/38612; **in 2011:** Rb. Haarlem 10 May 2011, nr. AWB 10/27005; Rb. Middelburg 12 May 2011, nr. 10/19117.

594 Rb Almelo 23 November 2005, nrs. Awb 05/49424 and Awb 05/49423.

595 Rb Almelo 23 November 2005, nrs. Awb 05/49424 and Awb 05/49423, par. 2.

596 Rb Almelo 23 November 2005, nrs. Awb 05/49424 and Awb 05/49423, par. 2. 'Family solidarity' is my translation of the Dutch term used by the INS, namely: '*verzorgingsgebondenheid*'. This term is not mentioned in Dutch dictionaries.

Within this reasoning, forced marriage is defined as cultural such that it is not a 'serious' affair. Since it is cultural it has no wider social or political relevance. It is viewed as a form of 'family solidarity' that entirely and inherently belongs to family culture. In addition, requiring that forced marriage should be a consequence of persecution shows that forced marriage itself is not seen as persecution. It is also striking that the INS openly states that after forced marriage, she would not be raped, as forced marriage often implies spousal rape.

In reply, the lawyer maintained that the INS statement that 'claimant apparently wishes to escape cultural traditions and practices' is incomprehensible and not in line with international law. The lawyer explicitly stresses that the case concerns human rights violations. This reasoning needs to be seen as one of the very few occasions in which explicit reference is made to human rights violations, although the lawyer did not include a detailed human rights analysis. However, from the court's view, the Refugee Convention is not applicable because the claimant's problem has no link with her social, religious or political status, as it is located within the private sphere.[597] So, in line with previous cases, forced marriage is characterized here as opposed to what is societal and political.

***B. Membership to a particular social group***

In response to the exclusion of forced marriage from the scope of the Refugee Convention, lawyers often argued that women fleeing forced marriage do belong to a particular social group. As described below, they advanced broad and narrow formulations, but courts have regularly rejected the understanding that forced marriage engages the particular social group persecution ground.

*'Women'*

The case (2005)[598] concerns a claimant from Nigeria. When her grandmother passed away, she was forcibly married to a man who already had five wives. In the INS's view, her problems with her husband were not related to the Refugee Convention. The lawyer argued that domestic violence against women in combination with a persecution ground, namely membership in a particular social group, can lead to refugee status. However, the court found that 'women in general' do not form a particular social group, as they are too diverse. In the court's view, the claimant does not belong to a 'specific' group that is discriminated in terms of protection.[599]

597 Rb Almelo 23 November 2005, nrs. Awb 05/49424 and Awb 05/49423, par. 3, p. 4. In this case the court granted appeal because in its view claimant is single woman and thus article 3 ECHR is at stake.
598 Rb 's-Hertogenbosch 6 June 2005, nr. AWB 04/21435.
599 Rb 's-Hertogenbosch 6 June 2005, nr. AWB 04/21435, par. 2 at p.3.

*'Women in the country of origin'*

The first case[600] involves a claimant from Burkina Faso who was forced by her uncle to leave her school and to marry. The lawyer argued that 'women in Burkina Faso' should be seen as a social group because they are systematically subordinated and continuously victims of violence, while national protection is lacking.[601] The court rejects this reasoning and states that it is not demonstrated that the lack of national protection is based on the persecution grounds, in particular not because of claimant's membership to the group of 'women in Burkina Faso'.[602] In higher appeal[603], the lawyer reiterated that the claimant belongs to a particular social group because the government tolerates female discrimination and the systematic violence against women in Burkina Faso.[604] However, the Council of State confirmed the court's decision without substantive reasoning.[605]



Similarly, in a case[606] concerning a claimant from Togo who was forced to marry the brother of the village's chief, the lawyer argues that she was persecuted because 'women in Togo' form a social group, as they are not protected by the authorities.[607] The lawyer refers to the UNHCR Gender Guidelines.[608] The court disagrees with the lawyer and maintains that even if national protection is lacking, the failure is not based on the persecution grounds and in particular not on the basis of being a woman in Togo. In the court's view, the failure of state protection is due to the circumstance that 'domestic violence is not criminalized within Togolese views'.[609]

*'Women who are in Guinea seriously subordinated by men'*

In a case (2004)[610] that involves a claimant from Guinea fleeing forced marriage and domestic violence, the lawyer argued that claimant belongs to the particular social group of 'women who are in Guinea seriously subordinated by men'.[611] The lawyer further refers to the UNHCR Guidelines on 'Membership in a particular group' and argues that 'the fact that the authorities do not offer protection against violence, while they base this on a persecution ground, such as membership in a particular social group, can be sufficient to grant refugee protection'.[612] The lawyer adds that 'due to the circumstance that the claimant was forced to marry at a very young age and that she was repeatedly raped and mistreated by her husband, while the

600 Rb. Arnhem 17 December 2010, nrs. 10/41049 and 10/41046.
601 Rb. Arnhem 17 December 2010, nrs. 10/41049 and 10/41046, par. 5.
602 Rb. Arnhem 17 December 2010, nrs. 10/41049 and 10/41046, par. 11.
603 ABRvS 8 February 2011, nr. 201012636/1/V2.
604 Ground nr. 2 in the lawyer's Higher Appeal Brief in: ABRvS 8 February 2011, nr. 201012636/1/V2.
605 ABRvS 8 February 2011, nr. 201012636/1/V2.
606 Rb. Haarlem 10 May 2011, nr. AWB 10/27005.
607 Rb. Haarlem 10 May 2011, nr. AWB 10/27005, par. 2.5 & 2.6.
608 Rb. Haarlem 10 May 2011, nr. AWB 10/27005, par. 2.5.
609 Rb. Haarlem 10 May 2011, nr. AWB 10/27005, par. 2.6.
610 Rb. Alkmaar 22 March 2004, nrs. AWB 02/71373 and AWB 01/34827.
611 Rb. Alkmaar 22 March 2004, nrs. AWB 02/71373 and AWB 01/34827, par. 2.
612 Rb. Alkmaar 22 March 2004, nrs. AWB 02/71373 and AWB 01/34827, par. 2.

authorities do not offer protection, the claimant should be seen as a refugee'.[613] The court maintains that according to the UNHCR Guidelines on 'Membership of a social group'[614], 'domestic violence' against women *can* amount to persecution on the basis of membership to a particular social group.[615] Although this case seems to be an exception to the courts reluctance to accept such formulations, the court in fact focuses in this case on 'domestic violence', not on forced marriage. The court mentions exclusively 'domestic violence' and did not engage with the issue of forced marriage. The focus is thus on the consequences of forced marriage (domestic violence), not on forced marriage itself. It should, moreover, be noted that the court did not explicitly hold that claimant indeed belongs to the social group as formulated by the lawyer. It only held that according to the UNHCR Guidelines, 'domestic violence' can amount to persecution on the basis of membership to a particular social group.

*'Women refusing forced marriage'*

In a case concerning a claimant from Azerbaijan,[616] the lawyer argued that she was persecuted on the basis of membership in the social group of 'women who refuse forced marriage'. However, the court found this argument insufficient.[617] In higher appeal[618], the lawyer refers to the gender-specific elements in the claimant's narrative to argue for a link with the Refugee Convention. In the lawyer's view, the court should have taken into account the fact that the claimant explicitly invoked the gender-related elements of the persecution. The lawyer added that the court overlooked that the vulnerable position of women in Azerbaijan, in particular young single mothers, can lead to a well-founded fear of being persecuted.[619] However, the Council of State confirmed the court's decision without substantive reasoning.[620]

Similarly, in a case concerning a claimant from Afghanistan[621] who fled a Mujahidin commandant, the lawyer refers in appeal to the position of women in Afghanistan and argues that claimant's fear is based on her gender, and membership in the social group of 'women refusing marriage with a commandant', where the authorities are not able to protect them.[622] The court rejects this reasoning and maintains that there is no particular and individual circumstance which leads to conclude that the claimant's position as a

613 Rb. Alkmaar 22 March 2004, nrs. AWB 02/71373 and AWB 01/34827, par. 2.
614 UNHCR, *Guidelines on International Protection No. 2: "Membership of a Particular Social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, May 2002, HCR/GIP/02/02.
615 Rb. Alkmaar 22 March 2004, nrs. AWB 02/71373 and AWB 01/34827, par. 10.
616 Rb. Zwolle 21 December 2007, nr. 05/42582.
617 Rb. Zwolle 21 December 2007, nr. 05/42582, par. 2.11.
618 ABRvS 3 April 2008, nr. 200800507/1.
619 Ground nr. 1 in the lawyer's Higher Appeal Brief in: ABRvS 3 April 2008, nr. 200800507/1.
620 ABRvS 3 April 2008, nr. 200800507/1.
621 Rb. Roermond 24 February 2005, nrs. AWB 03/25891 and AWB 03/42683.
622 Rb. Roermond 24 February 2005, nrs. AWB 03/25891 and AWB 03/42683, p. 4.

woman in Afghanistan (seen in the light of the 'general vulnerable situation' of women) entails she fears persecution on the basis of her gender.[623]

*'Islamic women who are mistreated by their husbands'*

Lawyers also formulated the social group by combining 'women' and 'Islam', for example in a case[624] concerning a claimant from Guinea. In this case, the claimant's father refused her marriage with a young man with whom she had a relationship and then forced her to marry an older man. Her husband mistreated and raped her every day. The claimant escaped and joined her boyfriend. Because her husband was looking for her, she escaped and went to stay with other friends before she succeeded in leaving the country.[625] The INS found the claim not credible because of contradictions in her asylum account.[626] The lawyer argued that the claimant has a well-founded fear of being persecuted because she belongs to the social group of 'Islamic women who are mistreated by their husbands'. The lawyer added that she was forced to marry and that her husband, who is member of a powerful group of Wahhabis 'who do what they want of women', raped and mistreated her. The lawyer further maintained that she, being a woman, cannot seek national protection and referred to her young age and isolated position within a small and closed Islamic community.[627] The court found the contradictions in the asylum account as meaningless so that the INS could not conclude that the claim is not credible.[628]

*'Vulnerable group'*

The case (2011)[629] presented here is the third fundamental case presented above. It concerns a claimant from Iraq who fled forced marriage imposed by her father.[630] The INS found the claimant's problems as located in the private sphere without any link with the Refugee Convention, and that she does not belong to a vulnerable minority group.[631] The lawyer argued that the claimant, being a woman refusing to be married forcibly, belongs to a 'vulnerable group' because she risks being victim of honour-based violence.[632] The court found that the claimant did not belong to a particular social group and that it was not plausible that the national authorities would refrain from protecting her because of being a woman.[633] The court added that based on her declarations and the available country information, it cannot be concluded that the claimant belongs to a vulnerable minority

623 Rb. Roermond 24 February 2005, nrs. AWB 03/25891 and AWB 03/42683, par. 2 at p. 4.
624 Rb. Groningen 2 april 2007, nr. 06/7837.
625 Rb. Groningen 2 april 2007, nr. 06/7837, par. 2.1.
626 Rb. Groningen 2 April 2007, nr. 06/7837, par. 2.2.
627 Rb. Groningen 2 April 2007, nr. 06/7837, par. 2.3.
628 Rb. Groningen 2 April 2007, nr. 06/7837, par. 2.19.
629 Rb. Middelburg 12 May 2011, nr. 10/19117.
630 Rb. Middelburg 12 May 2011, nr. 10/19117, par. 3.
631 Rb. Middelburg 12 May 2011, nr. 10/19117, par. 4.
632 Rb. Middelburg 12 May 2011, nr. 10/19117, par. 5.
633 Rb. Middelburg 12 May 2011, nr. 10/19117, par. 9.

group or that she fears the authorities because of her gender.[634] In higher appeal, the lawyer argued that women in Iraq are often victim of violence; the police often fail to intervene; and that shelters are very limited and temporary.[635] The lawyer added that the court overlooked the values and norms of Iraqi culture within which a single mother is not accepted, and reiterated that she would again be forced to marry because she was still viewed as an unmarried woman.[636] However, the Council of State confirmed the court's decision without substantive reasoning.[637]

*No formulation of the particular social group*

Finally, it deserves to be mentioned that lawyers sometimes advance the social group argument without any formulation. For example, in the above-mentioned case (2005)[638] that concerns a claimant from Afghanistan whose brother-in-law informed her that she should marry him, the lawyer refers to the UNHCR Gender Guidelines and states that claimant is persecuted on the basis of her membership to a social group without specifying the social group.[639] The lawyer argues that since forced marriage involves women discrimination, there is persecution.[640] However, from the court's view, the Refugee Convention is not applicable in such situations, because the claimant's problem has no link with the social, religious or political status of claimant, as it is located within the private sphere.[641]

### 3.3.2 Failure of state protection

This paragraph describes how the second branch of the persecution analysis is conducted. As will be illustrated below, reference is made to the following forms of protection: (A) state protection in the sense of police protection; (B) state good-faith efforts, such as legislation, in combination with NGOs protection; (C) shelters; (D) relocation alternative; and (E) family protection.

***A. State-based protection***

The cases presented here show that when country reports mention that it is possible to submit a complaint against 'domestic violence', courts usually found state protection was available in cases involving forced marriage. Protection is deemed to exist when the complaint can be submitted with the police or another government institution specialized in 'domestic violence' and not specifically in 'forced marriage'. We will also see that in order

634 Rb. Middelburg 12 May 2011, nr. 10/19117, par. 10.
635 Ground nr. 4 in the lawyer's Higher Appeal Brief in: ABRvS 12 September 2011, nr. 201106357/1/V1.
636 Ground nr. 5 in the lawyer's Higher Appeal Brief in: ABRvS 12 September 2011, nr. 201106357/1/V1.
637 ABRvS 12 September 2011, nr. 201106357/1/V1.
638 Rb. Almelo 23 November 2005, nrs. Awb 05/49424 and Awb 05/49423.
639 Rb. Almelo 23 November 2005, nrs. Awb 05/49424 and Awb 05/49423, section 2 at p. 3.
640 Rb. Almelo 23 November 2005, nrs. Awb 05/49424 and Awb 05/49423, section 2 at p. 3.
641 Rb. Almelo 23 November 2005, nrs. Awb 05/49424 and Awb 05/49423, par. 3 at p.4. The court granted appeal because in its view claimant is a single woman and thus article 3 ECHR is at stake.

to argue for lack of state protection, lawyers cited culture-based evidence. The following four cases illustrate these observations.

*Case 1*

The first case (2007)[642] concerns a woman from Afghanistan who had been living with her aunt and cousins. She had been threatened by third persons to forcibly marry a certain man. Because she refused, she received threats from them. When she reported the issue to the authorities, the police arrested those persons. However, they were released two days later after having signed a written declaration stating that they would not threaten the claimant in the future. The court found that since the police intervened when the claimant reported domestic violence, state protection was available.[643]



*Case 2*

The second case (2006)[644] concerns a claimant from Guinea who had been living with her aunt who wanted to force her to marry her cousin who threatened to kill her if she continued to refuse the marriage. She managed to escape to her friend. As she feared being traced and brought back to her cousin, she left her country.[645] In the court's view, since the state criminalises violence against women and since there is a possibility to report domestic violence to the police, the claimant should have tried to seek state protection before leaving her country.[646]

*Case 3*

The third case[647] concerns a claimant from Ethiopia. For the reason that her father was not able to pay off a debt to one of his friends, he married her off to him as being the repayment of the debt. When she refused sexual intercourse with her husband, she was sent back to her father. As excuse for her refusal, she said that she is mutilated in a way that she could not have any sexual intercourse. For this reason, her father sent her to the hospital. Subsequently, she went together with the neighbour to a friend to end the effect of FGM to which she previously was subject. In the way to that friend, claimant managed to escape and went to her aunt who helped her to flee the country. The INS maintained that the claimant should have tried to seek state protection.[648] The INS also argued that the claimant could evade forced marriage by relocating somewhere else in Ethiopia. The court found that claimant

642 Rb. Dordrecht 27 March 2007, nr. AWB 06/9272.
643 Rb. Dordrecht 27 March 2007, nr. AWB 06/9272, par. 2.4.2.
644 Rb. Arnhem 31 March 2006, nrs. AWB 06/12749 and AWB 06/12747fC.
645 Rb. Arnhem 31 March 2006, nrs. AWB 06/12749 and AWB 06/12747fC, par. 4.
646 Rb. Arnhem 31 March 2006, nrs. AWB 06/12749 and AWB 06/12747fC, par. 9.
647 Rb. Dordrecht 2 December 2008, nr. 08/12314.
648 Rb. Dordrecht 2 December 2008, nr. 08/12314, par. 2.2.

did not justify why she did not seek state protection before leaving the country.[649] In higher appeal[650], the lawyer represents forced marriage as an Islamic rule:

> Ethiopia is an Islamic country. Upon return, she would be condemned. It must be remembered that she infringed Islamic law, as she acted in violation of Islamic law by fleeing and preventing that she would be married off.[651]

However, the Council of State confirmed the court's decision without substantive reasoning.[652]

*Case 4*

The final case[653] concerns an Iraqi man. His sisters arranged a marriage for him, but after the engagement he discovered that he did not wish to live with his fiancée. Under pressure of his family-in-law, he nevertheless married her. During his marriage, he was continuously forced to sexual intercourse with his wife. Because of this he left Iraq.[654] The INS argued that the claimant could seek the protection of national authorities.[655] In appeal, the lawyer argued that

> 'it is already almost impossible for a woman to seek national protection against spousal rape, let alone for a man; the culture in Iraq does not allow this.'[656]

It is notable that men are represented in the lawyer's reasoning as being culturally more vulnerable than women when it comes to forced marriage. The court maintained that the asylum account is not related to the Refugee Convention and that claimant can seek national protection.[657] In higher appeal, the lawyer argued that the claimant's problem is transformed into a clan-problem against which there is no national protection.[658] However, the Council of State dismissed the higher appeal without substantive reasoning.[659]

***B. State good-faith efforts and NGOs protection***

The four cases reconstructed below show that reference is made to (draft) legislation that criminalizes domestic violence (not specifically forced marriage) and to up-coming

649 Rb. Dordrecht 2 December 2008, nr. 08/12314, par. 2.4.
650 ABRvS 17 April 2009, nr. 200809458/1/V1.
651 Ground nr. 3 in the lawyer's Higher Appeal Brief in: ABRvS 17 April 2009, nr. 200809458/1/V1.
652 ABRvS 17 April 2009, nr. 200809458/1/V1.
653 Rb. Groningen 11 March 2010, nr. 09/22170
654 Rb. Groningen 11 March 2010, nr. 09/22170, par. 2.1.
655 Rb. Groningen 11 March 2010, nr. 09/22170, par. 2.2.
656 Rb. Groningen 11 March 2010, nr. 09/22170, par. 2.3.
657 Rb. Groningen 11 March 2010, nr. 09/22170, par. 2.9.
658 See page 2 in the lawyer's Higher Appeal Brief in: ABRvS 21 June 2010, nr. 201003595/1/V1.
659 ABRvS 21 June 2010, nr. 201003595/1/V1.

emancipation of women. Overall, courts and the Council of State found these state good-faith efforts in combination with NGOs assistance as sufficient to find the availability of state protection. This often takes place without engaging in the analysis of the effectiveness of these 'protection' possibilities.

*Case 1*

The case[660] concerns a claimant from Burkina Faso. After her parents passed away, her paternal uncles and their wives forced her to leave her school and to exclusively be responsible for housekeeping. She then was forced to marry a man who mistreated and raped her. She managed to escape and with the help of a pastor she reported the issue to the police. However, the police brought her back to her family who continued to mistreat her. After a period of time, she escaped and with the help of the pastor, she travelled to the Netherlands.[661] The INS maintained that the claimant should seek state protection or the protection of 'other organisations'.[662] The court considered the claimant's attempt to seek protection with the police as insufficient and referred to country reports in which it is stated that there are possibilities to seek the protection of government institutions, associations and NGOs which are 'committed to victims of domestic violence'. The court adds that she did not attempt to seek protection except when the pastor brought her to the police office, while she did not attempt by herself to submit a complaint against her husband or to seek further protection with the police or higher authorities.[663]

In higher appeal[664], the lawyer first referred to the fact that the claimant was brought back by the police to her husband and then emphasised that 'commitment to women rights' is absolutely not sufficient to admit the availability of protection. The lawyer referred to article 7 of the EU Qualification Directive and argued that what is decisive is whether Burkina Faso's government takes reasonable steps to prevent persecution by operating an effective legal procedure for the prosecution and punishment of acts constituting persecution. In this context, the lawyer observed that the INS does not specify which government institutions can effectively protect the claimant and which, unlike the police, would not bring her back to her husband. The lawyer emphasized that her husband was not punished when she reported abuse to the police. With regard to the argument of protection by (international) organizations, the lawyer put forward that these organizations do not meet the requirement of article 7 of the EU Qualification Directive.[665] However, the Council of State confirmed the court's decision without substantive reasoning.[666] It is notable that the Council refrains from substantively dealing with the higher appeal because the question of whether 'commitment

660 Rb. Arnhem17 December 2010, nrs. 10/41049 and 10/41046.
661 Rb. Arnhem17 December 2010, nrs. 10/41049 and 10/41046, par. 4.
662 Rb. Arnhem17 December 2010, nrs. 10/41049 and 10/41046, par. 5.
663 Rb. Arnhem 17 December 2010, nrs. 10/41049 and10/41046, par. 12
664 ABRvS 8 February 2011, nr. 201012636/1/V2.
665 Ground nr. 3 (at p. 5-6) in the lawyer's Higher Appeal Brief in: ABRvS 8 February 2011, nr. 201012636/1/V2.
666 ABRvS 8 February 2011, nr. 201012636/1/V2.

to women rights' and NGOs protection can be considered as effective protection is a relevant legal question in the light of article 7 of the EU Qualification Directive.[667]

*Case 2*

The case (2011)[668] concerns an Indonesian claimant. When her mother passed away, her father decided that she (being sixteen years old) should marry an older man who is unknown to her. The father previously married off her brother and sisters. When claimant refused the marriage, she was mistreated by her father and was forced to leave her school. In the period between April 2009 and June 2009, she stayed with her aunt. Her nephew living in the Netherlands helped her in July 2009 to travel to the Netherlands with a short-term visa. In September 2009, she claimed asylum because of forced marriage.[669] The INS argues that the claimant could have sought protection with the Indonesian authorities, as they introduced the 'Ministry for Women'. Moreover, the INS maintains that the claimant could approach various NGOs.[670] The lawyer argued as follows: the Indonesian legislation allows child marriages as of sixteen years old; there is neither a legislation forbidding child marriage, nor justice institutions which can annul such marriages; and it is not demonstrated that the Ministry for Women and NGOs offer effective protection.[671] The court found the claimant should have tried to seek state protection or NGOs protection. The fact that the Indonesian legislator allows child marriages does not mean that (higher) authorities would not offer protection. In the court's view, the claimant did not demonstrate that the authorities or NGOs would not provide protection in her case.[672]

*Case 3*

The case (2010)[673] involves a claimant from Macedonia whose father decided, in exchange for money, to force her to marry a much older married man. She refused with the result that her father daily mistreated her. She then fled Macedonia but without having approached the police.[674] The INS argues that the claimant should have tried approaching national authorities to seek protection. In its view, the fact that she did not even submit a complaint against her father shows that she had been passive in seeking protection.[675] The court also found that state protection was available and states as follows: the Macedonian legislation criminalizes domestic violence (again, not forced marriage); although the legislation is not effectively

667 See for example: H. Battjes, 'Potentieel prejudicieel. Wanneer is bescherming effectief? De Afdelingsjurisprudentie over bescherming in het licht van het Unierecht', *JNVR* 2016, nr. 3/24; Battjes 2012, *supra* note 481, at pp. 20-25; S. Rafi, 'Kroniek toelatingsgronden asiel', *A&MR*, vol. (9) 2018, pp. 437-445, at p. 440.
668 Rb. Groningen 20 October 2011, nr. 11/13661.
669 Rb. Groningen 20 October 2011, nr. 11/13661, par. 2.1.
670 Rb. Groningen 20 October 2011, nr. 11/13661, par. 2.2.
671 Rb. Groningen 20 October 2011, nr. 11/13661, par. 2.3.
672 Rb. Groningen 20 October 2011, nr. 11/13661, par. 2.12.
673 Rb. Groningen 21 January 2010, nrs. 10/382 and 10/376.
674 Rb. Groningen 21 January 2010, nrs. 10/382 and 10/376, par. 2.2.
675 Rb. Groningen 21 January 2010, nrs. 10/382 and 10/376, par. 2.3.

implemented, the Macedonian authorities and NGOs provide assistance for victims of domestic violence; and there is a phone help service enabling victims to report abuse.[676] In higher appeal[677], the lawyer maintained that although the law specifically criminalizes domestic violence and prescribes punishments for perpetrators, authorities rarely applied the law.[678] However, the Council of State confirmed the court's decision without substantive reasoning.

*Case 4*

In the above-mentioned Armenian case (2010)[679], the claimant fled the house and crossed police agents in the street and reported the issue to them. However, the police merely talked with her husband without any other form of protection. In the INS's view, she could seek national protection against her husband and family.[680] In its view, her attempt to seek protection with the police agents in the street was an incidental effort, while she should have submitted a complaint with higher authorities. In this context, the INS refers to the upcoming women emancipation; NGOs assisting women in Armenia; and to previous police investigations into domestic violence.[681]

The court found state protection was unavailable. It first emphasises that the on-going emancipation and the existence of NGOs assisting victims of domestic violence was not sufficient to conclude that state protection was available. With regard to the previous police investigations into domestic violence, the court observes that the available information does not mention that they indeed concerned complaints and it is also unknown what their outcome was. The court then found state protection was unavailable because there are active and passive mechanisms in the Armenian justice system which render the complaint procedure ineffective. In this context, the court stresses that the claimant's attempt to seek protection by the police agents in the street was a serious attempt. The court further mentions the following country information: domestic violence is a huge problem in Armenia; complaints against domestic violence are seldom submitted; and when a complaint is submitted, the woman in question is usually told that it is a family problem that needs to be solved within the family.[682]

However, when the case reached the Council of State (2011)[683], it annulled the court's judgement. The Council first observes that according to the Armenian Constitution women and men are equal and that the government and the police had been working on the improvement of women's position. In this context, the Council refers to the Draft

676 Rb. Groningen 21 January 2010, nrs. 10/382 and 10/376, par. 2.10.
677 ABRvS 1 March 2010, nr. 201001201/1/V2.
678 See p. 4 in the lawyer's Higher Appeal Brief in: ABRvS 1 March 2010, nr. 201001201/1/V2.
679 Rb. Zwolle 24 December 2010, nrs. 10/41581 and 10/41579.
680 Rb. Zwolle 24 December 2010, nrs. 10/41581 and 10/41579, par. 2.3.
681 Rb. Zwolle 24 December 2010, nrs. 10/41581 and 10/41579, par. 2.6.
682 Rb. Zwolle 24 December 2010, nrs. 10/41581 and 10/41579, par. 2.6.
683 ABRvS 30 March 2011, nr. 201100018/1/V2.

Law, elaborated by the Women's Rights Centre, which criminalizes domestic violence. The Council further refers to the diverse NGOs engaged in assisting victims of domestic violence. Finally, the Council maintains that the unsuccessful incidental protection request made by the claimant in the street does not mean that higher police and justice authorities would not have helped her to be protected if she would have sought protection.[684]

***C. Shelters/NGOs***

The first case (2011)[685] concerns a claimant from Iraq. As of her birth, she was promised as a spouse for one of her parental cousins. However, she repeatedly told her father that she totally refused the marriage. In 2005, she fell in love with her maternal cousin and she secretly married him. After a period of time, her husband immigrated to the Netherlands. At a given moment, the father, mother and sister of her paternal cousin passed away. For this reason, the claimant's father decided that she should marry her paternal cousin. She managed to escape and with the help of another uncle she fled to the Netherlands.[686] The court found that the claimant could have sought state protection and refers to existing women shelters.[687] In higher appeal[688], the lawyer argued that available shelters operate on a small scale and only provide temporary protection.[689] However, the Council of State confirmed the court's decision without substantive reasoning.[690]

In the above-mentioned case (2011)[691] concerning the claimant from Togo, the INS argued that she could have sought NGO protection. The lawyer maintained that although victims of domestic violence can seek NGO protection, this solution is in practice not feasible.[692] The court found NGO protection insufficient and maintained as follows: domestic violence is not criminalized in Togo; shelters offered by NGOs are meant to be temporary; women do not have a good position in Togo; there is no law prohibiting spousal rape and domestic violence; NGOs protection is not feasible for women; and women subordination is socio-cultural. The court further stated that

> 'the traditional justice practices and socio-economic conditions in Togo offer women no possibility to be protected against domestic violence and violent cultural practice such as forced marriage'. [693]

684 ABRvS 30 March 2011, nr. 201100018/1/V2, par. 2.5.3.
685 Rb. Maastricht 21 March 2011, nr. 10/26464.
686 Rb. Maastricht 21 March 2011, nr. 10/26464, par. 2.
687 Rb. Maastricht 21 March 2011, nr. 10/26464, par. 2 at p.4.
688 ABRvS 20 June 2011, nr. 201104532/1/V2.
689 Ground nr. 1 in the lawyer's Higher Appeal Brief in: ABRvS 20 June 2011, nr. 201104532/1/V2.
690 ABRvS 20 June 2011, nr. 201104532/1/V2.
691 Rb. Haarlem 10 May 2011, nr. AWB 10/27005.
692 Rb. Haarlem 10 May 2011, nr. AWB 10/27005, par. 2.7.
693 Rb. Haarlem 10 May 2011, nr. AWB 10/27005, par. 2.9 and 2.10. In this case the court granted appeal.

Finally, the court re-emphasises that NGO protection is insufficient because NGOs are not state organizations, while it can only be expected from claimant to seek protection with state authorities.[694]

***D. Relocation alternative***

The three cases presented here illustrate that claimants are expected, from the INS's view, to be capable of independently living safely in another part of the country because they are educated and/or have had an independent income and/or work experience. Although some courts accepted this reasoning, others rejected it.



*Case 1*

The case (2009)[695] concerns a university student from Cameroon. In 2008, her father informed her that she would be married off. She refused and was subjected to maltreatment. She then sought the help of the old men of the village, but she was told that she must listen to her father. She then went to the police, but she was informed that since she is still a minor, her father could make decisions for her. The marriage was concluded under force and the claimant went to stay with her husband. After a while, he told her that she would be subject to FGM. She refused and escaped to her father, but he obliged her to return to her husband. She then managed to escape and went to seek refuge by a friend named Paul with whom she stayed one month before he brought her to the Netherlands. Because he forced her to work in prostitution, she escaped and sought asylum.[696]

The INS argued that she could relocate and live safely in another part of Cameroon, as she could be seen as independent person; since she stayed one month before her flight without any problems, she could return and live independently and safely.[697] In reply, the lawyer maintained as follows: she is a minor and cannot relocate; her father is responsible for her and will remain even if she lives in another part of the country; since she is still a minor, she is considered as falling under the power of her father and as property of her husband; and since the Cameroonian government fails to protect 'vulnerable groups such as women', there is no relocation alternative. The lawyer further referred to the fact that claimant was victim of human trafficking in Cameroon and argued as follows: she cannot count on the support of male family members in her country; she originates from the countryside in which forced marriage is frequent, while it is unknown to what extent the local authorities can offer protection.[698]

The court first observes that although the claimant is still minor, she could be considered as independent since she was able to cover the cost of living and she lived independently

694 Rb. Haarlem 10 May 2011, nr. AWB 10/27005, par. 2.10.
695 Rb. Groningen 8 June 2009, nrs. AWB 09/16704 and AWB 09/16703.
696 Rb. Groningen 8 June 2009, nrs. AWB 09/16704 and AWB 09/16703, par. 2.2.
697 Rb. Groningen 8 June 2009, nrs. AWB 09/16704 and AWB 09/16703, par. 2.3. See also par. 2.4.
698 Rb. Groningen 8 June 2009, nrs. AWB 09/16704 and AWB 09/16703, par. 2.4.

in student dorms.[699] However, the court found the fact that she stayed one month safely before leaving the country insufficient to conclude that her husband and father are not looking for her; one month is a short period of time and she was under the 'protection of a man'.[700] The court found the relocation alternative was unavailable and maintained as follows: her husband and father have been looking for her; married women are considered as property of their husbands, while divorce is difficult to obtain; it is plausible that her father and husband are still looking for her; and since there are in Cameroon regular policy controls, she could be traced and subsequently brought back to her husband and father.[701]

*Case 2*

The case (2011)[702] concerns a claimant from Ghana who had been living with her husband and family-in-law. While she had been waiting for her second child, her husband passed away. Her family-in-law wanted to force her to get married to the young brother of her husband. She refused and subsequently was raped. She then fled and stayed two months with a lady working in the market in one of the cities. She then travelled to the Netherlands with the help of a travel agent.[703] The INS argued that claimant could relocate in another part in Ghana to avoid forced marriage, for example in one of the large cities.[704] In reply, the lawyer maintained that claimant does not have any family or social network in Ghana that can help or protect her. In the lawyer's view, being a woman in a patriarchal community and having grown up in a rural community, she could not live independently in one of the cities.[705] The court found that the claimant could be expected to live independently because she is an adult woman and she was able to do so during a period of two months before leaving her country.[706] In higher appeal[707], the lawyer stresses that the claimant is uneducated and then argues that she is not independent because she was relying on the help of the lady with whom she stayed.[708] However, the Council of State confirmed the court's decision without substantive reasoning.[709]

*Case 3*

The case[710] concerns a claimant from Togo. The INS argued that she could relocate to another part of Togo and that her husband would not be able to find her, as Togo is a large country with a large population. The INS added that the claimant was highly qualified, she

699 Rb. Groningen 8 June 2009, nrs. AWB 09/16704 and AWB 09/16703, par. 2.11.
700 Rb. Groningen 8 June 2009, nrs. AWB 09/16704 and AWB 09/16703, par. 2.11.
701 Rb. Groningen 8 June 2009, nrs. AWB 09/16704 and AWB 09/16703, par. 2.11.
702 Rb. Amsterdam 13 May 2011, nr. 09/38623.
703 Rb. Amsterdam 13 May 2011, nr. 09/38623, see page 2.
704 Rb. Amsterdam 13 May 2011, nr. 09/38623, par. 1.1 & 3.22.
705 Rb. Amsterdam 13 May 2011, nr. 09/38623, par. 3.14.
706 Rb. Amsterdam 13 May 2011, nr. 09/38623, par. 3.15.
707 ABRvS 15 March 2012, nr. 201106188/1/V1.
708 Ground nr. 5 and 6 in the lawyer's Higher Appeal Brief in: ABRvS 15 March 2012, nr. 201106188/1/V1.
709 ABRvS 15 March 2012, nr. 201106188/1/V1.
710 Rb. Haarlem 10 May 2011, nr. AWB 10/27005.

had work experience and she speaks two languages (French and Ewe).[711] The lawyer replied by arguing as follows: she could not relocate because her husband previously traced her when she was hiding; she has no opportunities to work in other parts of Togo; she was unable to independently ensure a minimum level of living; and her life upon return would be inhuman because she cannot live independently.[712] The court first observed that the economic situation in Togo is very bad and that it is for (married) women very difficult to find a job enabling them to live independently. The court adds that 'many women in Togo do not have identity documents and for this reason they are excluded from legal protection and citizenship'.[713] The court refers to the following country information:

> 'a husband legally can restrict his wife's freedom to work or control her earnings. (…) In urban areas women and girls dominated market activities and commerce; however, harsh economic conditions in rural areas, where most of the population lived, left women with little time for activities other than domestic tasks and agricultural work. (…) Under traditional law a wife has no maintenance or child support rights in the event of divorce or separation and no inheritance rights upon death of her husband."[714]

The court then emphasizes that the claimant's education level, her work experience and her language skills were not sufficient to conclude that she would be able to relocate. In the court's view, the INS overlooked the general and personal vulnerable situation in which claimant is positioned.[715]

***E. Family protection***

The cases presented here show that women fleeing forced marriage are expected to seek the protection of male family members such as fathers, uncles and cousins. Not only male family members in the country of origin are expected to 'protect' but also those residing abroad are expected to act as agents of 'protection'. In addition to close family members, reference is also made to the protection by the clan-family.

*Case 1*

The case[716] concerns two sisters from Pakistan. They left their country because members of the extended family exercised pressure on their father to marry them off. The father was threatened and the claimants feared that if he would not collaborate with the forced

711 Rb. Haarlem 10 May 2011, nr. AWB 10/27005, par. 2.8.
712 Rb. Haarlem 10 May 2011, nr. AWB 10/27005, par. 2.7.
713 Rb. Haarlem 10 May 2011, nr. AWB 10/27005, par. 2.9.
714 Rb. Haarlem 10 May 2011, nr. AWB 10/27005, par. 2.9.
715 Rb. Haarlem 10 May 2011, nr. AWB 10/27005, par. 2.10.
716 Rb. Haarlem 14 February 2006, nrs. AWB 06/5180, AWB 06/5175, AWB 06/5179, AWB 06/5172, AWB 06/5178 and AWB 06/5169.

marriage, they both would be kidnapped and killed by the extended family.[717] The INS pointed out that since the father was against forced marriage, the two sisters did not have any problem with their father and thus they could return and stay safely with him.[718] In the same vein, the court maintained that their father is publicly against forced marriage and that he supported their refusal. The father informed the family that he would not give any consent for forced marriage of his daughters. Hence, in the court's view, it was not plausible that their father could not protect them.[719]

*Case 2*

The case (2007)[720] concerned a claimant from Afghanistan who had been living with her aunt and cousins. She had been threatened by third parties to forcibly marry a certain man. The INS argued that as she stayed for five years with her aunt living with her adult son before leaving Afghanistan, she could re-join them upon return. The INS added that she had two other adult cousins in Afghanistan.[721] The court agreed with the INS and reasoned that since there are adult family members in the country of origin, the claimant could safely stay with them.[722]

*Case 3*

The case[723] concerned a claimant from Guinea. In 2004, she married a Dutch man living in the Netherlands. He tried in vain to bring her to the Netherlands through family reunification. Failing to reunite with her husband, her uncle decided to force her to marry one of his friends. When she refused, her uncle and cousins mistreated her. She then managed to escape to her grandmother. Her uncle reported the issue to the police who picked up the claimant to the police office where she was mistreated. When she agreed with the planned forced marriage, she was released. She then escaped to a friend and subsequently fled to the Netherlands.[724] The INS maintained that the claimant could seek the protection of her husband, as the couple could enjoy family life in another part in Guinea or in another country.[725] In the court's view, although her husband resided in the Netherlands, it was not demonstrated that he could not in one way or another protect her. Although her husband is a refugee in the Netherlands, he is not originally from Guinea and he did not have any

717 Rb. Haarlem 14 February 2006, nrs. AWB 06/5180, AWB 06/5175, AWB 06/5179, AWB 06/5172, AWB 06/5178 and AWB 06/5169, par. 2.8.
718 Rb. Haarlem 14 February 2006, nrs. AWB 06/5180, AWB 06/5175, AWB 06/5179, AWB 06/5172, AWB 06/5178 and AWB 06/5169, par. 2.9.
719 Rb. Haarlem 14 February 2006, nrs. AWB 06/5180, AWB 06/5175, AWB 06/5179, AWB 06/5172, AWB 06/5178 and AWB 06/5169, par. 2.15.
720 Rb. Dordrecht 27 March 2007, nr. AWB 06/9272.
721 Rb. Dordrecht 27 March 2007, nr. AWB 06/9272, par. 2.2.
722 Rb. Dordrecht 27 March 2007, nr. AWB 06/9272, par. 2.4.2 & 2.4.5.
723 Rb. Groningen 18 October 2010, nr. 09/38612.
724 Rb. Groningen 18 October 2010, nr. 09/38612, par. 2.1.
725 Rb. Groningen 18 October 2010, nr. 09/38612, par. 2.2.

problems in that country. It was therefore, in the court's view, not plausible that it would be impossible for him to protect her in Guinea.[726]

In higher appeal[727], the lawyer argued that it was not reasonable to expect the claimant's husband to live in Guinea. The INS did not investigate whether he ran the risk of being killed by the claimant's family. Further, it would be unacceptable to require a Dutch citizen to face such a risk. In this context, the lawyer observed that the Guinean authorities are on the side of the family as they detained the claimant when she refused the marriage. It was thus absurd, in the lawyer's opinion, to think that the claimant's husband would be able to resist family and state violence.[728] However, the Council of State confirmed the court's decision without substantive reasoning.[729] The acceptance of male protection is notable as it reflects a wide understanding of the protection agents; it endorses the idea that women need males to be 'physically' protected; and it reproduces female dependency.[730]



*Case 4*

The case[731] concerns a claimant from Afghanistan. Her husband had been residing as a refugee in the Netherlands. Because family reunification was unsuccessful, her father decided, under pressure of the entourage, to force her to marry her aunt's husband. To evade this marriage, her mother brought her to the uncle of the claimant's husband, with whom she had been hiding for two months. Upon advice of the uncle, she left the country.[732] The INS put forward that her husband should have returned to Afghanistan to protect her from the planned forced marriage.[733] The court rejected this reasoning and maintained that it was not plausible that her husband could return to Afghanistan in order to protect her, although he previously visited Afghanistan for the wedding.[734]

*Case 5*

The case[735] concerns a claimant from Somalia. She immigrated to Saudi Arabia in which she got married. Her cousin, who is a member of Al-Shabab, rejected that marriage because he wanted to marry her. He set her house in fire and shot her husband, while he continued to put pressure on her to marry.[736] The INS maintained that it was unlikely that the claimant's clan would not have reacted towards her cousin's acts.[737] In reply, the lawyer

726 Rb. Groningen 18 October 2010, nr. 09/38612, par. 2.8.
727 ABRvS 20 April 2011, nr. 201011024/1/V1.
728 Ground nr. 1 in the lawyer's Higher Appeal Brief in: ABRvS 20 April 2011, nr. 201011024/1/V1.
729 ABRvS 20 April 2011, nr. 201011024/1/V1.
730 T.P. Spijkerboer, 'Gender, Sexuality, Asylum and European Human Rights', *Law and Critique*, vol. (29) 2018, pp. 221-239, at p. 227.
731 Rb. Haarlem 21 April 2005, nr. 04-21832.
732 Rb. Haarlem 21 April 2005, nr. 04-21832, par. 2.2.
733 Rb. Haarlem 21 April 2005, nr. 04-21832, par. 2.6.
734 Rb. Haarlem 21 April 2005, nr. 04-21832, par. 2.13.
735 Rb. Arnhem 23 December 2010, nr. 10/23569.
736 Rb. Arnhem 23 December 2010, nr. 10/23569, Par. 2.
737 Rb. Arnhem 23 December 2010, nr. 10/23569, par. 4.

argued that clan-protection against a member of the same clan, who is at the same time member of Al-Shabab, was becoming increasingly unlikely.[738] The court, however, found that clan protection was available.[739] In higher appeal[740], the lawyer argued that because the cousin is member of Al Shabab, clan members would be reluctant to intervene in the conflict.[741] However, the Council of State confirmed the court's decision without substantive reasoning.[742]

*Case 6*

The final case (2005)[743] concerns the claimant from Afghanistan mentioned above (par. 3.3.1, A). When her husband passed away, her brother-in-law informed her that she should marry him. The INS argues that since claimant lived for a period of eleven years with multiple members of her family-in-law, she could relocate with them.[744] In reply, the lawyer maintains that the claimant should be seen as a single mother of two minor children and that she cannot obviously return to her family-in-law because single women cannot return to Afghanistan.[745] From the court's view, relocation by the family-in-law is not possible because the claimant had problems with the members of her family-in-law. The court adds that women and girls are still victim of violence in some regions and that they are marginalized due to continuous discrimination by state and non-state actors.[746]

***F. In sum:***

Besides state protection in the sense of police protection, reference is made to:

(i) State good-faith efforts such as (draft) legislation criminalizing 'domestic violence' and 'upcoming emancipation';
(ii) NGOs protection;
(iii) Shelters designed for women fleeing 'domestic violence';
(iv) Relocation alternative;
(v) Family protection, in particular by male family members; and
(vi) Clan protection.

These 'protection' possibilities clearly echo the 2005 ACVZ reasoning. In order to find state protection unavailable, claimants are required to make use of all local possibilities to be

738 Rb. Arnhem 23 December 2010, nr. 10/23569, par. 4.
739 Rb. Arnhem 23 December 2010, nr. 10/23569, par. 10 & 13.
740 ABRvS 24 May 2011, nr. 201100965/1/V1.
741 Ground nr. 1 in the lawyer's Higher Appeal Brief in: ABRvS 24 May 2011, nr. 201100965/1/V1.
742 ABRvS 24 May 2011, nr. 201100965/1/V1.
743 Rb. Almelo 23 November 2005, nrs. Awb 05/49424 and Awb 05/49423.
744 Rb. Almelo 23 November 2005, nrs. Awb 05/49424 and Awb 05/49423, par. 2 at p. 2.
745 Rb. Almelo 23 November 2005, nrs. Awb 05/49424 and Awb 05/49423, par. 2 at p. 3.
746 Rb Almelo 23 November 2005, nrs. Awb 05/49424 and Awb 05/49423, par. 3 at p. 5.

'protected'. The concept of protection is widened with the result that state protection is increasingly 'privatized'.[747]

## 3.4 Credibility

The cases presented in this paragraph illustrate how the credibility of persons seeking asylum because of forced marriage is negotiated. We will see that the INS, lawyers and courts often employ culture-based arguments when addressing this question.



*Case 1*

The first case (2011)[748] concerns a claimant from Nigeria. Her father informed her that she would be married off to the Chief Priest of the village. The INS found her asylum account not credible because forced marriages do occur among Muslims in the North of Nigeria and not within the Christen community:

> The number of forced marriages decreases in Nigeria. Forced marriages occur especially among Muslims in the North of Nigeria, while claimant is Christen. Moreover, children and not adults like the claimant face forced marriage. Given this country information, it is not plausible that she faces forced marriage.[749]

The lawyer argued that the circumstance that country information does not confirm her forced marriage does not mean that her statements are incredible.[750] However, the court agreed with the INS.[751] In higher appeal[752], the lawyer reiterated that even if some parts of the claim are not confirmed by country information, this does not mean that her claim is implausible and added that country information does not confirm the opposite of her statements.[753] However, the Council of State confirmed the court's decision without substantive reasoning.[754] This case shows that to be credible, women from Nigeria are obliged to fit the 'cultural script' the state included in Nigerian country reports. Women from Nigeria who fail to represent themselves as victims of Islam are therefore excluded. The case also shows the consequence of presenting forced marriage in country reports as exclusively concerning children: forced marriage of adult women is not credible.

747 Battjes 2012, *supra* note 481, at p. 22-23. See also T.P. Spijkerboer, *De Nederlandse rechter in het vreemdelingenrecht*, Den Haag: Sdu 2014, p. 380-381.
748 Rb. Arnhem 23 Augustus 2011, nr. 10/32142.
749 Rb. Arnhem 23 Augustus 2011, nr. 10/32142, par. 11.
750 Rb. Arnhem 23 Augustus 2011, nr. 10/32142, par. 17.
751 Rb. Arnhem 23 Augustus 2011, nr. 10/32142, par. 17.
752 ABRvS 14 October 2011, nr. 201109697/1/V2.
753 Ground nr. 3 in the lawyer's Higher Appeal Brief in: ABRvS 14 October 2011, nr. 201109697/1/V2.
754 ABRvS 14 October 2011, nr. 201109697/1/V2.

*Case 2*

The case (2006)[755] concerns a Nigerian claimant who was pregnant without having been married. When her father knew about this, he decided that she should marry a man to be chosen for her. The INS disbelieved her claim based on forced marriage because she was not able to provide sufficient information about Islam:

> Claimant is lacking basic knowledge about Islamic religion. Therefore, it is neither plausible that she grew up by an Islamic father or family, nor that she lived in an Islamic entourage. Given this, it is not credible that her father is Islamic and that he, according to the Sharia, decided to marry her off or to kill her.[756]

In reply, the lawyer maintained as follows: forced marriage is frequent in Nigeria; her asylum account fits in this picture; given her subordinate position, it is logical that she has no knowledge about Islamic law.[757] The lawyer then emphasized the situation of the claimant as follows: she was pregnant at young age; she is in a vulnerable situation because the position of pregnant young single women and single mothers with very young children is very precarious; she had a bad position within her family after her mother passed away; and the role of women in Nigeria is subordinate to men. For all of these reasons, the claimant was not able to give declarations about Islam.[758] The court agreed with the INS and stated that the claimant was not able to provide with basic information about Islamic religion.[759]

*Case 3*

The case (2011)[760] concerned a claimant from Nigeria who faced forced marriage with her brother-in-law. With the help of her family she succeeded to escape and upon advice of her uncle, she fled the country.[761] The INS found her asylum account not credible. The lawyer refers in appeal to the position of women in Nigeria.[762] The court found the asylum account as not credible. The court first acknowledges that women in Nigeria have a subordinate position in relation to their husbands and family-in-law so that they usually are in a dependent position in relation to male family members. The court emphasizes that this is more the case in the Islamic North of Nigeria where women are not allowed to work. However, it found that the claimant did not demonstrate that she had problems because of being a woman as she had been working since she was thirteen years old and she was financially independent. The court further observes that the claimant does not originate

755 Rb. Amsterdam 26 June 2006, nr. AWB 05/36357.
756 Rb. Amsterdam 26 June 2006, nr. AWB 05/36357, par. IV-1.
757 Rb. Amsterdam 26 June 2006, nr. AWB 05/36357, par. IV-2.
758 Rb. Amsterdam 26 June 2006, nr. AWB 05/36357, par. IV-2.
759 Rb. Amsterdam 26 June 2006, nr. AWB 05/36357, par. V-12.
760 Rb. Almelo 1 July 2011, nr. 11/6216.
761 Rb. Almelo 1 July 2011, nr. 11/6216, par. 2 at p. 4.
762 Rb. Almelo 1 July 2011, nr. 11/6216, par. 2 at p. 8.

from the Islamic North but from the Southern Christian part of the country.[763] In higher appeal, the lawyer focused on the lack of documents and other credibility elements without any attention to forced marriage.[764] The Council of State confirmed the court's decision without substantive reasoning.[765]

*Case 4*

The case[766] concerned a Guinean claimant who was forcibly married. She fled to her father, but he mistreated her and brought her back to her husband. She then fled to the house of her mother's friend. After a while, her mother's friend then told her that her father was looking for her. Because of this, she fled the country. The INS found the declarations of the claimant regarding forced marriage as not credible:



> Claimant stated that her would-be husband is a Koran teacher and that he strictly follows Islamic rules. Therefore, it should be admitted that upon marriage he would follow the rules of Islamic marriage law instead of the general applicable marriage practices usually mixed with local practices. In Guinea, the rules of the Maliki law school, within which the consent of the woman is always required, are applicable. Therefore, it is not plausible that claimant would be married off in contradiction with these rules requiring consent.[767]

In reply, the lawyer refers to country information to argue for the credibility of the claim:

> As far as the consent is required, it is not her consent, but that of her father that is needed for the conclusion of the marriage because, although she is 20 years old, she is in Guinea still considered as minor. According to the 2011 Musawah report titled 'CEDAW and Muslim Family Laws', it occurs within the Maliki law school that women are married off against their will.[768]

The court found that since the INS admitted (in the courtroom) that forced marriages do also occur within the Maliki law school, its decision was lacking justification.[769] However, although the court granted the appeal, it maintained the legal consequence of the decision because, in the court's view, many statements of the claimant were contradictory.[770] In higher appeal[771], the lawyer argued that the court should have refrained from conducting

763 Rb. Almelo 1 July 2011, nr. 11/6216, par. 2 at p. 8.
764 See the lawyer's Higher Appeal Brief in: ABRvS 21 November 2011, nr. 201108103/1/V4.
765 ABRvS 21 November 2011, nr. 201108103/1/V4.
766 Rb. Almelo 3 May 2011, nr. 11/11893 and 11/11892.
767 Rb. Almelo 3 May 2011, nr. 11/11893 and 11/11892, par. 2 at p. 4.
768 Rb. Almelo 3 May 2011, nr. 11/11893 and 11/11892, par. 2 at p. 5.
769 Rb. Almelo 3 May 2011, nr. 11/11893 and 11/11892, par. 2 at p. 5.
770 Rb. Almelo 3 May 2011, nr. 11/11893 and 11/11892, par. 2 (at p. 5) and par. 3.
771 ABRvS 27 July 2011, nr. 201105404/1/V2.

a second credibility assessment.[772] The Council of State confirmed the court's decision without substantive reasoning.[773]

*Case 5*

Another Guinean case[774] concerned a claimant who had a secret relationship with her friend. Her uncle refused their marriage because her friend is Christian. Subsequently, the uncle decided to marry her off to the village's chief. When she refused, she was locked away and was told that she would be subject to FGM. Because of these problems, she fled to her friend who helped her to flee. The INS and the court found her asylum story implausible because she was not able to present information about the chief. The lawyer referred in higher appeal[775] to Guinean culture to render the claim credible:

> Due to claimant's cultural background, it is usual that the uncle, who is responsible for her, marries her off. The fact that she never met the man to whom she would be married off is not striking; it is from 'our white' perspective, but in Guinea and within the Guinean culture it is very normal that you previously never had seen the future husband to whom you would be married off. It should be examined whether her asylum account and statements fit in what is known about the cultural traditions in Guinea.[776]

However, the Council of State confirmed the court's decision without substantive reasoning.[777]

*Case 6*

The case[778] concerned a Shia Kurdish woman from Iraq who lived with her Arabic Sunni husband. A few months after he passed away, she was forced to abandon her house because of her Shia background. She went back with her children to stay with her mother and brother. In 2010, her father-in-law frequently visited her to ask her to marry her brother-in-law. He also insisted to re-integrate the three children in his family in order to be educated according to Sunni values. Because she continuously refused the marriage, her father-in-law threatened, insulted and mistreated her. She then fled Iraq together with her children. The INS rejected her claim because of lack of credibility. In response, the lawyer referred to a quote from the expert opinion of an anthropologist:

772 Ground nr. 2.3 in the lawyer's Higher Appeal Brief in: ABRvS 27 July 2011, nr. 201105404/1/V2.
773 ABRvS 27 July 2011, nr. 201105404/1/V2.
774 Rb. Arnhem 8 April 2011, nr. 11/9222 and 11/9220.
775 ABRvS 18 May 2011, nr. 201104352/1/V2.
776 See par. 5, 7 and 8 in the lawyer's Higher Appeal Brief in: ABRvS 18 May 2011, nr. 201104352/1/V2.
777 ABRvS 18 May 2011, nr. 201104352/1/V2.
778 Rb. Assen 21 January 2011, nr. 11/252 and 11/251.

> In the Arabic and Kurdish society, when a woman enters the marriage she becomes part of her family-in-law and leaves her own family. Children belong to the family-in-law. This is also the case after the death of the husband. The widow and the children have to be cared for by the family-in-law after the death of the husband. Because a single woman in the Arabic and Kurdish society is considered to be vulnerable, widows are married off to brothers-in-law.[779]

In the courtroom, the INS maintained that her asylum account diverged from what is usual: she initially returned to her own family instead of staying with her family-in-law; and it is striking that the father-in-law wanted to re-claim her children ten years after the death of her husband. The court agreed because she did not present any justification for this divergence from what is culturally normal.[780] In higher appeal,[781] the lawyer argued that her story about forced marriage with her brother-in-law fits in her Kurdish/Arabic culture.[782] However, the Council of State confirmed the court's decision without substantive reasoning.[783]



*Case 7*

The case[784] involves a young Yazidi woman from Russia. She left because her father wanted to marry her off to an old man. The INS found the claim not credible because she was not able to present information about Yazidi culture. In reply, the lawyer argued that she was forced to marry according to her culture and that her asylum story fits in that culture. However, the court dismissed the claim:

> The argument that her asylum account fits in the context of Yazidi culture does not change the established lack of credibility. The court takes into account that she is unable to provide with any information about Yazidi culture, while she claims to be married off according to the tradition of that culture.[785]

In higher appeal,[786] the lawyer argued as follows:

> The fact that she was unable to present information about Yazidi culture is mistakenly not considered as an indication for the reason why she resisted forced marriage and the old traditions. Her asylum interview shows that she had been active on Internet and in this way she exited her father's old traditions.[787]

779 Rb. Assen 21 January 2011, nr. 11/252 and 11/251, par. 2 at p. 5.
780 Rb. Assen 21 January 2011, nr. 11/252 and 11/251, par. 2 at p. 5.
781 ABRvS 23 February 2011, nr. 201101488/1/V2.
782 Ground nr. 2 in the lawyer's Higher Appeal Brief in: ABRvS 23 February 2011, nr. 201101488/1/V2.
783 ABRvS 23 February 2011, nr. 201101488/1/V2.
784 Rb. Amsterdam 11 June 2010, nrs. 10/17353 en 10/17354.
785 Rb. Amsterdam 11 June 2010, nrs. 10/17353 en 10/17354, par. 5.2.
786 ABRvS 29 June 2010, nr. 201005874/1/V2.
787 See p. 3 in the lawyer's Higher Appeal Brief in: ABRvS 29 June 2010, nr. 201005874/1/V2.

However, the Council of State confirmed the court's decision without substantive reasoning.[788]

*Case 8*

The final case[789] concerns an Afghan man who fled forced marriage. The INS rejected the claim because the claimant declared that his problem was solved via an agreement between his father and uncle. In reply, the lawyer argued that the agreement does not mean that his father would not force him to marry: in Afghan culture the agreement could be that he marries two wives.[790] In its decision, the INS re-stresses that he declared that his uncle and his father reached an agreement about the marriage and that claimant did not specify (in the interview corrections) that the agreement should be understood in another way. In the INS's view, reference to Afghan culture does not change this conclusion.[791]

## 3.5 Sidelining and erasing forced marriage

In the cases discussed here, the asylum claim consists of forced marriage along with female genital mutilation (FGM), 'honour-based' violence (HBV) or homosexuality. We will see that lawyers regularly sidelined or erased forced marriage, while they put the emphasis either on FGM (par. 3.5.1), HBV (par. 3.5.2) or homosexuality (par. 3.5.3).

### 3.5.1 Forced marriage and 'female genital mutilation'

I first present a case in which forced marriage remained as a separate part of the claim during the procedure: in the INS's decision, lawyer's appeal, court's reasoning and in the lawyer's higher appeal. I then move on to cases in which lawyers sideline or erase forced marriage, while focusing on FGM.

*Case 1*

The case (2011, Ghana)[792] concerned a claimant who fled forced marriage, FGM and rape.[793] In its decision, the INS distinguished between the three claims: FGM, rape and forced marriage.[794] In appeal, the lawyer also addressed the three parts of the claim.[795]

788 ABRvS 29 June 2010, nr. 201005874/1/V2.
789 Rb. Zwolle 19 May 2010, nr. 09/42114.
790 See par. 4 (at p. 4) in the INS's decision (*beschikking*) annexed to the lawyer's Higher Appeal Brief in: ABRvS 25 October 2011, nr. 201005477/1/V3.
791 See par. 4 (at p. 4) in the INS's decision (*beschikking*) annexed to the lawyer's Higher Appeal Brief in: ABRvS 25 October 2011, nr. 201005477/1/V3.
792 Rb. Amsterdam 13 May 2011, nr. 09/38623.
793 See p. 2 under the heading '*Asielrelaas*' in: Rb. Amsterdam 13 May 2011, nr. 09/38623.
794 Rb. Amsterdam 13 May 2011, nr. 09/38623, par. 3.2.
795 Rb. Amsterdam 13 May 2011, nr. 09/38623, par. 1.2.

The court observed that in the INS's decision distinction is made between the claimant's three problems and that each would be separately dealt with.[796] The court then separately discussed FGM[797], rape[798] and forced marriage[799]. In higher appeal[800], the lawyer devoted five grounds to FGM[801] and one ground to forced marriage[802]. The claim based on rape is totally erased in the lawyer's higher appeal. The Council of State confirmed the court's decision without substantive reasoning.

*Case 2*

The case (2009, Guinea)[803] concerns a claimant who applied for asylum because of forced marriage and FGM.[804] The INS paid attention to both claims, but found them implausible.[805] In appeal, the lawyer addressed FGM, while no attention was paid to forced marriage.[806] The court did not address forced marriage and only focused on FGM.[807] In higher appeal[808], the lawyer focused on FGM and refers to country information on FGM, while forced marriage is erased.[809] The Council of State confirmed the court's decision without substantive reasoning.



*Case 3*

The case (2009, Guinea)[810] concerned a claimant who fled forced marriage and FGM.[811] The INS addressed both claims and found the asylum account not credible.[812] In appeal, although the lawyer mentioned forced marriage along with FGM, the lawyer basically focused on FGM by citing country information, while no evidence was put forward to support the forced marriage claim.[813] The court paid attention to both claims, but like the lawyer, it focused on FGM by citing country information, while no evidence is mentioned regarding forced marriage.[814] In higher appeal[815], the lawyer addressed FGM, while forced marriage is out of the picture.[816] The Council of State confirmed the court's decision without substantive reasoning.

796 Rb. Amsterdam 13 May 2011, nr. 09/38623, par. 3.2.
797 Rb. Amsterdam 13 May 2011, nr. 09/38623, par. 3.3-3.17
798 Rb. Amsterdam 13 May 2011, nr. 09/38623, par. 3.18-3.20
799 Rb. Amsterdam 13 May 2011, nr. 09/38623, par. 3.22.
800 ABRvS 15 March 2012, nr. 201106188/1/V1.
801 Ground nr. 1-5 in the lawyer's Higher Appeal Brief in: ABRvS 15 March 2012, nr. 201106188/1/V1.
802 Ground nr. 6 in the lawyer's Higher Appeal Brief in: ABRvS 15 March 2012, nr. 201106188/1/V1.
803 Rb. Groningen 19 June 2009, nr. 08/39245.
804 Rb. Groningen 19 June 2009, nr. 08/39245, par. 2.1.
805 Rb. Groningen 19 June 2009, nr. 08/39245, par. 2.2.
806 Rb. Groningen 19 June 2009, nr. 08/39245, par. 2.3.
807 Rb. Groningen 19 June 2009, nr. 08/39245, par. 2.9-2.10.
808 ABRvS 7 June 2010, nr. 200904696/1/V2.
809 Ground nr. 2 in the lawyer's Higher Appeal Brief in: ABRvS 7 June 2010, nr. 200904696/1/V2.
810 Rb. Arnhem 29 September 2009, nr. 09/7133.
811 Rb. Arnhem 29 September 2009, nr. 09/7133, par. 2.
812 Rb. Arnhem 29 September 2009, nr. 09/7133, par. 3.
813 Rb. Arnhem 29 September 2009, nr. 09/7133, par. 4.
814 Rb. Arnhem 29 September 2009, nr. 09/7133, par. 11-13.
815 ABRvS 24 December 2009, nr. 200908209/1/VI.
816 Ground nr. 2 in the lawyer's Higher Appeal Brief in: ABRvS 24 December 2009, nr. 200908209/1/VI.

*Case 4*

The case (2011, Guinea)[817] concerns a claimant who escaped forced marriage and FGM.[818] The INS addressed FGM and argued that it was not credible that the claimant was not yet subjected to it. The INS refers to country information on FGM, while no attention is paid to forced marriage.[819] Within the courtroom, the INS observed that the core of the rejection was that the FGM claim was not credible.[820] In reply, the lawyer emphasized that the claimant's problem was clear: she was not yet subjected to FGM and she fears to be subject to it upon return. The lawyer focuses on FGM and argues that if the INS disbelieved that she had not yet been genitally mutilated, it should conduct a medical test.[821] The court focused on FGM and agreed with the INS.[822] In higher appeal[823], the lawyer focuses on FGM and referred to country information, while forced marriage was not addressed.[824] The Council of State confirmed the court's decision without substantive reasoning. In this case, erasing forced marriage started from the INS's decision and then reaffirmed by the lawyer.

*Case 5*

In the final case (2010, Guinea)[825], when claimant's parents passed away, her uncle informed her that she would be married off and then subject to FGM.[826] Both forced marriage and FGM gained simultaneous attention in the INS's decision as being interwoven and both are found to be not credible.[827] The text of the court's judgment does not include the lawyer's arguments regarding this lack of credibility. The court paid attention to both forced marriage and FGM and considers them as not credible.[828] In higher appeal[829], the lawyer puts forward that the claim is not based on forced marriage but, instead, on FGM. The lawyer adds that the fact that the INS disbelieves forced marriage does not mean that her fear for FGM is not credible.[830] The Council of State confirmed the court's decision without substantive reasoning. In this case, the lawyer makes an explicit distinction between both claims in order to erase forced marriage (because it is considered as not credible) and focus on FGM.

817 Rb. Groningen 27 July 2011, nrs. 11/21048 and 11/21047.
818 Rb. Groningen 27 July 2011, nrs. 11/21048 and 11/21047, par. 2.2.
819 Rb. Groningen 27 July 2011, nrs. 11/21048 and 11/21047, par. 2.3.
820 Rb. Groningen 27 July 2011, nrs. 11/21048 and 11/21047, par. 2.4.
821 Rb. Groningen 27 July 2011, nrs. 11/21048 and 11/21047, par. 2.5.
822 Rb. Groningen 27 July 2011, nrs. 11/21048 and 11/21047, par. 2.14.
823 ABRvS 6 September 2011, nr. 201108517/1/V2.
824 Ground nr. 1 in the lawyer's Higher Appeal Brief in: ABRvS 6 September 2011, nr. 201108517/1/V2.
825 Rb. Zutphen 9 June 2010, nr. 09/25757.
826 Rb. Zutphen 9 June 2010, nr. 09/25757, par. 2.2.
827 Rb. Zutphen 9 June 2010, nr. 09/25757, par. 2.3.
828 Rb. Zutphen 9 June 2010, nr. 09/25757, par. 2.8.
829 ABRvS 22 September 2010, nr. 201006504/1 /V3.
830 See p. 2 in the lawyer's Higher Appeal Brief in: ABRvS 22 September 2010, nr. 201006504/1 /V3.

### 3.5.2 Forced marriage and 'honour-based violence'

I first present a case in which forced marriage remained as a separate part of the claim and then move on to cases in which lawyers sideline or erase forced marriage, while focusing on HBV.

*Case 1*

In this case (2011, Iraq)[831], the claimant refused forced marriage with the consequence that her father and brother threatened to kill her.[832] The INS reasoned that her problems were located in the private sphere and have no link with the Refugee Convention.[833] The lawyer maintained that there were clear indications that HBV is at stake: being a woman refusing to be forcibly married means that she belongs to a 'vulnerable group' because she risks HBV.[834] The court argued that the fact that she has problems with her father because she refuses to marry did not mean that she belongs to a particular social group.[835] In higher appeal, the lawyer addresses both HBV and forced marriage.[836] However, the Council of State confirmed the court's decision without substantive reasoning.[837]

*Case 2*

The case (2008, Syria)[838] concerned a claimant who had a secret relationship with her friend. Her father wanted to marry her off to her cousin, but she refused and fled the country.[839] The INS considered the secret relationship and forced marriage as credible but disbelieves the claim based on HBV.[840] In reply, the lawyer refers to forced marriage and HBV as follows: on the one hand, she fears forced marriage; on the other hand, she fears HBV because of her secret relationship.[841] The court focused on HBV and mentioned in passing that refusal of forced marriage did not engender any problems with her parents.[842] The court referred to country information and found the HBV claim not credible.[843] In higher appeal[844], the lawyer exclusively focused on HBV, while forced marriage is totally out of the picture.[845] The Council of State confirmed the court's decision without substantive reasoning.[846]

831 Rb. Middelburg 12 May 2011, nr. 10/19117.
832 Rb. Middelburg 12 May 2011, nr. 10/19117, par. 3.
833 Rb. Middelburg 12 May 2011, nr. 10/19117, par. 4.
834 Rb. Middelburg 12 May 2011, nr. 10/19117, par. 5.
835 Rb. Middelburg 12 May 2011, nr. 10/19117, par. 9.
836 Ground nr. 1 & 4 (forced marriage) and Ground nr. 2 & 3 (HBV) in the lawyer's Higher Appeal Brief in: ABRvS 12 September 2011, nr. 201106357/1/V1.
837 ABRvS 12 September 2011, nr. 201106357/1/V1.
838 Rb. Assen 1 August 2008, nrs. 08/24590 and 08/24591.
839 Rb. Assen 1 August 2008, nrs. 08/24590 and 08/24591, p. 2.
840 Rb. Assen 1 August 2008, nrs. 08/24590 and 08/24591, p. 4.
841 Rb. Assen 1 August 2008, nrs. 08/24590 and 08/24591, p. 2.
842 Rb. Assen 1 August 2008, nrs. 08/24590 and 08/24591, p. 4.
843 Rb. Assen 1 August 2008, nrs. 08/24590 and 08/24591, p. 4.
844 ABRvS 4 September 2008, nr. 200806089/1.
845 Ground nr. 1 in the lawyer's Higher Appeal Brief in: ABRvS 4 September 2008, nr. 200806089/1.
846 ABRvS 4 September 2008, nr. 200806089/1.

*Case 3*

In another case (2010, Iraq)[847], the INS paid attention to forced marriage, on the one hand, and HBV, on the other.[848] Within the courtroom, the claimant declared that she feared HBV because she fled after her father decided to marry her off to a much older man.[849] Although forced marriage is mentioned in the court's reasoning, it focused on HBV, while forced marriage was not addressed.[850] In higher appeal[851], the lawyer focuses on HBV, while forced marriage is erased.[852] The Council of State confirmed the court's decision without substantive reasoning.[853]

*Case 4*

The final case (2011, Iraq)[854] concerns a claimant who had problems with the Kurdistan Democratic Party (KDP). She also fled because of a threatening forced marriage of her daughter and because of HBV.[855] The INS found the claim based on forced marriage as implausible.[856] In appeal, the lawyer addressed the problems with the KDP as well as the claim based on HBV, while forced marriage was excluded.[857] Similarly, the court pays exclusive attention to the KDP element[858] and to HBV.[859] In the same vein, the lawyer focused in higher appeal[860] on those two issues, while forced marriage is erased.[861] The Council of State confirmed the court's decision without substantive reasoning.

### 3.5.3 Forced marriage and 'homosexuality'

The two cases presented below illustrate a similar trend as above. In the first case, the INS erased forced marriage, but the lawyer and the court maintained it as part of the claim. In the second case, the INS and the court maintained forced marriage as part of the claim, while the lawyer sidelined it in appeal and erased it in higher appeal, while focusing on homosexuality. Although these two single cases are very few to draw conclusions regarding cases involving forced marriage along with homosexuality, it nevertheless confirms the trend of sidelining/erasing forced marriage.[862]

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847 Rb. Utrecht 6 September 2010, nr. 10/27311 & 10/27313.
848 Rb. Utrecht 6 September 2010, nr. 10/27311 & 10/27313, par. 2.5.
849 Rb. Utrecht 6 September 2010, nr. 10/27311 & 10/27313, par. 2.4.
850 Rb. Utrecht 6 September 2010, nr. 10/27311 & 10/27313, par. 2.8.
851 ABRvS 19 October 2010, nr. 201008916/1/V2.
852 Ground nr. 1, 2 and 3 in the lawyer's Higher Appeal Brief in: ABRvS 19 October 2010, nr. 201008916/1/V2.
853 ABRvS 19 October 2010, nr. 201008916/1/V2.
854 Rb. Arnhem 28 June 2011, nr. 10/38794 & 10/38797.
855 Rb. Arnhem 28 June 2011, nr. 10/38794 and 10/38797, par. 2.
856 Rb. Arnhem 28 June 2011, nr. 10/38794 and 10/38797, par. 3.
857 Rb. Arnhem 28 June 2011, nr. 10/38794 and 10/38797, par. 4.
858 Rb. Arnhem 28 June 2011, nr. 10/38794 and 10/38797, par. 7.
859 Rb. Arnhem 28 June 2011, nr. 10/38794 and 10/38797, par. 8-10.
860 ABRvS 16 August 2011, nr. 201107391/1/V2.
861 Ground nr. 2 and 3 in the lawyer's Higher Appeal Brief in: ABRvS 16 August 2011, nr. 201107391/1/V2.
862 For an analysis of sexuality and forced marriage including claims submitted by gay men, see Dauvergne & Millbank 2010, *supra* note 95.

*Case 1*

The case (2013, Ghana)[863] concerned a lesbian woman. When her father passed away, her uncle forced her to quit school and to marry her cousin.[864] The INS focused on sexuality and argued that it was not plausible that she ran the risk of persecution: she had no problems because of her sexuality, and no one knew of it.[865] By doing this, the INS erased forced marriage. The lawyer argued that the claimant feared persecution because of her sexuality, on the one hand, and because she ran the risk of being forced to marry, on the other.[866] The court argued that there was no persecution because of sexuality and added that forced marriage had no link with her sexuality.[867]

*Case 2*

The second case (2010, Egypt)[868] concerned a man who fled persecution from his family and national authorities because of his homosexuality. The INS found the homosexuality claim not to be credible and considered that the claimant could relocate to another part in Egypt in order to escape forced marriage.[869] In appeal, the lawyer referred to forced marriage in passing and focused on homosexuality.[870] The court maintained that fear for forced marriage had no link with the persecution grounds and adds that a relocation alternative is available; for the rest, the court focused on homosexuality.[871] In higher appeal, the lawyer exclusively focused on homosexuality, while forced marriage was erased.[872] The Council of State dismissed the higher appeal without substantive reasoning.[873]



## SECTION 4: SUMMARY AND CONCLUSION

This chapter aimed to reconstruct how asylum claims based on forced marriage are negotiated within the political and legal debate over the period between 2004 and 2014. In this concluding section, I present a summary (par. 4.1-4.4) and then conclude that state approach to forced marriage in regular migration law (as presented in par. 1.2.2, Ch1) stands in stark disjuncture with its approach in refugee law (par. 4.5).

863 Rb. Amsterdam 29 November 2013, nr. AWB 13/28475 & AWB 13/28473.
864 Rb. Amsterdam 29 November 2013, nr. AWB 13/28475 & AWB 13/28473, par. 3.
865 Rb. Amsterdam 29 November 2013, nr. AWB 13/28475 & AWB 13/28473, par. 4.4.
866 Rb. Amsterdam 29 November 2013, nr. AWB 13/28475 & AWB 13/28473, par. 4.3.
867 Rb. Amsterdam 29 November 2013, nr. AWB 13/28475 & AWB 13/28473, par. 4.7.
868 Rb. Middelburg 23 September 2010, nr. 09/15862.
869 Rb. Middelburg 23 September 2010, nr. 09/15862, par. 4.
870 Rb. Middelburg 23 September 2010, nr. 09/15862, par. 5.
871 Rb. Middelburg 23 September 2010, nr. 09/15862, par. 14.
872 See the lawyer's Higher Appeal Brief in: ABRvS 24 February 2011, nr. 201010088/1/V1.
873 ABRvS 24 February 2011, nr. 201010088/1/V1.

*4.1 Lack of political debate:* forced marriage in the asylum context was not subject of political debate; my search did not identify any policy letters, transcripts of parliamentary debates or NGOs reports specifically addressing this issue. In addition, reports of monitoring/advisory institutions addressing forced marriage in asylum law are very scarce.

*4.2 Forced marriage in the 2005 ACVZ report:* the committee viewed forced marriage as a form of 'domestic violence' and as such it can amount to persecution. In its view, women fleeing forced marriage can be seen as belonging to the social group of 'women in the country of origin'. In terms of state protection, the committee advances: state-based protection, 'society protection', 'family protection' and internal relocation. In the committee's view, a woman fleeing forced marriage should have exhausted all possible means of obtaining protection before seeking asylum.

*4.3 Forced marriage in country reports:* although forced marriage is mentioned in many reports, it consistently remained un-thematized except in some Nigeria reports within which forced marriage received a separate section. This thematization occurred after many TOR reports specifically addressing forced marriage. Nigeria reports represent forced marriage as basically affecting underage women, in particular Islamic women. In terms of protection, state-based protection, NGOs protection, family protection and internal relocation are cited.

*4.4 Forced marriage in case law:* the INS and courts were routinely of opinion that forced marriage is unrelated to the Refugee Convention; it is opposite to what is social and political, and for this reason, it falls outside its scope. They both considered forced marriage as exclusively being a 'private family matter' and/or a 'negotiable cultural affair'. Because it is located within the private family, personal and/or cultural sphere, it has no link with the persecution grounds. In response, lawyers consistently argued for membership to a particular social group but in vain. Further, courts and the Council of State accepted 'non-state' protection. In this context, reference is made to: state good-faith efforts such as (draft) legislation criminalizing 'domestic violence' and 'upcoming women emancipation'; NGO protection; shelters designed for women fleeing domestic violence; internal relocation; and family protection, in particular the protection by male family members and the clan-family. With regards to credibility of forced marriage claims, all involved actors employed culture-based reasoning to argue for their arguments. Further, we have seen how forced marriage can be sidelined or erased by lawyers when it is part of the asylum claim along with FGM, HBV or homosexuality. Finally, we have regularly seen that the Council of State consistently dismissed all higher appeals submitted by lawyers without substantive reasoning.

*4.5 Contrasting state approaches to forced marriage:* this chapter allows us to conclude that the state approach to forced marriage in refuge law stands in sharp disjuncture with its

approach in regular migration law. First, the political 'silence' on forced marriage in refugee law is in contrast with the political attention paid to forced marriage in regular migration law. While it is un-problematized in the former, it is problematized in the latter: while forced marriage is 'public' in regular migration law, it is 'private, familial and personal' in refugee law. Second, while forced marriage is explicitly viewed in regular migration law as a human rights violation, it is excluded from the scope of the ECHR and the Refugee Convention in refugee law. Third, while the state assigned itself a positive obligation to protect (potential) victims in regular migration law, protection in refugee law is privatized and includes NGOs, male family members and the clan-family. In other words, while the state is the principal agent of protection in regular migration law, non-state actors are called to offer protection in refugee law. A final contrast concerns the representation of involved asylum seekers. In refugee law, women fleeing forced marriage are represented as independent and capable of protecting themselves, while they are represented in regular migration law as vulnerable, not independent and for this reason in need of state protection. While education, work experience and being adult are viewed in refugee law as sufficient to be autonomous, they are not in regular migration law within which future marriage partners are seen as not independent in spite of possessing those 'skills'. This contrast becomes more visible if we bear in mind that even underage children are sometimes represented as autonomous in refugee law, while women between 18 and 21 years old are not in regular migration law. Finally, besides this disjuncture both law regimes overlap in viewing forced marriage as a cultural issue.

# 4

# Chapter 4

## Closing Scene

In the first chapter of this study, I introduced two case studies on the basis of which I wish to address my overreaching research question that stipulates as follows: how is the dilemma of doing justice, through law, to individual freedoms without jeopardizing family life, and vice versa, negotiated within the Dutch debate on family-related asylum claims? In the first case study, refugees claim that their family relations need to be protected from interference by the Dutch authorities (family reunion for foster children of refugees) while in the second situation asylum seekers claim that they need the protection of the Dutch authorities against violence in their family relations (asylum claims based on forced marriage). Since I wish to analyse how the dilemma that is the focus of this study is negotiated through critical framing theory, I asked two questions: which frames are constructed within the two debates? To what extent are the identified frames aligned? In the first chapter of this study (section 6, Ch1), I presented how I analyzed my data to answer these questions. This resulted in the following hypothesis: three frames probably guide both debates and alignment between the frames of different actors took place within the debate on foster children, while within the debate on forced marriage it did not. The material presented in chapters 2 (research question 1) and 3 (research question 2) should allow me to test this hypothesis. This fourth chapter presents the results of this test and confirms the hypothesis.

The first section below presents the three identified guiding frames (research question 3), while the second section addresses frame alignment within the framing process (research question 4). Since I want to analyse the two debates in their interrelation, the third section of this chapter discusses whether there are differences in frames and degrees of frame alignment across the two debates (research question 5). In the closing section of this chapter, I present the overall conclusion of the thesis, some methodological reflections and suggestions for further research.

## SECTION 1: FRAMES

In this section, I present a frame analysis of the two debates as reconstructed in chapter 2 and 3. To this aim, I relied on three questions when reading both chapters: what is the problem and how is it defined? What solutions are proposed? How are foster children and their parents, on the one hand, and women fleeing forced marriage, on the other, portrayed within the problem definition and the proposed solutions? Based on this analysis, I identified the following three frames within both debates: the 'boy at the dike' frame (par. 1.1); the 'vulnerability' frame (par. 1.2); the 'culture' frame (par. 1.3).

## 1.1 The 'boy at the dike' frame

Before analysing how this frame is constructed, I first contextualize the name I give it, namely 'the boy at the dike'.

In 1865, American author Mary Mapes Dodge published a book titled '*Hans Brinker, or the Silver Skates: A story of Life in Holland*' through which she introduces the Dutch sport of speed skating.[874] The book's events take place in the Netherlands and present a fictional portrait of early 19th-century Dutch life. The novel's title refers to the silver skates to be awarded to the winner of the ice-skating race that the main character (Hans Brinker) wishes to enter. A story within the book gained considerable attention as symbolic of the eternal Dutch struggle with water. It is about a little Dutch boy who saved the Dutch city of Haarlem from inundations by using his finger to stop a leak in the dike. The boy's story can briefly be summarized as follows:

> *'Trudging stoutly along the canal, he noticed how the autumn rains had swollen the waters. Just as he was bracing himself for a run, he was startled by the sound of trickling water. Whence did it come? He looked up and saw a small hole in the dike through which a tiny stream was flowing. The boy understood the danger at a glance. That little hole, if the water were allowed to trickle through, would soon be a large one, and a terrible inundation would be the result. "Quick as a flash, he saw his duty. The boy clambered up the heights until he reached the hole. His chubby little finger was thrust in. The flowing was stopped! Ah! He thought, with a chuckle of boyish delight, the angry waters must stay back now! Haarlem shall not be drowned while I am here! He shouted loudly; he screamed, 'Come here! come here!' but no one came. 'I will stay here till morning.'" "At daybreak a clergyman thought he heard groans as he walked along on the top of the dike. Bending, he saw, far down on the side, a child apparently writhing with pain. "'In the name of wonder, boy,' he exclaimed, 'what are you doing there?' "'I am keeping the water from running out,' was the simple answer of the little hero. 'Tell them to come quick.'* [875]

The boy remains nameless in the book, but he was known as '*The Hero of Haarlem*'.[876] In other versions of the story, the little boy is known as '*The Little Dutch Hero*' or '*The Boy at the Dike*'.[877] This story symbolizes the eternal struggle of the Netherlands with water and it is not for nothing that the Netherlands continuously reinforces its dikes and immediately

874 Mary Mapes Dodge, *Hans Brinker, or The Silver Skates*, New York: Scholastic Inc. 1865.
875 This quote is based on various passages in the EBook version of the story, available at: http://www.gutenberg.org/files/34378/34378-h/34378-h.htm#Page_129. See in particular p. 129-136.
876 'Popular culture: the legend of the boy and the dike', *Wikipedia*, available at: https://en.wikipedia.org/wiki/Hans_Brinker,_or_The_Silver_Skates
877 *Ibid*.

stops any identified leak that would lead to inundation. Without this water-policy, the Netherlands would flood and sink. Controlling and stopping water is thus of vital interest for the Netherlands as it protects it from 'the angry and dangerous water'. In this context, the problem faced by the Dutch state is an increasing amount of water, and the solution is the water-policy which consists of controlling the floodgates, reinforcing the dikes and stopping any leaks. The story can be seen as being framed by what I call the 'boy at the dike' frame. Within this frame, the increasing amount of water flowing through the hole in the dike and the related risk of inundation if nothing happens to stop it is the problem, while the solution is to stop the flowing water by closing the hole. The Dutch's struggle with water can be seen as a metaphorical sketch of its struggle with immigrants. While it is generally admitted that the Netherlands continuously needs immigrants (like water) and while the Dutch state is committed and willing to protect migrant's rights (such as on the basis of family reunification and asylum) the Netherlands cannot accept that immigrants come in without any state control with open floodgates as result. The idea is that when the borders are not strong enough, the floodgates would open with the result of waves of immigrants entering the Netherlands; the solution to this risk is that the borders (dikes) should be reinforced and each identified entry leak should immediately be stopped. Immigrants are represented within this understanding as potential intruders threatening the national economy, social and cultural cohesion. One way to control migration is migration law and policy. Just like Dutch water policy (that regulates the amount of water allowed to enter via the floodgates and which water should be kept away by dikes), migration law and policy also serve to do the same. This allows us to admit that the 'boy at the dike' frame exists within the migration debate in general as well. We can even say that this frame is inherent to migration law and policy (like in water-policy) and can be seen as a *default* frame. This inherence is related to state sovereignty which allows states to possess a margin of appreciation to decide on who comes in, although states are bound to international human rights norms. The margin of appreciation refers to the space for manoeuvre which states have, for example, when fulfilling some of their obligations based on the ECHR; and it is assumed to be wider when the legal conflict concerns vague concepts such as 'morals' and the 'family' and its role in society.[878]

In the light of this argument and as will be discussed below, while within the debate on foster children a 'policy leak' is constructed and then stopped (par. 1.1.1), within the debate on forced marriage a 'policy leak' is prevented (par. 1.1.2). In both cases, immigrants involved are explicitly (foster children) and implicitly (women fleeing forced marriage) portrayed as (potential) intruders.

878 ECtHR 7 December 1976, no. 5493/72 (*Handyside v. The United Kingdom*), par. 48: 'it is not possible to find in the domestic law of the Contracting States a uniform conception of morals. The view taken by their respective laws...varies from time to time and from place to place...By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them.'

### 1.1.1 Foster children

This paragraph presents the frame as constructed and articulated within the debate on foster children. As will be discussed, the frame is visible (A) within the quantitative approach adopted by the state; (B) when the state endorsed the 'one-headed' family model; and (C) when it trivializes parenthood based on foster care.

***A. Quantitative approaching to family reunion***

The most vivid construction of the 'boy at the dike' frame was articulated when the state secretary communicated that in the case of family reunion for Somali foster children, the 'filter' contains 'large holes' that she would 'close'. (Ch2, par. 1.1.3) Although this approach was criticised in parliament because it would deny family reunion for many foster children, the state secretary openly communicated that 'the state's commitment is to prevent foster children coming to the Netherlands' (Ch2, par. 1.1.3). This shows that the state secretary is clearly willing to urgently close the 'hole', just like the 'Hero of Haarlem'. This intention articulates a quantitative approach that is re-emphasized within the problem definition as well as within the proposed solutions.



The problem as presented by the state (Ch2, par. 1.1.1) comprises three interlinked elements: the difficulty the state faces when assessing the family bond; fraud; and the increasing number of foster children. The first element is represented as bearing the risk of fraud, while the third one is seen as an indication of it. Fraud, therefore, seems to be the key problem faced by the state. However, a closer reading of both the information communicated by the government as well as its fraud-related reasoning reveals that the problem faced by the state is not fraud but that of the increasing number of foster children. This can be derived from the quantitative approach the government adopted at three key moments during the debate: (i) when constructing the problem; (ii) when presenting and defending the proposed policy measures to prevent the alleged fraud; (iii) and when communicating the effect of those measures after their implementation.

As described above (Ch2, par. 1.1.1), the government placed the issue of family reunion for foster children within the larger debate regarding the increasing number of Somali asylum seekers and refugees in 2009. The government communicated that the influx, including the number of foster children, had remarkably increased in 2008 and 2009 in comparison with 2007 and that Somalis form the largest group of asylum seekers in the Netherlands. The government further advised that the percentage of family reunification applications is strikingly high within the Somali influx and that the number of family reunification applications submitted by Somalis had increased remarkably. In the same context, the government reported that the majority of Somali refugees residing in the Netherlands declared having one or more foster children, and that Somalis who applied

for asylum in January 2009 reported to have, all together, around 500 foster children. This identified increase in the number of foster children was, for the government, the reason for investigating whether fraud was at stake. One month later, the state secretary reported that it is striking that Somalis suddenly began to report having foster children since 2007, the year the INS started to routinely apply parental DNA testing. The government considered this sudden increase as a trend showing the prevalence of abuse that changes due to the measures taken by the INS, such as parental DNA testing. Based on this quantitative evidence (sudden increase of reported foster children), the state secretary concluded that Somalis had been abusing the procedure of family reunion for foster children.

Arguably, placing the issue of foster children within the larger debate regarding increasing numbers of Somali refugees and the emphasis on the high number of foster children articulates a quantitative approach. The state was, therefore, concerned about the increasing number of Somali foster children. In addition, concluding that Somalis had been fraudulent on the basis of the sudden increase of reported foster children clearly articulates a quantitative approach. This shows that family reunion for foster children was approached from a quantitative perspective which allowed for the increasing number of foster children to be viewed as problematic, and subsequently linked to fraud. This approach is also visible when the state secretary argued that even if we take into account that the high number of foster children can partly be explained by the war in Somalia, as a result of which many children lost their parents and for this reason have been integrated to another family as foster children, the number of foster children reported by Somali asylum seekers is still high (Ch2, par. 1.1.1). In other words, the state secretary acknowledged that family bonds take other forms in the Somali context and for this reason foster children are allowed to reunite, but the increasing number of foster children is problematic and suspect. The underlying idea is that if the increasing trend persists, there is a risk of the state losing its control over family reunion with the consequence that terribly high numbers of foster children will continue entering the country.

Based on the above quantitative construction of the problem, the state decided to introduce policy measures to prevent alleged fraud. In this context, the state secretary communicated that in the case of foster children, '(i) we will not easily accept the family bond between the sponsor and the foster child', and (ii) 'we will easily consider the family bond as ceasing to exist when the foster child is housed in another family' (Ch2, par. 1.1.2). Arguably, the policy consisting of reluctance to acknowledge the existence of the family bond aims to reduce the number of foster children admitted, since the lack of a family bond implies a denial of family reunion. Similarly, the policy consisting of easily considering the family bond as ceasing to exist also aims to reduce the number of foster children, since breaking the family bond implies denying family reunification. These policy plans made by the state secretary

are in harmony with the quantitative approach described above. It is unclear how these measures would prevent the alleged fraud. It is thus plausible that they actually aim to reduce the number of foster children. The state secretary wanted to reduce the number of foster children by shrinking the 'door' through which they could enter the country. In other words, the state secretary constructed a 'leak' in the procedure and wanted to immediately stop it.

A quantitative approach is also evident in a government communication about the effect of the policy introduced to prevent alleged fraud in 2011. According to the government, the policy measures 'appeared to be effective because they led to less asylum and family visa applications and more refusals of family reunion applications' (Ch2, par. 1.1.4). In other words, the policy is effective because it resulted in reducing the number of foster children. The effectiveness of this policy is clearly measured in quantitative terms. This again demonstrates that the problem the state actually faced was the increasing number of foster children and not fraud.



The foregoing discussion allows us to summarise the state's reasoning as follows: the state identified the increasing number of foster children; the state considered this as a key indication of fraud; the state introduced measures to prevent fraud; these measures resulted in reducing the number of foster children; thus, the state succeeded in preventing fraud. In other words, the state faced the risk of its door, through which foster children enter the country, being wide open, with high numbers of foster children entering the country as a result. Problematizing the identified increase in the number of foster children and linking it to fraud served to (i) construct risk, implying that if the state does not urgently intervene to reduce the number of foster children, fraudulent families would flood the country; and to (ii) justify the restrictive policy measures. In this way, foster children are portrayed as a suspect population whose entry is to be prevented. By doing this, the state 'enters into' the 'boy at the dike' frame within which the increasing number of foster children is problematic and should be reduced.

***B. Channelling parenthood into the 'one-headed family model'***

As mentioned above, the state secretary communicated the solution that in the case of foster children, the INS will *not easily* accept the family bond between parent and the foster child. This reluctance to accept diversity in forms of parenthood is vividly illustrated in the following quote from the INS (Ch2, par. 1.2.2, case 5):

> 'It is of great importance to note that the question of whether there is an actual family bond should be answered on the basis of Dutch standards and not on the basis of the standards of the country of origin. It cannot be accepted that in similar cases the

> question of whether reunification should take place depends on the way in which the society in the country of origin is structured.' [879]

The INS thus explicitly rejects the interpretation of family bonds on the basis of family norms in the country of origin such as Somalia in which diversity in family bonds is dominant.

In practice, this policy measure was implemented by channelling child-parent bonds into the 'one-headed family model': in order to be allowed to reunite with his/her foster child, the parent should be qualified as being the head of the family to which the foster child belongs. Case law (Ch2, par. 1.2.2) showed that the state endorses the understanding that there is always a family head and that there can only be 'one' family head at one given moment in time. By doing this, the state promotes the 'one-headed family' model. The head of the family is the adult family member who takes important decision regarding the child, such as the place of residence and education. Within this reasoning, family decisions regarding children are made by an individual adult family member. Parental decisions are represented as 'individual' decisions of one adult family member rather than shared family decisions taken by more than one adult.

Arguably, by promoting the one-headed family model, the state limits the reunification possibilities for foster children. From the perspective of the state, limiting the scope of adult family members who can be qualified as being the family head is a way to limit reunification possibilities for foster children. On the contrary, from the perspective of applicants and in the light of Somali family diversity, it is more favourable to approach the concept of the family head in a flexible way. In this view, it is favourable when various adults within the family can take the position of the family head because this widens the reunification possibilities for foster children. However, if the state adopts this flexible approach, the state would face the risk that many adults may be reunited with many foster children. To avoid this risk, that also reflects a quantitative approach, the state promotes the one-headed family model. Where the state to accept a liberal understanding of parenthood, state regulation of family reunion for foster children would not make any sense, as it would be undermined by an unlimited diversity of parenthood, such as in the case of Somali families. If the state leaves family bonds based on foster care as a *carte blanche*, there is no control over the family anymore and thus no control of reunification for foster children with the result that many people can be reunited with many foster children. Arguably, accepting diversity in child-parent bonds would lead to many foster children being allowed to reunite with family members in the Netherlands. This would lead to increasing numbers of foster children entering the Netherlands. In order to avoid this risk, the state channels the family

879 See par 4.4 in the INS's Higher Appeal Brief in: ABRvS 7 February 2011, nr. 201005131/1/V2.

into the one-headed-family model within which only one person can be qualified as being the head and thus as having the right to be reunited with his/her foster children. When the state has the monopoly to determine who is the head of which family, it arguably maintains control of the family and thus also of the number of foster children entering the country. Although the state accepts family reunification of foster children, and although the state acknowledges that in the Somali context family bonds take various forms, if the state accepts Somali understandings of family, the state will lose control of the family and thus also of family reunion for foster children. The state in any case wants to keep the option of having a say about the existence of the family bond. The power to decide which family bonds are relevant cannot be delegated to various non-controlled and exotic family systems within which everyone can be the foster child of everyone. For this reason, the state steps in to control the family. When there is no control over the family, there will be no control of family reunion and thus no control of the number of foster children entering the country.

This shows that promoting the one-headed family model articulates the 'boy at the dike' frame because it enables a reduction of the reunification possibilities for foster children. In this way, the risk that the 'hole' through which foster children enter the country is governed in a way that it prevents it from becoming larger. To avoid the risk of being drowned by a high number of foster children when accepting family diversity, the state imposes a specific family model: there is always one head of the family and it is the adult family member who takes important decisions regarding the child. When fitting a specific family model is required for family reunion, families not fitting the required model are excluded from reunification. By promoting the one-headed family model, the diversity in family bonds is limited and family bonds between adults and foster children are under state control. So, by promoting the one-headed family model, the state channels family bonds towards a model within which only one family member is allowed to be reunited with the foster child. In this way, the number of foster children is kept under state control.



***C. Trivializing parenthood based on foster care***

As mentioned above, the state secretary communicated that the INS will *easily* consider the family bond as ceasing to exist when the foster child is housed in another family. Before 2009, this 'housing rule' concerned housing that took place before the flight of the parent. However, between 2009 and 2012, this requirement also concerned housing of the foster child *after* the parent fled the country. That this fits the frame is most visible when we recall the INS's key argument in this context: 'since foster children do not belong to the nuclear family, when another person takes on childcare in the country of origin, there is no necessity to admit the foster child into the Netherlands' (Ch2, par. 1.2.1, A).

Arguably, this policy trivializes the family bond between the parents and their foster child and represents foster parents as being easily interchangeable caregivers. In addition, a foster parent is not seen within this policy as someone with a moral obligation towards a specific child. Within this approach, intimacy between parents and their foster children is depicted as *very easy* to sever. Foster children and their parents are considered as isolated individuals, and their intimacy is considered as a relationship that can easily end. Within this policy, the decision of the parent to house the child in another family is seen as a unilateral, definitive and irreversible 'voluntary choice' for which the parent is held responsible.

By denying the status of foster parent to refugees who left their foster children with another family after the flight, the state steps in to determine when family bonds severe. In this way, the state widens its power in terms of determining family membership and indirectly controls the number of foster children. Although this measure is presented as aiming to prevent fraud, it is unclear how it would help to that aim. In fact, it served to exclude a specific group of foster children, namely those who are housed in another family *after* the flight of the parent. Bearing in mind that refugees usually arrange substitute childcare for their children at the moment of fleeing the country, as they usually prefer not to confront the child with the risky journey, the applicability of the housing rule after the flight means that all foster children who stay behind with another family will be refused permission to reunite with their parents.

In this light, this measure fits *par excellence* the boy at the dike frame, as it excludes a specific and large group of foster children. In this way, the state is able to reduce the number of foster children. By doing this, the state attributes itself the power to decide when family bonds exist and when they are severed. In this way, the state intervenes in the family, keeps control of the family and enables the exclusion of a specific group of foster children. This fits the 'boy at the dike' frame as it contributes to reducing the number of foster children entering the country. Through stepping in to control the family bond, the state keeps its power and control over the family and enables the exclusion of a specific group of foster children. Through this policy, reducing the number of foster children is made possible.

***D. In sum***

In 2009, the state discovered that it lost control of the entrance of foster children because of the sudden increase in their number due to 'large holes in the filter'. The state then communicated this information in the shape of the frame within which the high number of foster children is problematized and tainted by a narrative of fraud in order to justify introducing the restrictive policy aiming to 'close the large holes'. In order to regain its control of family reunion for foster children and limit their number, the state re-claimed control over the family through (i) endorsing the one-headed family model; and (ii)

considering the family bond as broken when the foster child is housed in another family after the flight of the sponsor. By re-claiming control of the family, the state re-gained its control over family reunion for foster children and was able to exclude the population it constructed as fraudulent. Therefore, the introduced measures colluded to exclude foster children under the guise of a narrative of fraud. In this way, the state considers the alleged policy leak as having been stopped.

### 1.1.2 Forced marriage

This paragraph presents the frame as constructed and articulated within the debate on forced marriage. I would like to note here that this frame is very implicit and hard to detect. This does however not mean that it does not exist within the examined debate. Paying attention to implicit frames, those which seem like common sense, is critical because these are the most powerful ones, which come across as a transparent representation of reality.[880]



As discussed below, the state routinely represented forced marriage as a private problem. In terms of defining solutions within courtrooms, the state proposes solutions which reflect a wider understanding of the scope of state protection than that included in the refugee and in the EU Qualification Directive. In addition, the state promotes the individual responsibility of women fleeing forced marriage as a solution to escape forced marriage. In the following, I argue that (A) the privatisation of forced marriage, (B) the wider understanding of the scope of state protection and (C) the promotion of individual responsibility all fit the 'boy at the dike' frame.

***A. Privatization of forced marriage***

In chapter 3, we have seen that the state consistently represented forced marriage as falling outside the scope of the Refugee Convention because it belongs to the private and family sphere: it is a 'family decision' and a 'private affair' without any link to the refugee convention (Ch3, par. 3.3.1, A). This privatization of forced marriage echoes and is in harmony with the political silence on forced marriage (Ch1, par. 5.2, A), since political silence indirectly means that the issue is not considered to be of 'public' concern. By doing this, the state refrains from intervening in the family and does not claim to have any control over it. This needs to be seen as a way of keeping the women in these situations outside of national borders, and thus fits the frame, because if the state claims to have control over the family, the state would be obliged to protect these women, for example by recognizing them as refugees. The privatization of forced marriage in refugee law is in sharp contrast with the politicization of forced marriage, and the state intervention in the family in the context of marriage migration within which the state claims to have control over and obligations

880 Kitzinger 2007, *supra* note 140, at p. 151.

towards potential victims of forced marriage (Ch1, par. 1.2.2). By presenting forced marriage as a private matter falling outside of the Refugee Convention, the state prevents a leak through which the women concerned can enter the country. Further, by endorsing the privatization understanding of forced marriage within courtrooms, the state indirectly not only discourages women facing forced marriage from seeking asylum in the Netherlands, but also their lawyers from grounding their arguments on forced marriage. Arguably, this privatization would have been one of the reasons behind the finding that lawyers often focus on other claims (FGM, HBV, homosexuality) rather than forced marriage (Ch3, par. 3.5). This effect on lawyer's strategy reinforces and fits the frame.

***B. Amplifying the scope of state protection in the country of origin***

The concept of state protection is crucial in refugee law. According to the refugee definition, when state protection is available, the asylum seeker cannot be admitted as a refugee. This is based on the subsidiary nature of refugee protection that comes into play when the state of origin cannot provide protection. So, when women fleeing forced marriage can rely on the protection of state authorities in the country of origin, it is obvious that they should first seek that protection. According to article 7 of the EU Qualification Directive, there are two agents of protection: (i) the state or (ii) international organizations controlling a part of the territory. This means that actors other than these two agents cannot be considered as agents of protection in this provision.

Arguably, if the state consistently and continuously refers applicants to other kinds of protection than state-based protection when considering a specific asylum claim, the state is following a restrictive policy aiming to limit the possibility of gaining refugee status on the basis of that specific asylum claim. This is exactly what happens in the case of asylum claims based on forced marriage. As will be discussed below, the state routinely referred to agents of protection falling outside the scope of article 7 of the EU Qualification Directive. By widening the concept of state protection, the state minimizes the possibility of gaining refugee status on the basis of forced marriage. In this way, the pre-existing 'boy at the dike' frame is reinforced. Arguably, if the state limits the scope of state protection to exclusively include protection offered by the state of origin, there is a risk that a policy leak will emerge, if we take into consideration that it is generally known that state protection is often unavailable or limited in the countries from which the concerned women originate. The state thus widens the concept of state-protection in order to exclude those women and encourage them to find solutions in their country of origin. The widening scope of protection in the asylum context is in contrast with proactive state protection in the context of marriage migration, in which the state considers itself as the principal protection agent (Ch1, par. 1.2.2). In contrast to the asylum context, the state introduced clear measures in marriage migration, civil law and criminal law in order to ensure state-protection for potential victims of forced marriage

in the context of marriage migration. While in this context, the state claims control over the family and thus control over migration, in the asylum context the state does not claim any control of the family and in this way it also controls migration.

In the following, I discuss how the concept of state protection is amplified in order to justify the exclusion of women fleeing forced marriage.

To start with, the state found state protection available in the following circumstances (Ch3, par. 3.3.2, B): the state is committed to women's rights in the country of origin (case 1, Burkina Faso); a 'Ministry of Women' exists in the country of origin (case 2, Indonesia); female emancipation is increasing in the country of origin (case 4, Armenia); the government is showing efforts to improve women's position (case 4, Armenia); the Constitution in the country of origin prescribes that women are equal to men (case 4, Armenia). While these 'state good faith' efforts can be seen as an indication for 'impending' state protection, they cannot be considered as equal to effective state protection as required by article 7 of the EU Qualification Directive. The state's reasoning can thus be seen as widening the scope of the concept of state protection, and conflates the existence of good-faith state efforts to protect women facing forced marriage with the finding that protection 'is' effectively available in practice. This widening can thus be seen as limiting the possibility of entering the Netherlands on the basis of forced marriage. It has an exclusive effect because it is a dominant trend and not incidental. Further, the state also considers the existence of (draft) legislation that criminalizes domestic violence (not specifically forced marriage) as sufficient to conclude that state protection is available, even in cases in which the Dutch state acknowledges that the existing legislation is not effectively implemented in practice (Ch3, par. 3.3.2, B, case 3, Macedonia). While the existence of pertinent legislation can be seen as an indication of the existence of state protection, when it is established that the legislation is not effectively implemented in practice, it is obvious that state protection is lacking. The state's reasoning can thus be seen as widening the scope of state protection to include the mere existence of legislation. It can thus be seen as minimizing the possibilities of entering the Netherlands on the basis of an asylum claim based on forced marriage. In this way, the 'boy at the dike' frame is reinforced.

As well as this, the state often refers to the assistance and shelters that NGOs offer victims of domestic violence (Ch3, par. 3.3.2, B and C) to conclude that protection is available. Since NGOs are not mentioned in article 7 of the EU Qualification Directive, this can also be seen as widening the scope of state protection by minimizing the possibility of gaining asylum on the basis of forced marriage. This reasoning thus reinforces the pre-existing 'boy at the dike' frame. Finally, the state also considers the existence of male family members who are against forced marriage in the country of origin as sufficient to conclude that protection is

available (Ch3, par. 3.3.2, E). In this context, the cases concerning women whose husbands were in the Netherlands, and who were threatened by forced marriage because family reunion was unsuccessful, illustrate a remarkably gendered widening of the scope of state protection, as the state expected these women's husbands would return home to protect them. Both these references to family protection and to NGO protection vividly illustrate a shift in the definition of state protection, in particular a shift towards privatization. By privatizing state protection, the state widens the concept of state-protection. In this way, the state minimizes the possibility of gaining asylum on the basis of forced marriage, and thus reinforces the frame.

This shows that the state is widening the concept of state protection in various ways to include all local solutions women might rely on in their country of origin. In the words of the ACVZ (2005), women fleeing forced marriage are expected to try all possible local solutions for obtaining 'protection' in the country of origin before seeking asylum in the Netherlands. Only once efforts to make use of these local remedies are exhausted, or if it is clear at the outset that asking for (state and non-state) protection is pointless or dangerous, should it be assumed that the person concerned has a well-founded fear of being persecuted (Ch3, par. 1.2). By doing this, the state minimizes entry to the country on the basis of forced marriage so that the pre-existing frame is reinforced. The will to reinforce the frame invited the state to be creative and innovative in finding all kinds of possibilities for protection including purely private actors so that those women remain in their countries.

***C. Promoting individual responsibility***

Another way to keep these women outside the borders is the promotion of their individual responsibility. This is visible when the state argues that women facing forced marriage can relocate to another area of their country in order to avoid forced marriage (Ch3, par. 3.3.2, D). The idea is that the claimant can no longer fear persecution when she could live safely in another area of her country of origin, away from oppressive family members. This solution represents women fleeing forced marriage as autonomous individuals who can escape forced marriage, and for this reason it is not necessary to provide asylum protection. They are expected to be able to protect themselves by evading forced marriage, by changing their place of residence in the country of origin. Within this reasoning, women are represented as independent and autonomous individuals capable of avoiding forced marriage and living independently and safely. Autonomy and independence are seen as inherent to being adult, educated, having work experience, an independent income and the freedom to live independently, for example in student dorms. This approach is in contrast with the state's attitude in marriage migration in which women are not seen as being able to protect themselves, for this reason needing the protection of the Dutch state, by denying family reunion. The age requirement is a visible contrast: in asylum law even underage women are

expected to protect themselves by relocating to another area, while in marriage migration women are expected to be autonomous only as of the age of 21 years old. The way in which the state promotes individual responsibility and autonomy in the asylum context is taken to mean that these women are 'empowered' and could therefore relocate away from the family. Women fleeing forced marriage are therefore held primarily responsible for their problem. They should solve their problem in their country of origin and not in the Netherlands. The state thus does not claim to have any control over the family and encourages individual autonomy, but at the same time it controls migration. In this way, women fleeing forced marriage are kept outside the border and the 'boy at the dike' frame is reinforced.

***D. In sum***

The state reinforced the pre-existing 'boy at the dike' frame by privatizing and excluding forced marriage from the scope of the refugee convention. By doing this, the state minimizes possibilities of acquiring refugee status on the basis of forced marriage. Further, the state widens the scope of state protection to include good faith efforts of the states of origin, private actors such as the family and NGOs, and it promotes individual responsibility of the affected women in order to keep them in their countries of origin. By doing this, the state refrains from claiming to have any control regarding the family and in this way, it retains control of migration.



## 1.2 The vulnerability frame

In this paragraph, I analyse how and by whom the vulnerability frame is articulated within the debate on foster children (par. 1.2.1) and the debate on forced marriage in asylum law (par. 1.2.2).

### 1.2.1 Foster children

It warrants mentioning here that this frame is double-edged, as it is constructed both by child-advocates and by the state. As will be discussed, the frame is visible when reference is made to (A) the war background of Somali families; (B) the child's vulnerability during interviews; (C) the risk of child trafficking; and (D) vulnerability resulting from parents fleeing.

***A. Vulnerability because of war***

The vulnerability frame first emerged during the 2009 parliamentary debate on the so-called 'Somalia Letter' (Ch2, par. 1.1.3). Although the parliament agreed with the need to prevent fraud, some political parties (the SP, CU and GL) rejected the restrictive policy solutions presented by the state secretary within the 'boy at the dike' frame. These political parties linked the high number of foster children to the fact that many children lost their

biological parents during the on-going war in Somalia, and to the important protective role of extended family towards those children. Those political parties emphasised the important role of extended family in taking care of those children and represented foster parents as a source of protection since the Somali State was failing to take care of them. Within this reasoning, foster children are portrayed as vulnerable not only because they lost their biological parents, but also because they need someone to take care of them. The three political parties also argued that it is very difficult for those families to prove the family bond since there are no formal authorities in Somalia and the country is facing internal conflict. (Ch2, par. 1.1.3) Through this reasoning, foster children and their parents are represented as vulnerable because of the difficulty they face when proving their family bond. This difficulty puts foster children in a vulnerable situation with reference to the Dutch state, as they run the risk of remaining separated from their foster parents who are recognized as refugees in the Netherlands. In the view of these political parties, the state should find a solution to assist them in proving the bond.

***B. Vulnerability of children during interviews***

Lawyers (Ch2, par. 2.2), NGOs (Ch2, par. 2.3.1) and the Children's Ombudsman (Ch2, par. 2.3.2) consistently argued that the state failed to take into account the vulnerability of children during interviews at embassies. Within this reasoning, children are represented as passive individuals in need of help in the form of child-friendly interviews that facilitate reunification instead of closing the door for those children. In this context, lawyers continuously argued within courtrooms that due to their vulnerability (past traumatic experiences and the child's age), children are not able to answer all questions during interviews. They also referred to the long duration of interviews and child-unfriendly interview practices. Similarly, NGOs and the Children's Ombudsman consistently argued that the vulnerability and interest of the child were not taken into account during interviews. They refer to long interviews without sufficient breaks, high numbers of questions, a lack of qualified interviewers and interpreters, and inadequate interview rooms. In their view, because the child's vulnerability is overlooked during interviews, the risk of inconsistent testimonies is high. This renders proving the family bond almost impossible, because any inconsistency and contradiction in the child's testimony is taken into account by the INS. Lawyers and NGOs further argued that in spite of the enormous importance of children's declarations, minimum procedural safeguards are not met, even when one ought to be particularly careful because it concerns 'vulnerable children who are displaced and traumatized' (Ch2, par. 2.3.1). In this light, children's advocates argued that the vulnerability of children obliges the state to assist foster children during the procedure in a way that facilitates reunification. In this vein, they consistently advocated for the implementation of child-friendly interviews incorporating the interview guidelines based on article 12 of the CRC. The reasoning is that due to the particular position of minor children, their 'dependency and vulnerability, interview officers

should have the possibility of relying on generally accepted guidelines on interviewing children' (ACVZ, Ch2, par. 2.3.4).

***C. Vulnerability because of the risk of child trafficking***

In response to the vulnerability frame as constructed by child advocates, the state secretary maintained that the war background and resulting complexity of family bonds and foster care is a source of child vulnerability emphasizing the need for state assistance in the context of family reunification. The state secretary advanced that since fraud bears the risk of child trafficking, the state should prevent fraud by means of intensified interviews, as it is difficult to examine the family bond in the case of foster children, due to the absence of any effective central government in Somalia (Ch2, par. 2.3.3.). This difficulty puts foster children in a vulnerable situation, namely being at risk of being trafficked, and it puts the state in a difficult situation, as it has the obligation to protect children from trafficking. For this reason, it is necessary to conduct a rigorous investigation of the family bond before the child is admitted to the Netherlands. Intensified interviews are therefore necessary in the case of foster children, because the risk that the child becomes a victim of trafficking is real (Ch2, par. 2.3.3). In the state's view, when the assessment of the family bond is not adequately checked, there is a chance that children coming to the Netherlands without really belonging to the family become victims of child trafficking or smuggling, and possibly end up in prostitution or other forms of forced labour. Within this reasoning, children are represented as vulnerable passive individuals in need of help, while the foster parents have an active role and are potential child traffickers.



***D. Vulnerability because of the flight***

The vulnerability frame is also articulated within the lawyer's response to the housing rule. As mentioned within the 'boy at the dike' frame, when the child is housed in another family after the flight of the parent, the INS considers the family bond as broken. The INS justified this by referring to the established fraud among Somalis and to the difficulty of examining the family bond in the case of foster children (Ch2, par. 1.2.1, A). In response, lawyers consistently argued (Ch2, par. 1.2.1, B) that (i) the separation between child and the parent was involuntary; (ii) the housing in another family was involuntary; (iii) it is logical that minor children should be looked after by someone else when their parents are absent given the young age of the children; (iii) children were sheltered in the house of the neighbour in order to avoid that they disappear into the streets; and (iv) that the housing of the children by the other family should be seen as emergency shelter. These arguments were persuasive to the courts, which consistently agreed with the lawyers (Ch2, par. 1.2.1, B). Courts found that parents did not have another choice in such situations and that they were forced to house the children in another family because of the flight. In this context, courts referred to the general situation in Somalia and the young age of children. These arguments and

reasoning articulate the vulnerability frame within which (i) children are represented as vulnerable because they need emergency care, and (ii) parents are portrayed as vulnerable because they did not have any choice other than sheltering their child in another family.

***D. In sum***

From the perspective of some political parties (SP, CU and GL), the war background of Somali families was sufficient to justify the high number of Somali children. Within this reasoning, foster children are represented as vulnerable because they lost their biological parents during the war while the extended family plays an important role in protecting them. In this context, children and their foster parents are also vulnerable, because they cannot easily prove their family bond. In addition, children's advocates re-constructed the vulnerability frame by focusing on the child's vulnerability during interviews and by stressing the vulnerability resulting from the flight of parents. In this context, they consistently argued for the implementation of article 12 of the CRC in order to ensure child-friendly interviews and in this way facilitate family reunification. In response, the state argued that because foster children run the risk of being trafficked when fraud is not prevented, they are vulnerable and for this reason need state assistance in the form of intensified interviews.

### 1.2.2 Forced marriage

To start with, it is important to observe that only lawyers constructed this frame within the debate on forced marriage. The frame is articulated in three ways. It is first visible when lawyers argue for refugee status on the basis of membership to the broad social group of 'women' (A). The frame is also constructed when lawyers refer to the vulnerable situation of women within the social group of 'women in the country of origin' and when they argue against the relocation alternative (B). The frame is thirdly constructed when lawyers refer to individual vulnerability indicators in combination with the vulnerable situation of claimants in the country of origin (C). In what follows, I showcase these three articulations and I discuss whether vulnerability is viewed as being the cause or effect of forced marriage. In other words, whether forced marriage is at play because the claimant was vulnerable, or the claimant is considered vulnerable because of forced marriage? In addition, I discuss whether the claimants concerned are viewed as individually vulnerable or as being in a vulnerable situation.[881]

***A. Vulnerability by default***

Lawyers argued that women fleeing forced marriage belong to the social group of 'women' (Ch3, par. 3.3.1, B). Within this reasoning, forced marriage is viewed as targeting women *as* 'women'. This conveys the impression that 'women' are by default in a situation beyond

881 Y. Al Tamimi, 'The Protection of Vulnerable Groups and Individuals by the European Court of Human Rights', *European Journal of Human Rights*, vol. 2016(5), pp. 561-583.

their own actions and responsibility because they simply are 'women'. The reasoning also conveys the impression that persecution, in the case of fleeing forced marriage, is equated to persecution because of 'being a woman'. Women fleeing forced marriage are vulnerable not because of forced marriage, but because they are 'women'. In other words, the vulnerability of women fleeing forced marriage is not viewed as being the consequence of forced marriage but, instead, as inherent to 'being a woman' and thus existing prior to forced marriage. Women fleeing forced marriage are thus portrayed as 'vulnerable by default' and all together form a 'vulnerable group'.

***B. Vulnerable situation***

Besides representing women as inherently vulnerable, lawyers routinely referred to the vulnerable situation of women in their country of origin. They do this for example when they argue for membership in the social group of 'women in the country of origin' (Ch3, par. 3.3.1, B). In this context, lawyers emphasize the general vulnerable situation of women in the country of origin by citing vulnerability indicators such as women's systematic subordination, marginalization and discrimination in Burkina Faso. Within this reasoning, systematic subordination, discrimination and violence against women are presented as indicators which render women a 'vulnerable group'. Vulnerability in this reasoning is not represented as the consequence of forced marriage but as prior to it, due to pre-existing systematic violence and the discrimination of women in the country of origin. The claimant is thus portrayed as being in a vulnerable situation in the country of origin and not as being individually vulnerable. Although the lawyer presented some vulnerability indicators, these indicators are general. In the same vein, lawyers also argued that the 'vulnerable position/situation of women' in the country of origin can lead to a well-founded fear of being persecuted (Ch3, par. 3.3.1, B, Afghanistan and Azerbaijan). Within this reasoning, the claimant is represented as being in a vulnerable situation and not as a 'vulnerable individual'. Vulnerability is viewed as the cause of forced marriage and claimants are portrayed as being in a vulnerable situation but not as vulnerable individuals. Similarly, lawyers also argued that a claimant belongs to a 'vulnerable group'. (Ch3, par. 3.3.1, B, Iraq) Within this reasoning, the claimant is represented as being in a vulnerable situation in the country of origin and not as individually vulnerable.

***C. Vulnerable individuals in vulnerable situations***

Lawyers also combined general vulnerability with individual vulnerability. Lawyers for example (Ch3, par. 3.3.1, B, Guinea) advanced individual vulnerability indicators by referring to the claimant's young age, her experience of forced marriage and the fact that she was gravely raped and mistreated by her husband. Within this reasoning, the claimant is portrayed as being individually vulnerable and vulnerability is viewed as a consequence of forced marriage and violence. In the same case, the lawyer refers to the claimant's isolated

position as a woman and wife within a small closed community as a reason why she cannot seek the protection of the police. By doing this, the lawyer portrays the claimant as being in a vulnerable situation.

The vulnerability frame is also articulated when lawyers reply to the INS's argument regarding alternative relocation in the country of origin. We have seen that the INS depicted claimants fleeing forced marriage as being able to relocate to another area of the country of origin and in this way escape persecution (Ch3, par. 3.3.2, D). In response, lawyers constructed the vulnerability frame. They represent claimants as dependent individuals (individual vulnerability) and/or as being in a vulnerable situation so that they cannot relocate in another area in the country of origin. For example, lawyers referred to the lack of any family or social network that can help or protect the claimant in Ghana; her lack of education; the patriarchal community; and to the fact of her having grown up in a rural community. For these reasons, the claimant could not live independently in a city. This lawyer's reasoning portrays the claimant as a 'vulnerable individual' by citing individual indicators (no family/social network; having grown up in a rural area; being uneducated) and who will be in a 'vulnerable situation' upon return (a woman in a patriarchal community).

Similarly, lawyers argued that the claimant, being a minor, could not relocate in Cameroon because she falls under the responsibility of her father who will remain responsible for her even if she lives in another part of the country. The lawyer adds that she cannot relocate because she also falls under the power of her husband as she is considered his property. Within this reasoning, the claimant is portrayed as individually vulnerable due to her dependency on her father and husband, so internal relocation is impossible. In addition, reference to the claimant's underage status is an articulation of individual vulnerability because children are generally seen as vulnerable individuals. Besides, the lawyer refers in this case to the general vulnerable situation of women in Cameroon by arguing that the Cameroonian government fails to protect 'vulnerable groups such as women' and for this reason there is no relocation alternative. Within this general argument, women in Cameroon are represented as being in a vulnerable situation. We thus see again that lawyers combine individual vulnerability with vulnerable situation reasoning.

***D. In sum***

Lawyers first portrayed women fleeing forced marriage as inherently vulnerable when arguing for membership in the social group of 'women'. Second, lawyers articulated the vulnerability frame when referring to the vulnerable situation of women in the country of origin both when arguing for membership in the social group of 'women in the country of origin' as well as when rejecting the relocation alternative. The vulnerability frame is thirdly articulated when lawyers combine individual vulnerability, on the one hand, and the vulnerable situation of women in the country of origin, on the other.

## 1.3 The culture frame

In this paragraph, I analyse how and by whom the culture frame is constructed within the debate on foster children (par. 1.3.1) and the debate on forced marriage in asylum law (par. 1.3.2).

### 1.3.1 Foster children

In the first place, it deserves to be mentioned that the frame was hard to detect. There are two reasons for this. On the one hand, as well be explained below, the state constructed this frame in an implicit way so that it remained hidden. On the other hand, since one of the criteria used when looking for frames has been 'frequency of the frame', I did not initially pay attention to this frame within the reasoning of lawyers because they made use of it only very incidentally. As will be explained below, it nevertheless tells a story about these asylum seekers and helps capture the complexity of this frame in the sense that it is constructed both by the state and lawyers.



*The state*

Within the debate on foster children, culture-based reasoning was implicitly articulated when the state limited the debate on fraud to family reunion by Somali people instead of dealing with the issue in a broader context (Ch2, par. 1.1.1). Arguably, linking fraud to one nationality articulates a cultural understanding of fraud. The high number of foster children is not considered by the state as one of the consequences of the situation in Somalia, but as fraud without taking into account the question of why foster care is common and frequent among Somalis. By linking fraud to Somalis without such a context-based analysis of the high number of Somali foster children, the state implicitly communicates that 'being Somali' is potentially a problem in the context of family reunion.

Because 'being Somali' is seen as the problem, the state introduced policy solutions to specifically deal with Somali applications. These solutions were included in the policy letter entitled: '*The Somalia Letter*' (Ch2, par. 1.1.2). The title of this policy letter suggests that the policy solutions were specifically oriented towards Somali families. Although the paragraph of the Aliens Circular in which those measures were included mentions that they concern all nationalities, the context and the way in which they were implemented show that they concerned Somalis in particular, and no other nationalities (Ch2, par. 1.1.2). This is reproduced in decision-making when the INS defended the strict interpretation of the housing rule by referring to the fraud indications communicated in 'The Somalia Letter'. In the words of the INS: 'the policy measures regarding foster children are the consequence of the high number of applications submitted by Somali foster children as well as of previous suspicion of fraud and abuse of the reunification procedure by Somalis' (Ch2, par. 1.2.1). This confirms that those measures were exclusively oriented towards Somali people.

Another practice that articulates the culture frame within the context of family reunion is the existence of a 'Somali Counter' in the Dutch embassy in Addis Ababa exclusively for Somali applications (Ch2, par. 2.1.1). Separating Somali people from other nationalities articulates that Somali applications are problematic and deserve to be separately dealt with. Finally, the finding that collected policy documents and case law exclusively concern Somali children confirms that those measures were oriented towards Somali families.

*Lawyers*

Culture-based arguments are incidentally employed by lawyers. This articulation is visible in two single cases within the legal debate on the head of the family. In the first case (Ch2, par. 1.2.2, case 3), the lawyer maintained that the sponsor was the head of the family because he was in charge of childcare as well as the care for his parents (grandparents of the foster child). To support this argument, the lawyer argued that 'Somalis take care of their parents when they are aged and disabled and it is not acceptable to abandon them; given this responsibility, the sponsor stayed after his marriage in the same house with his parents'. So, in order to give the parent the status of head of the family, the lawyer refers to Somali culture within which married children take care of their parents for example by staying with them at home after their marriage. In the second case (Ch2, par. 1.2.2, case 5), the court accepted the lawyer's argument stating that 'in Somali culture, when the father passed away it is the oldest male son who becomes the head of the family and not the mother'. The court explicitly refers to the position of women in Somalia and argues that since the sponsor is the oldest male family member, he is the head of the family: 'as generally known and also appears from the general country report on Somalia, women are subordinated in the patriarchal Somali community. It is therefore plausible that in the Somali community, after the death of the male family head (the father), not the widow but an adult son, such as the sponsor, becomes the head of the family.' (Ch2, par., 1.2.2, case 5) Within this reasoning, the court bases its conclusion on culture-based evidence. These two examples illustrate how lawyers slightly mobilized the culture frame. However, apart from these two single cases, the culture reasoning is not dominant in the lawyers advocacy within the debate on foster children. In particular, they did not refer to country reports, anthropological reports and/or existing research dealing with child fostering and family culture in, for example, Africa.[882]

### 1.3.2 Forced marriage

It deserves to be first observed that this frame was not hard to detect. This has to do with the explicit reference to culture within the legal debate. As will be explained below, this frame is doubly constructed within the debate on forced marriage: while the state employs the frame to mitigate the claim, lawyers advance the frame to aggravate it.

882 See for example Alber et al 2013, *supra* note 88.

*The state*

From the perspective of the state, the forced marriage of a widow to her brother-in-law is a form of family solidarity and mutual support in Afghan culture (Ch3, par. 3.3.1, A). In this way, forced marriage is implicitly represented as a negotiable cultural family experience and for this reason it is not related to the refugee convention. In credibility cases, forced marriage is consistently seen as an Islamic affair (Ch3, par. 3.4, Nigeria). Because forced marriage is viewed as exclusively affecting Muslim women, Christian women fleeing forced marriage are placed in a disadvantageous position. In the same vein, the state found the claim unconvincing because the claimant was not able to provide sufficient information about Islam (Ch3, par. 3.4, Nigeria). In the state's view, since the claimant was lacking basic knowledge about Islam, it was neither plausible that she grew up in an Islamic family, nor that she lived in an Islamic environment. In the state's view, it was therefore not credible that her father was Islamic and that he, according to the Sharia, decided to marry her off. This approach shows that in order to be credible, women from Nigeria are obliged to fit into the culture frame within which forced marriage is placed. Women from Nigeria who fail to represent themselves as victims of Islam are excluded.



This Islamization of forced marriage in courtrooms is a reproduction of the Islamic framing of forced marriage in state country reports on Nigeria (Ch3, par. 2.3, A). Although country reports mention that forced marriage occurs in various parts of Nigeria, the emphasis is on the Islamic North Nigeria. For example, the 2012 report mentions that forced marriages frequently occur in Nigeria, especially in the Islamic North. The report adds that for a very long time, girls in North Nigeria have been married off, according to Islamic rules, at a very young age. This information endorses the cultural understanding of forced marriage, as it presents it as specific to the Islamic community. This understanding is further endorsed when the report communicates that in the North there is resistance to the Federal Child Rights Act (2003), prescribing the age of eighteen years old as the legal marriage age and prohibiting underage marriage. The report mentions that this law is seen as anti-Islamic in North Nigeria. This information suggests that Islam is anti-child-rights and that child marriages are Islamic. In brief, Islam is seen within Nigerian country reports as the cause of the problem of forced marriages.

Interestingly, while forced marriage is viewed as inherent to Islam in Nigerian cases, in one of the Guinean cases (Ch3, par. 3.4) forced marriage is depicted as prohibited within Islam. The state argued that since the claimant stated that her husband is a Koran teacher and that he strictly follows Islamic rules, it should, therefore, have been accepted that he would follow the rules of Islamic marriage law (within which consent is required to enter marriage) instead of the general applicable marriage practices usually mixed with local practices. It was, therefore, in the state's view, not plausible that the claimant would be married off

without her consent. Within this reasoning, the claimant is seen as 'empowered' by Islam instead of being 'oppressed' by it.

Further, a culture-based understanding of forced marriage is articulated within the clan-protection state argument (Ch3, 3.3.2, E, Somalia). This reflects a wider understanding of the concept of protection that can be seen in harmony with what the ACVZ called 'society protection' (Ch3, par. 1.2). It is unclear how a 'society' (a very wide group) can protect a person fleeing forced marriage. By referring to society as a protection agent, the ACVZ implicitly communicates that forced marriage is inherent to the society in the countries from which women fleeing forced marriage originate. It is thus a matter of 'foreign culture'.

*Lawyers*

While the state constructs the culture frame in order to mitigate the claim or to render it less credible, lawyers employ the culture frame to aggravate the claim. For example, in the case concerning the claimant from Ethiopia (Ch3, par. 3.3.2, A) the lawyer argued that Ethiopia is an Islamic country and that, upon return, the claimant would be condemned because she infringed Islamic law by fleeing and preventing herself from being married off. Reference to Islamic law in this context conveys the impression that Islamic law allows forced marriage. Islam is thus the problem. In addition, presenting Ethiopia as an Islamic country, while there is no 'state religion'[883] in that country is notable and serves to represent forced marriage as a serious affair in order to aggravate the claim.

Additionally, in cases concerning credibility (Ch3, par. 3.4), lawyers consistently represented forced marriage as fitting claimants' cultural background. For example, in a Nigerian case, the lawyer maintained that forced marriage is frequent in Nigeria and that the claimant's asylum account fits into that picture. The lawyer adds that given the position of the claimant within her culture, it is logical that she has no knowledge of Islamic law. By doing this, the lawyer reproduces the Islamic understanding of forced marriage. Similarly, in the Guinean case (Ch3, par. 3.4) in which the state argued that since the claimant's husband was a Koran teacher, he would not force her to marry, the lawyer defended the opposite view by arguing that forced marriage occurs within Islam in order to render the claim credible. In the same vein, the lawyer refers in another Guinean case (Ch3, par. 3.4) to culture by arguing that the claim based on forced marriage fits into Guinean culture, by saying it was common for uncles who are responsible for children to marry them off. By doing this, the lawyer represents forced marriage as inherent to Guinean family culture. Another articulation of the culture frame within credibility cases is to be found in the case concerning an Afghan

883 According to Wikipedia, there is in Ethiopia 'no state religion, and it is forbidden to form political parties based upon religion'. See: 'Religion in Ethiopia', *Wikipedia, the Free Encyclopedia*, at: <https://en.wikipedia.org/wiki/Religion_in_Ethiopia#Religious_politics> (last accessed 29 December 2018).

man (Ch3, par. 3.4). In this case, the INS rejected the claim because the man declared that his problem was solved via an agreement between his father and uncle. The lawyer argued that the agreement does not mean that his father would not force him to marry and refers to Afghan culture to strengthen his case: in Afghan culture such an agreement could be that the claimant marries the woman in question alongside a second wife.

Further, lawyers implicitly employed the cultural understanding of forced marriage when they argued for membership in a particular social group (par. 3.3.1, B). We have seen that besides the broad social group of 'women', lawyers routinely argued that the claimant belongs to the social group of 'women in the country of origin' (Nigeria, Burkina Faso, Togo and Guinea). For example, in the case concerning a young girl from Nigeria whose parents wanted to forcibly marry her to a sixty-year-old chief in exchange for money, the lawyer advanced that the claimant belongs to the social group of 'women in Nigeria' (Ch3, par. 3.2.1). The combination 'women and the nationality/country of origin' links forced marriage to the nationality of the claimant and suggests that forced marriage is of a foreign culture to which only 'women in countries of origin' are subject. As such, it is the culture in the country of origin that is persecutory. Within this reasoning, forced marriage is viewed as targeting women *as* 'women in the country of origin'. It conveys the impression that women in Nigeria for example are by default in a situation beyond their own actions and responsibility because, simply, they are women in Nigeria.



Finally, the frame is also constructed in the case concerning an Iraqi man who fled forced marriage (3.3.2, A, Ch3) when the lawyer argued that 'it is already almost impossible for a woman to seek national protection against spousal rape, let alone for a man; the culture in Iraq does not allow this' and that 'the claimant's problem is transformed into a clan-problem against which there is no national protection'. By arguing in this way, the lawyer wanted to convey forced marriage as a serious affair and represented men as being culturally more vulnerable than women when it comes to forced marriage.

## SECTION 2: THE FRAMING PROCESS

In the previous section I analyzed which frames are articulated within the two examined debates. In this section, I analyse the framing process through addressing my fourth research question, namely: to what extent are the identified frames aligned? The analysis also pays attention to whether reframing occurred, whether frozen frames emerged, and the extent to which the asylum seekers involved have had voices within the debate through the advocacy of their lawyers and other refugee advocates, and how. When addressing the voice dimension, I bear in mind that lawyers and other refugee advocates (such as NGO's and

monitoring institutions), should not be identified with asylum seekers. In fact, it is lawyers and refugee advocates speaking for them, but they have no direct voice of their own. It is this representative role that is analyzed and not the 'real voices' of asylum seekers. In this context, I will be looking at the strategies employed by lawyers and refugee advocates both within courtrooms and beyond. My aim is to analyse whose narratives are silenced and whose are given prominence and the processes by which this is achieved, rather than to address the issue of the 'real voices' of asylum seekers. In what follows, I first discuss the framing process in the debate on foster children (par. 2.1) and then within the debate on forced marriage (par. 2.2.).

## 2.1 Foster children

Within the debate on foster children, the framing process was initiated through frame *amplification*. The state did not introduce a new frame, but amplified a pre-existing one, namely the 'boy at the dike' frame. As previously mentioned (Ch1, par. 3.3.2), frame amplification serves to clarify, reinforce and renew a pre-existing frame with respect to a particular topic, problem or event. Frame amplification took place through an amplification of the problem, namely the increase in the number of foster children. The state secretary re-emphasised the pre-existing 'boy at the dike' frame by clarifying it through fraud discourses and figures (quantitative information). This amplification served to reinforce the aim to control family migration for refugees and to reduce the increasing Somali asylum flow in general. Frame amplification served to clarify, reinforce and renew the pre-existing 'boy at the dike' frame with respect to foster children. It served to reinforce the aim and urgent need to decrease the asylum influx, to reinforce the idea that Somalis have been fraudulent and to justify the proposed restrictive policy measures. In order to reinforce this amplification, the state combined the 'boy at the dike' frame with the culture frame when representing fraud as inherent to being Somali. We can see this frame alliance as a form of *frame alignment* although it concerns two frames imposed by the same actor (the state) and not an alliance between two frames of different actors as included in the definition of frame alignment (Ch1, par. 3.3.2).

In response to the amplified 'boy at the dike' frame, lawyers consistently and continuously submitted appeals against the INS's decisions implying that foster children who stayed behind with another family could not be granted family reunion (Ch2, par. 1.2.1, B). In this context, lawyers constructed the vulnerability frame. We have noted that courts consistently considered the strict interpretation of the family bond as unconvincing because parents were obliged to involuntarily leave a child behind. In this context, courts adopted the vulnerability frame constructed by lawyers and found that it is obvious that parents arrange

substitute childcare when they flee the country. We can thus say that through legal framing lawyers *transferred* the constructed vulnerability frame to a part of the state, namely the courts. The successive and successful appeals obliged the INS to continuously reconsider its decisions on the basis of the court's judgments. In this way, the INS became frustrated in implementing the 'boy at the dike' frame. Facing this frustration, if the INS wished to maintain the 'boy at the dike' frame and avoid the consequences of the successive court's ruling rejecting its restrictive policy, the INS needed to ask the Council of State for re-confirmation of the 'boy at the dike' frame. This meant that the INS needed to submit higher appeals against the court's judgments. This happened in 2012 (Ch2, par. 1.2.1, C). However, the Council of State rejected the INS's higher appeal and declared the housing rule (that articulates the 'boy at the dike' frame) as 'unlawful'. The Council's judgment was subsequently incorporated, in 2013, into the Aliens Circular in which it is stated that the distinction between foster and biological children is unacceptable (Ch2, par. 1.2.1, D). The key measure within the 'boy at the dike' frame (that is, the housing rule) was thus abolished and the requirement of the actual family bond was redefined in a way that there is no distinction between biological and foster children. Social and legal change from within courtrooms and through legal framing was thus achieved after almost five years (2009-2013) of numerous successful appeals through which lawyers not only advocated for the individual interests of their clients but also for a larger cause, namely: equality between foster children and biological children. Within this social movement, we can say that lawyers succeeded through the strategy of 'frappez, frappez toujours!' to assist Somali parents and their foster children to re-gain their 'collective voice' within the debate on family reunion. Although Somali families indirectly lost 'the battle' in parliament in 2009, they succeeded, through their lawyers and via the strategy of 'frappez, frappez toujours!' in courtrooms, to re-gain their collective right of family reunification in 2012.



The success achieved in this context does, however, not mean that the 'frappez, frappez toujours!' strategy is always successful. Its limited efficiency is illustrated in how it worked out in the context of reunification interviews. Lawyers consistently and continuously submitted appeals against the INS's decisions by arguing that interviews were not child-friendly (Ch2, par. 2.2). Lawyers re-constructed the vulnerability frame and infused their legal arguments with complementary human rights, beyond the refugee convention and the ECHR, in particular article 12 of the CRC. By continuously emphasising that children are vulnerable during interviews, lawyers aimed not only to defend the individual interests of their individual clients, but also indirectly engaged in a larger cause, namely: respect for children's rights and voices during reunification interviews. Although some courts agreed with lawyers in that interviews are child-unfriendly, the Council of State consistently held that article 12 of the CRC is not applicable and that interviews take place adequately (Ch2, par. 2.2). The cause in favour of taking children's rights and voices seriously was therefore

frustrated in the legal debate. The strategy of 'frappez, frappez toujours!' has, therefore, not been fruitful within courtrooms because the Council of State frustrated it.

However, lawyers did not limit themselves to legal cause lawyering, and instead continued to defend the cause of child-friendly interviews beyond courtrooms by promoting and transferring the vulnerability frame to other child advocates. Lawyers formed coalitions with key child advocates, in particular Defence for Children International and the Dutch Refugee Council (Ch2, par. 2.3.1). Lawyers collaborated with these two NGOs for conducting a field mission to the Dutch embassy in Addis Ababa to investigate how interviews with Somali children took place. The field mission resulted in a critical report in which child advocates criticized the interview practice through re-constructing the vulnerability frame, and recommended implementing interview guidelines included in article 12 of the CRC. The vulnerability frame constructed by lawyers within courtrooms was thus *transferred* to NGOs. The field report reached parliament and was the subject of parliamentary debate (Ch2, par. 2.3.1). Although it did not directly engender policy change regarding reunification interviews, the coalition between lawyers and NGOs gave a 'collective voice' back to foster children and their parents within the political debate as their voices reached a part of the state, namely the parliament. This laid the groundwork for another coalition that helped keep Somali parents and their foster children involved in the political debate. Indeed, these critical voices invited the Children's Ombudsman to investigate how interviews take place at embassies. Besides interview observation at embassies, the Ombudsman organised a focus group with lawyers who provided the Ombudsman with a number of their client's files (Ch2, par. 2.3.2). In its 2013 report, the Ombudsman criticized the way in which interviews were conducted and, like NGOs, recommended the implementation of article 12 of the CRC. In his report, the Ombudsman re-constructed the vulnerability frame in a similar way to lawyers and NGOs. We can thus say that the vulnerability frame is again transferred to the Ombudsman. His report reached the parliament and was subject to political debate (Ch2, par. 2.3.2). Although it did not directly engender any policy change regarding reunification interviews, the report and coalition between lawyers and the Ombudsman once again gave a 'collective voice' to foster children in the political debate as their voice reached again a part of the state, namely the parliament.

Within this process, the vulnerability frame constructed by lawyers in courtrooms is connected to the similar vulnerability frame of NGOs and the Children's Ombudsman. The former preceded and functioned as a catalyst for the latter when lawyers collaborated with child advocates. Because they wanted to collaborate, and since they had similar advocacy agendas, these actors re-organized the vulnerability frame in such a way that it was reinforced and grew stronger so that an *alliance* was formed between these actors and their similar frames. An alliance between legal framing and policy framing was thus achieved. This

form of frame alignment aimed to establish a connection between these different advocates for children's rights. Frame alignment took place through *frame bridging* between similar frame constructions. We can also say that NGOs and the Ombudsman simply took over the vulnerability frame of lawyers, but the bridging role of lawyers in this process cannot be overlooked. Although this frame alignment did not directly result in social change, it kept Somali parents and foster children included in the debate (they had voices) and it also had a positive effect on the dynamic of the debate.

Indeed, the achieved frame alignment (that resulted in a strong vulnerability frame) had a positive effect on the dynamism of the framing process with the result that the state *reframed* the 'boy at the dike' frame. The state was obliged to re-construct the vulnerability frame in a way that children are in need of protection against child trafficking and for this reason interviews should remain intensive (Ch2, par. 2.3.3). We have seen (Ch1, par. 3.3.2) that when involved actors release their own frame and look differently at a problem, *reframing* takes place. So, in reaction to the vulnerability frame constructed by child advocates and the parliament, the state released the 'boy at the dike' frame and looked at the problem in another way: the state *reframed* the problem. There was thus a shift in state frames as a result of the alignment of the vulnerability frames constructed by child advocates. The state reframed the difficulty of examining the family bond and accepted a positive change in the mutual dynamic. The state reframed its perception from considering foster children as fraudulent to considering them as potential victims of child trafficking. Because the 'boy at the dike' frame was no longer convincing due to critique from various sides, the state *transformed* the 'boy at the dike' frame to fit into the frame of child advocates. Since the pre-existing convictions and beliefs of the state, namely fraud and abuse, were not in line with the vulnerability frame as advanced in various critiques, new values (protecting children from child trafficking) were developed in order to fit into the vulnerability frame.



So, in response to the critique of the Children's Ombudsman, the government consistently argued that interviews at embassies take place adequately and refused to improve the way in which they had been conducted. Its argument was based on the need to protect children from trafficking. However, the government's response to the recommendation of the Ombudsman was heavily criticized by a part of the parliament. This criticism resulted in the state secretary accepting, upon proposal from the parliament, to ask the ACVZ for advice (Ch2, par. 2.3.4). In late 2013, the state secretary indeed requested that the ACVZ examines the conformity of the Dutch reunification policy regarding refugees with International and European law. We thus see that Somali families regained their 'collective voice' since the Ombudsman succeeded in reaching another part of the state beside the parliament, namely the ACVZ.

In its advisory report (Ch2, par. 2.3.4), the ACVZ recommended that the government implement the guidelines enshrined in article 12 CRC into the Aliens Circular. In this context, the ACVZ argued that due to the particular position of children, their dependency and vulnerability, it is good administration when interview officers can rely on generally and accepted guidelines on interviewing children. This shows that the vulnerability frame, constructed by child advocates, was also transferred to the ACVZ. The vulnerability frame was thus again transferred to another part of the state, namely the ACVZ. In this way, the ongoing frame alignment was strengthened with social change as result. Although the state secretary refused to follow the ACVZ recommendation *à la lettre*, it accepted implementing article 12 of the CRC in the INS Guidelines. This can be seen as social change that has the potential to give children more space to speak during the family reunion procedure.

## 2.2 Forced marriage

The framing process within the debate on forced marriage remained dominated by political silence as a result of which forced marriage is un-problematized (Ch1, par. 5.2, A), while the scope of state protection is *amplified* (Ch3, par. 3.3.2, B. C and E). So, the state *shrunk* the problem (through silence on and privatisation of forced marriage) and *amplified* the solutions through widening the scope of state protection in the country of origin. The state did not introduce a new frame, but it maintained a pre-existing one, namely the 'boy at the dike' frame.

In terms of silence, between 2004 and 2014 there was no political debate on forced marriage in the asylum context (Ch1, par. 5.2, A). Forced marriage as a ground for claiming asylum is un-problematized and excluded from the political debate. This shows that women fleeing forced marriages do not have a voice within the political debate. Arguably, the state continuous silence reinforces a pre-existing power relation. Since the 'boy at the dike' frame is a default and pre-existing frame that works to benefit the state, political silence reinforces that frame. The state silence suggests that the state does not face any problems relating to asylum claims based on forced marriage. It particularly suggests that the number of asylum seekers admitted because of forced marriage seems not to be problematic for the state. In other words, since there is no 'policy leak' through which women fleeing forced marriage 'massively' enter the country, the state does not need to politicize the issue. This helps the state to keep the situation as it is. Keeping silent can be seen as reinforcing the 'boy at the dike' frame because breaking silence might lead to a new category of refugees and to the likely emergence of policy specifically dealing with such claims. The state keeps silent because breaking silence would lead to the politicization of the issue and might trigger a political debate and policy measures regarding women fleeing forced marriages. Concretely,

breaking silence might lead to the incorporation of forced marriage to the asylum chapter of the Aliens Circular, just like domestic violence, FGM, HBV, homosexuality and forced marriage in the context of marriage migration. The state's reluctance to give the issue of forced marriage a 'voice' in the asylum chapter of the Aliens Circular is also visible in the ACVZ's recommendations as included in its 2005 report. While the ACVZ explicitly recommended incorporating forced marriage in the chapter concerning marriage migration,[884] it did not do the same for forced marriage in the asylum context. The ACVZ merely recommended considering women fleeing forced marriage as a specific group without explicitly advising the state to incorporate it into the Aliens Circular.[885] Since incorporating forced marriage into the asylum chapter of the Aliens Circular would lead to a new category of refugees, the state keeps silent. The implicit idea is that this incorporation bears the risk of all oppressed women in refugee-producing countries coming to the Netherlands, with the result that the floodgates open or a policy leak emerges. In order to prevent the emergence of such a policy leak, the state keeps silent. In this way, a pull factor is avoided and people are discouraged from seeking asylum on the basis of forced marriage. By keeping silent, the issue remains hidden, specific policy is avoided, and people are kept outside the borders. By maintaining silence, the state refrains from claiming to have any control over the family in the case of forced marriage, but in this way actually keeps and reinforces its pre-existing power. This silence stands in stark contrast with the state's response to forced marriage in the context of marriage migration within which the state claimed control of the family and assigned itself the role of principal agent of change: it problematized and politicized forced marriage and then introduced various measures in order to prevent it, to protect victims and to prosecute perpetrators (Ch1, par. 1.2.2).



In line with this political silence, the state is also silent in country reports. We have seen (Ch3, par. 2.1) that forced marriage is not thematized in the majority of country reports published between 2004 and 2014. Although forced marriage is mentioned in many reports, it remained un-thematized. The 2011 and 2012 reports on Nigeria are a single exception to this trend (Ch3, par. 2.2). In these two reports, forced marriage receives a separate section. The issue of forced marriage thus has a very limited 'voice' in country reports, except those about Nigeria. This stands in contrast with the considerable amount of policy-oriented reports on forced marriage in the context of marriage migration (Ch1, par. 5.2, A). By keeping silent on forced marriage in country reports, the state reinforces the pre-existing power structure. Since the 'boy at the dike' frame is a default and pre-existing frame that works to benefit the state, excluding forced marriage from country reports reinforces this frame. In this way, the 'dike' is reinforced, and a new wave of asylum seekers is prevented. Excluding forced marriage from country reports enables the state to reinforce its power in terms of

884 ACVZ 2005, *supra* note 243, at p. 39-38 & 41-42.
885 *Ibid* at p. 77.

evidence and renders it difficult for asylum seekers to provide evidence when relying on country reports. In this context, it is worth mentioning that NGOs play a considerable role when the state drafts country reports. Since NGOs, in particular the Dutch Refugee Council, are in principle consulted by the state when drafting TOR reports (Ch3, par. 2.2), they also have an important role in making asylum issues visible, or rather, reinforcing their invisibility in country reports. We have seen that the thematization of forced marriage in Nigerian reports took place after many TOR reports. It is unknown whether and to what extent NGOs contributed to including forced marriage in the TOR reports on Nigeria. What is known is that they did not mention forced marriage regarding other countries in TOR reports. For example, in the Guinean 2009 TOR report, numerous and detailed questions on FGM are included, while no question concerning forced marriage is cited. Similarly, in the Guinean 2013 TOR report, FGM is visible, while forced marriage is absent. By failing to include forced marriage in these Guinean TOR reports, NGOs, in particular the Dutch Refugee Council, contributed to keeping forced marriage hidden in country reports. By doing this, they failed to challenge the 'boy at the dike' frame.

Regarding framing within courtrooms, we have seen that lawyers continuously submitted appeals against the INS's decisions in which forced marriage is put outside of the scope of the refugee convention (Ch3, section 3). In this context they constructed the vulnerability frame and the culture frame. We can say that this is a form of *frame alignment* although this alignment does not concern an alliance between two different parties. However, this frame alignment did not result in any social change from within courtrooms. Indeed, courts regularly disagreed with lawyers and were reluctant in adopting the vulnerability frame. Because of this, lawyers continuously submitted higher appeals with the Council of State (Ch3, section 3). However, the Council of State continuously and consistently dismissed higher appeals without any substantive reasoning although many higher appeals include pertinent and central legal questions, such as that of the conformity of family protection, clan protection and NGO protection with article 7 of the EU Qualification Directive (Ch3, section 3). The standard statement of the Council of State stipulates that the claim put forward in higher appeal cannot lead to the annulment of the court's decision; and it does not raise questions that require answering in the interest of legal unity, legal development or judicial protection.[886] In other words, the issue of forced marriage is not relevant in asylum law. Women fleeing forced marriage thus do not have a voice within the Council's jurisprudence. Women fleeing forced marriage cannot even have their questions dealt with by the Council. This echoes and reinforces the political silence and helps to prevent the emergence of a policy leak through which women fleeing forced marriage may enter the country. When the issue remains non-thematized in the Council's jurisprudence, the inclusion of women

886 Confirming court's decisions without substantive reasoning occurred in 24 cases among 25. The single case in which the Council of State engages in substantive reasoning concerns a higher appeal submitted by the INS and not by a lawyer.

fleeing forced marriage is further prevented. In this way, the Council reinforces the political silence and the un-problematization of forced marriage within country reports. By doing this, the Council reinforces the pre-existing and default 'boy at the dike' frame. So, despite successive (higher) appeals by lawyers, they did not succeed in achieving social and policy change from within courtrooms. The strategy of 'frappez, frappez toujours!' has, therefore, not been fruitful in court over a period of ten years (2004-2014) because it is frustrated by the attitude of courts and the Council of State.

We have also seen (Ch3, par. 3.5) that when forced marriage is part of the asylum claim along with FGM, HBV or homosexuality, lawyers regularly put the emphasis on these claims, while they sideline or erase forced marriage. This 'go with the flow'[887] manoeuvre can be seen as a strategy followed by lawyers to make individual claims successful because FGM, HBV and homosexuality claims are more successful than forced marriage claims. These claims are more successful because they have been accepted by courts for many years as sufficient to lead to refugee status and they are incorporated in the Aliens Circular. In contrast, forced marriage is not yet accepted by courts as sufficient to lead to refugee protection and it is not yet incorporated in the Aliens Circular. However, this strategy can be seen as a 'forced strategy' and not as a choice made by lawyers. An important reason behind this strategy is the fact that forced marriage is not thematized in country reports, while FGM, HBV and homosexuality are (Ch3, par. 2.1). We have seen that the legal debate is guided by the content of country reports (Ch3, par. 3.5). While forced marriage is thematized in lawyers' arguments when the case concerns Nigerian claims, it is sidelined or erased in claims from other countries because forced marriage is not thematized in the respective country reports. When FGM, HBV and/or homosexuality are part of the claim, and as they are often thematized in country reports, lawyers put the emphasis on them and sideline or erase forced marriage. We can thus say that lawyers are in fact forced to 'go with the flow' of country reports, since the legal debate is guided by the information included in those reports. Since lawyers basically do their best to make the claim successful, it is strategically much better to go with the flow and put the emphasis on FGM, HBV or homosexuality rather than forced marriage. The idea is that it is not in the interest of the claimant if the lawyer takes the risk of a case failing by putting weight on forced marriage, while other parts of the claim could easily make it successful. Focusing on forced marriage would limit the chance of success.

Although the 'go with the flow' strategy might be beneficial in certain individual cases and can lead to more successful individual claims, it contributes to further 'silencing' forced marriage in courtrooms. This strategy thus reinforces the 'boy at the dike' frame. By

887 Compare the strategy of '*go with what is known to work*' in: M. Balzani, 'Constructing victims, construing credibility: forced marriage, Pakistani women and the UK asylum process', in: Gill & Anitha 2011, *supra* note 96, pp. 200-220, at p. 215.

following this strategy, lawyers did not engage in a larger cause, but limited themselves to defending the individual interest of their clients. This might clarify why lawyers failed to give a (political) 'collective voice' to women fleeing forced marriage. They thus played an important role in reproducing state power instead of challenging it. This strategy can therefore be seen as in harmony with political silence, a lack of alliances with NGOs, NGO's silence, silence in country reports and in the jurisprudence of the Council of State. These levels of silence served to reinforce the pre-existing powerful 'boy at the dike' frame. All these actors colluded together to keep the issue of forced marriage in asylum law hidden and reinforced the pre-existing frame.

In addition, the 'go with the flow' strategy manipulates the asylum narratives of women fleeing forced marriage and, therefore, has consequences in terms of voice.[888] When erasing or sidelining forced marriage when it is part of the claim, it is questionable whether lawyers tell the 'authentic' stories of the women affected.[889] The experience of fleeing forced marriage is rendered insignificant and does not count, unlike FGM, HBV and homosexuality. The strategy of 'go with the flow' can thus be seen as an act of (partly) 'muting' women fleeing forced marriage.[890] As Balzani argues, although there is no doubt that lawyers follow this strategy with good intentions, claimants are left with accounts diverging from their original account: 'when a case goes well, such narrative violence may be accepted as a price to be paid for a greater good, but when a case fails and the asylum seeker is in effect told that her case did not fall within Convention grounds, or that she is simply not believed, then the lurking suspicion that she did not get to tell her story her way may be an added issue to deal with'.[891]

In terms of frame alignment between the frames of different parties, this did not occur. Instead of frame alignment, frame *freezing* took place. Both the 'boy at the dike' frame and the culture frame can be seen as *frozen* frames. Because the 'boy at the dike' frame was not challenged, and instead partly reinforced by the 'go with the flow' strategy, it remained *frozen*. The 'boy at the dike' frame appeared repeatedly in case law (and political silence continued) because it underlines the interest of restrictive policies and it gives a 'safe feeling'. It is difficult for the state to change this frame because it has been developed and reinforced for a long period of time. Changing this frame would be against 'what is usual' from the perspective of the state. This frame primes the state to stick to old patterns and to the myth of immigrant invasion. In order to reinforce the 'boy at the dike' frame, the state constructed the culture frame within courtrooms. We can see this frame alliance as a form

888 *Ibid.*
889 *Ibid* at p. 214. Balzani refers to M. McKinly, 'Life Stories, Disclosure and the Law', *Political and Legal Anthropology Review,* vol. 20(2) 1997, pp. 70-82.
890 Balzani 2011, *supra* note 887, at p. 213.
891 *Ibid* at p. 214.

of *frame alignment* although it concerns two frames held by the same actor (the state) and not an alliance between two frames held by different actors. This reinforcement through the culture frame flourished when lawyers reproduced the culture frame in the same way as the state. The culture frame is frozen because it remained stable and it appeared repeatedly in case law, the ACVZ report and country reports because it gives a safe feeling for the state and lawyers. It is difficult for them to change this frame because it is developed and reinforced over time. Since both the state and lawyers employed the culture frame in the same way, the culture frame is reinforced and reaffirmed. Changing the culture frame would be against the 'usual' way of thinking from the perspective of the state and lawyers. Both parties therefore stick to old 'orientalist' patterns and thinking. Because the key conflicting actors (lawyers and the state) rely on the same culture frame, we can say that there had been a frame alignment with a *freezing* effect because they employed the culture frame in the same way: lawyers reproduced the same culture/orientalist frame as employed by the state, although they did it with a different aim.



## SECTION 3: CONTRASTING THE TWO DEBATES

The two previous sections answered my third and fourth research questions. We have seen which frames are articulated in the two examined debates, to what extent did foster children and women fleeing forced marriage have had voices, whether frame alignment took place, and finally whether frozen frames exist within the debate. In the present section, I address my final research question. I comparatively juxtapose the two debates by reflecting on the identified frames (par. 3.1, par. 3.2 and par. 3.3) as well as on the framing process (par. 3.4) to find out whether there are differences in frames and degrees of alignment across the two debates. When reflecting on the frames, I also discuss how the relation between the individual, the family and the state is approached within the frame; i.e. which approach is adopted: the individualistic or the family-unit approach?

### 3.1 Reflection on the 'boy at the dike' frame

To begin with, it is important to note that the 'boy at the dike' frame is 'unilateral' within both debates: it is exclusively constructed by the state. This is an important difference with the two other identified frames (vulnerability frame and culture frame), which are constructed both by the state and by advocates of the asylum seekers involved. This has to do with the default nature of this frame and its inherency to migration law that basically aims towards regulating and controlling the entry of immigrants. Second, while the frame is relatively visible within the debate on foster children, it is invisible within the debate on forced marriage because it

comes across as a transparent description of migration reality. Its visibility within the debate on foster children is due to the fact that the state explicitly communicated its concern about the increasing number of foster children, while its invisibility within the debate on forced marriage is due to state silence. Third, the frame is not a 'rights' frame, like the culture frame and unlike the vulnerability frame. This confirms that legal and policy framing is not necessary and exclusively about rights violations because there are other important aspects of legal and policy frames beyond rights and not all legal or policy frames are 'rights frames' (Ch1, par. 3.1).

In terms of frame paradigms, the frame as articulated within the debate on foster children is a representation of the pre-stored knowledge about fraud and the idea of invasion inherent to family migration policies. This pre-existing knowledge was in 2009 linked to the increasing asylum influx of foster children from Somalia. The frame is thus mobilized as a larger and pre-existing *cognitive* structure that served to organise and interpret new incoming information regarding the increasing number of foster children. Similarly, the frame within the debate on forced marriage forms a representation of pre-stored knowledge, namely that if the state opens the door for oppressed women, waves of 'third world' women will come to the Netherlands. The frame is thus invisibly mobilized as a larger and pre-existing *cognitive* structure that served to organize and interpret refugee claims based on forced marriage.

In terms of frame types, because the state puts Somali family relations in a suspicious light, the frame can be seen as a *characterisation* frame. It is an expression of the way in which the state views foster children and their parents, namely as potentially fraudulent. This frame undermines foster children and their parents by questioning the legitimacy of their shared intimacy and the motivation behind their wish to be reunited. This frame serves to reinforce the state's identity of being a wealthy state at risk of being 'cheated from all sides' by fraudulent foreigners (Ch2, par. 1.1.1). Similarly, because the state represents women fleeing forced marriage as autonomous individuals who are responsible for their private problems, the frame within the debate on forced marriage can also be seen as a *characterisation* frame. This frame undermines concerned women by questioning the legitimacy of and the motivation behind their asylum claims. This frame serves to reinforce the state's identity of being a wealthy state at risk of being flooded by new refugees.

With regard to the triangle relation between the individual, the family and the state, we see that this relation is unstable within the frame. While within the debate on foster children family bonds are problematized and politicized to justify state intervention in the family and thus to control family reunion, family bonds in the debate on forced marriage are un-problematized and privatized in order to justify state non-intervention in the family, but also to control migration. In other words, within the debate on foster children the state

adopts the individualistic approach, while it adopts the family-unit approach within the debate on forced marriage. A vivid illustration of this contrast within the frame is that while the protection by the extended (clan) family is denied to foster children, family and clan solidarity are promoted in the case of forced marriage.

Within the debate on foster children, the frame endorses the individualistic approach because it devalues the protective role of the family in the context of Somali foster children. The individual foster child is the unit of analysis and comes to stand in direct relation with the state, without the family as an intermediary protective unit. This is visible both within the state's reasoning concerning the head of the family and the housing rule.

Regarding the concept of the head of the family, we have seen that the state endorsed the understanding that there is always a family head and that there can only be one family head at a given moment in time (Ch2, par. 1.2.2). Within this approach, involved family members are seen as isolated individuals and not as forming a unit of interlinked individuals within which adults share the responsibility for the child and thus act as joint parents/heads of the family. Within this reading, individual family members are represented as isolated, and not as a unit that takes shared family decisions. This reasoning overlooks the fact that decisions regarding children often take place after a process of negotiation within the family in which various family members are engaged.[892] The state's approach places emphasis on the individual and not on the shared intimacy within which more than one individual adult family member shares the role of family head in the sense of shared responsibility for a child. The state ascribes itself the status of a family-decision-maker that tells individual family members that only one of them can be head of the family and that he/she is the member who takes important decision regarding the child. The individual thus comes to stand in direct relation to the state without the shared intimacy as intermediary. This approach is in contrast with family structures in many and various countries.[893] It is also in contrast with Dutch family norms according to which, since the 1970's, the family is viewed as a co-headed unit.[894]

Regarding the housing rule, we have seen that the state endorses the idea that housing a foster child in another family after the flight of the parent implies that breaking the family bond has occurred (Ch2, par. 1.2.1, A). This represents family members as isolated, not as unified individuals. The individual is the unit of the analysis, while the shared intimacy between child and parent is cast out of the equation. This endorses the individualistic approach because it devalues the protective role of the family in the case of foster children.

892 S.K. van Walsum, *De schaduw van de grens. Het Nederlandse vreemdelingenrecht en de sociale zekerheid van Javaanse Surinamers*, Gouda: Gouda Quint 2000, p. 269.
893 See for example: Alber et al 2013, *supra* note 88; van Walsum 2000, *supra* note 892.
894 Van Walsum 2008, *supra* note 38, at p. 42-43.

The individual foster child is the unit of analysis and comes to stand in direct connection with the state without the family as an intermediary protective unit. Within this reasoning, the parent and child are seen as separated individuals, as the emphasis is on the individual choice of the parent, while their shared intimacy is out of the picture. By doing this, the state steps in between family members and takes family decisions for them. Further, considering the family bond as ceasing to exist when the child is housed in another family endorses the idea that the child cannot have two families at one time.[895] Intimacy is represented as a mere 'contract' between two isolated individuals and the parent's decision is seen as a legitimate unilateral decision to end that 'contract'.[896] The parent's decision to house the child in another family is therefore 'individualized' and not seen as a 'family decision' falling under parental responsibility, taken after a process of negotiation within the family.[897] The state steps in and takes the position of the foster parent by deciding that the family bond with the foster child is broken. By following this approach, the state ascribes itself the role of family-decision-maker. The state 'teaches' parents what a responsible parent would do, namely refraining from housing foster children in another family. This policy suggests that in order to be eligible for reunion, the parent should have made another choice, namely leaving the foster child at home without a carer; or in the streets of the country of origin; or traveling with the child. The state thus pushes parents either to neglect their children or to embark on the risky journey with them in order to be reunited.

In contrast to the individualistic approach within the debate on foster children, the state follows the 'family unit' approach within the debate on forced marriage. This is visible in the privatisation of forced marriage (Ch3, par. 3.3.1, A) as well as in the amplification of the scope of state protection to include 'family protection' in the country of origin (Ch3, par. 3.3.2, E).

Within the state's privatizing reasoning, involved family members are represented as interlinked family members belonging to the private family unit that should be respected by the state. Within this approach, the parent's decision to force their child to marry is viewed as a family decision that falls under parental custody. Since parents have custody over the child, they lawfully make decisions about the child's personal circumstances. In this view, the state should respect parental custody and parental decisions regarding their children. This entails that parents have the full competence to take decisions concerning their children, such as whom they marry, and that the role of the state should only confirm and respect such parental competence. Within this approach, the family fulfils a private function and the state should therefore respect the natural subordination between parents and child. Because children and parents form a 'unit', both the cause of forced marriage,

895 S.K. van Walsum, 'De feitelijke gezinsband onder de loep genomen (deel 1)', *Migrantenrecht* (14) 1999-6, pp. 147-152, p. 148.
896 Spijkerboer 2014, *supra* note 747, at p. 379.
897 Van Walsum 2000, *supra* note 892, at p. 269.

forced marriage itself and its solution, belong to the private family sphere. In other words, the problem and solution could not be attributed to any other than the family unit. Involved family members are therefore viewed as interlinked individuals belonging to the family-unit. The state is excluded from the equation, while the emphasis is on the responsibility of the family as 'unit'. The family acts within this reasoning as an intermediary unit between the individual and the state and forms the cause of the problem as well as the first port the individual should call upon for solving the problem. The family is the unit of the analysis, not the individual. The privatization of forced marriage when it comes to asylum claims illustrates what Thomas Spijkerboer means when he observes that decision makers often get upset in typical female claims, as they discard the normal assessment framework (refugee definition) and engage in controversial ideas about the private sphere. In his view, a correct application of the refugee definition when the claim is based on forced marriage would definitely not mean that the floodgates would open wide for all oppressed women, as the refugee definition includes other criteria to be met, in particular the failure of national state protection.[898]



Regarding family protection in the country of origin, within state reasoning, involved individuals are represented as interlinked and as belonging to the family unit. Family members are seen as interlinked individuals belonging to the family unit that is called upon to take action and protect the woman in question. This approach reflects the understanding that although the relation between claimant and (members of) the family is in trouble, the family bond with other family members still exists. The problem should therefore still be solved within the family unit. This privatisation of state protection shows how the concept of protection is relativized and results in placing the state out of the equation. Individual family members are therefore encouraged to assist each other because they belong to the unit of the family. Within this reading, the state endorses the idea that the family is responsible for its individuals and that the family is the first port of call when family members need assistance. The family stands as intermediary between the state and the individual. State protection is positioned as last resort after exhausting possibilities that the family has for support. In the same family-protection context, we have seen that one of the solutions proposed to forced marriage is protection by male family members including those residing abroad. This reasoning promotes and reproduces female dependency and endorses the family-unit approach. Family solidarity is encouraged, and state protection is gendered and privatized in order to build boundaries between the individual and the state. The state is not the principal agent of protection but the gendered family.

898 T.P. Spijkerboer, *Case Note* (Rb. Zwolle 27 May 1998, nr. AWB 96/11243) No. *JV* 1998/197.

## 3.2 Reflection on the vulnerability frame

To start with, the frame is visible within both debates and was not hard to detect. Second, while the vulnerability frame is constructed both by lawyers and the state within the debate on foster children, only lawyers constructed the frame within the debate on forced marriage. That the state avoids this frame within the debate on forced marriage is notable because a considerable number of women fleeing forced marriage are underage children, while forced marriage can be seen as a form of child trafficking.[899] Failing to view forced marriage in the case of underage children as a form of child trafficking is not in harmony with the state's reasoning regarding child trafficking in the context of family reunion for foster children. This suggests that the state strategically employs the vulnerability frame. When it helps to deny entry (foster children) it is constructed, but when it facilitates entry (forced marriage) the state avoids it. Third, the frame as constructed by lawyers and the state within the debate on foster children is a 'rights' frame: lawyers argued for the child's right to be heard (article 12 of the CRC) and the state put forward the state's obligation to protect children against child trafficking. In contrast, the frame within the debate on forced marriage, as constructed by lawyers, is not a 'rights' frame. This confirms again that legal and policy framings are not necessary and exclusively about violations of rights because there are other important aspects of legal frames beyond rights.

In terms of paradigms, the frame is *interactive* within the debate on foster children, while it is *cognitive* within the debate on forced marriage.

Within the debate on foster children, we have seen that both state and child advocates constructed the frame. While child advocates employed the frame to argue for the entry of the child, the state employs the same frame but in another way, to justify the restrictive policy. This shows the *double-edged* nature of the vulnerability frame and for this reason it can be seen as *interactive*. We have seen that an important feature of interactive frames is that they are dynamic in nature and constantly reconstructed. The interactive nature of the frame is also visible when we see that it was constructed in various ways. The frame first emerged when the parliament reacted to the 'boy at the dike' frame as communicated in the so-called 'Somalia Letter'. Subsequently, during the interaction between children's advocates and the state, after the state communicated the high refusal rates, children advocates re-constructed the vulnerability frame. The way in which they constructed this frame was influenced by family norms the actors wanted to promote, but also on the basis of knowledge grounded in the field mission report of DCI, DRC, the Children's Ombudsman and their beliefs that the door of family reunification was closed for Somali foster children. In this context, lawyers also constructed the frame within courtrooms in response to the

899 Millbank & Dauvergne 2010, *supra* note 548, at p. 909.

housing rule: they emphasized the vulnerability of children in terms of care and the fact that parents were forced to shelter the children in another family because of their flight.

We have also seen that frames are not only constructed in interaction, but they also structure the way in which the interaction takes place. While child advocates constructed the frame, it also influenced the way in which the debate subsequently took place. The vulnerability frame influenced the form of subsequent interaction as it triggered the state to make use of another frame (vulnerability) than that of the 'boy at the dike'. The state's subsequent choice of the vulnerability frame was not solely determined by pre-existing knowledge, but also by interaction. The state constructed the vulnerability frame in order to achieve and secure specific interest in interaction, namely the justification of the restrictive policy after the 'boy at the dike' frame was criticized from various sides including the parliament and the Children's Ombudsman. This again shows the dynamic and interactive nature of the vulnerability frame.



In contrast to this framing dynamic, the vulnerability frame within the debate on forced marriage is a *cognitive* frame. It is a representation of the pre-stored knowledge about the vulnerability of women in 'third world' countries. This pre-existing knowledge was linked to asylum claims based on forced marriage. The frame is thus mobilized as a pre-existing *cognitive* structure that aimed at arguing for refugee status. Although this dramaturgic strategy (vulnerability) might help gain refugee status, it is a general argument that renders it difficult to argue that forced marriage is targeted at the claimant individually.[900] The inefficiency of this argument is reflected in the fact that courts routinely rejected the social group of 'women', because it is a diverse and wide group. The same holds for the lawyers' reasoning regarding membership in the social group of 'women in the country of origin'. In this context, it is important to note that the lawyers' general reasoning reproduces the state's vulnerability approach articulated in the debate on marriage migration within which women are seen as inherently vulnerable and in need of state protection by refusing family reunion when forced marriage is at play (Ch1, par. 1.2.2).

In terms of typology, while the frame within the debate on foster children is a *process* frame, it is a *characterisation* frame within the debate on forced marriage. We have seen that process frames refer to different views on the best possible way to solve a problem (Ch1, par. 3.2). The frame within the debate on foster children fits into this typology as it refers to two divergent views on the best solution for the difficulty Somali foster children face when proving a family bond. The major difference within this frame is related to the complexity of both solutions and the uncertainty about possible outcomes and consequences. While the solution presented by child advocates (flexible policy) can lead to high acceptance rates, the

900 Spijkerboer 1999/2000, *supra* note 548, at p. 155.

solution proposed by the state (strict policy) can lead to a closed door for foster children. By contrast, the frame within the debate on forced marriage is a *characteristic* frame because it says who the asylum seekers in question are: inherently vulnerable women. It is an expression about the way in which lawyers view women in the country of origin, namely as victims by default. In this context, it is important to recall that the vulnerability frame as constructed by lawyers in the debate on forced marriage reproduces the discourse of female vulnerability within the policy on marriage migration.

With regard to the triangular relationship between the individual, the family and the state, a close look at the vulnerability frame as constructed by the state within the debate on foster children reflects the individualistic approach. This is visible in the state's reasoning regarding child trafficking. Within this reasoning, parents and foster children are seen as isolated individuals: the parents are represented as potential child traffickers and foster children as potential passive victims. Through this emancipatory vision, the reunification of children with their parents in the Netherlands is represented as a source of oppression, namely child trafficking. The state steps between the child and the parents, while the protective role of the extended family is out of the equation. The individual is the unit of the analysis and not the family. The family is represented as a source of oppression, family members are considered as isolated individuals, the state is in direct relationship with the child, and shared intimacies are out of the equation.

The state's argument of child trafficking bears similarities with the argument of the AIRE Centre in the *Osman* case when it maintained that Sahro had been forced to leave Denmark and was subsequently exploited by her family by being forced to take care of her grandmother. In the view of the AIRE Centre, Sahro had been victim of forced labour and child trafficking. Within this emancipatory vision, the reunification of Sahro with her grandmother in the country of origin is represented as a form of child trafficking. That this argument is employed by the Dutch state in the case of foster children shows that the AIRE Centre's strategy reproduces and reinforces state policy, although such a strategy might be successful in specific cases, in the sense of admission to the host country. Thus, while the AIRE Centre tried to do a good job for Sahro, it makes it difficult for many other children who wish to be reunited with their foster parents. The state's use of the same reasoning in the context of family reunion shows the problematic side of the AIRE Centre argument and illustrates the potential counter productivity of approaching the issue through the lens of 'individual rights versus family rights'.[901] This vividly illustrates the *double-edged* nature of the vulnerability frame.

901 Compare S.K. van Walsum, 'The Politics of Culture. Orientalism in Court', in: I. Boer, A. Moors & T. Teeffelen (eds), *Changing Stories: Postmodernism and the Arab-Islamic World*, Amsterdam: Rodopi 1995, pp. 121-131, at p. 128: 'Given the historical context in which collectivities are defined, an analysis which weights collective and individual rights against each other as distinct and unrelated abstractions is problematic'. See also p. 129-130. A Dutch version of this article is published in *Nemesis*: S.K. van Walsum, 'Het machtskarakter van het cultuurdebat', *Nemsis* 1992, vol. 2, pp. 12-17.

The state's willingness to protect children from child trafficking is legitimate, as it is plausible that foster children are extremely vulnerable to trafficking because they have lost their parents, there is an on-going war and there are no authorities in Somalia to protect them. However, the state's reasoning exclusively focuses on child trafficking after reunification with foster parents (usually family members) and overlooks the risk of trafficking that results from the housing rule. Arguably, if the state were committed to prevent child trafficking, reunification would take place as soon as possible so that children do not stay behind without family members. Further, if protection against child trafficking is really one of the state's commitments, the state would not consider the family bond as broken when the child is left behind in the country of origin with third parties such as neighbours and friends. Arguably, in these cases, the risk of neglect or trafficking is more likely than when a foster parent, who is a family member (brother, sister, aunt, uncle etc.) applies for reunification with the child. Further, regarding child trafficking after reunification, if the state is really engaged in preventing child trafficking through interviews, the interview would take place in conformity with article 12 of the CRC, to thoroughly examine the family bond and explore whether there are indications of (past) child abuse. Moreover, if child trafficking occurs after reunification, the child should be seen as a victim and be protected by the state if child protection is really the aim. It thus seems that the vulnerability frame based on child trafficking merely serves to reinforce the 'boy at the dike' frame.



## 3.3 Reflection on the culture frame

First of all, it is important to note that the culture frame is visible within both debates and was not hard to detect, even though the state implicitly constructed the frame within the debate on foster children. Second, it is notable that lawyers within the debate on foster children very rarely constructed the frame. Third, the frame is not a 'rights' frame. This confirms again that legal and policy framings are not necessary and exclusively about rights violations. The culture frame would be a 'rights' frame if lawyers for example argued that child fostering (and thus shared responsibility for children) is a cultural form of child education that should be respected by the state for example on the basis of Article 2 Protocol No. 1 to the ECHR or Article 27 of the International Covenant on Civil and Political Rights (ICCPR).[902]

902 Article 2 (Right to education) of Protocol No. 1 to the ECHR stipulates as follows: 'No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.' See for example ECtHR 14 June 2011, no. 38058/09 (*Osman/Denmark*), par. 78 in which the AIRE Centre contended that the refusal to reinstate Sahro's residence permit in Denmark contravened Article 2 of Protocol No. 1 to the ECHR. This part of the application was inadmissible for non-exhaustion of domestic remedies within the meaning of Article 35 of the ECHR (see par. 79-81 of the judgment). Article 27 of the ICCPR) stipulates as follows: 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.'

In terms of typology, the frame served within both debates to create a homogeneous group and therefore can be seen as a *characterisation* frame: an expression of how the 'other' is viewed. This frame gives us the answer to the question 'who are those asylum seekers?' Within the debate on foster children, the frame is closely related to the stereotype that being Somali means being potentially fraudulent. It serves to construct a group as deviant in order to justify its exclusion. Similarly, within the debate on forced marriage, the frame is an expression of how asylum-producing countries, in particular Islamic countries, are viewed. The frame is closely related to the stereotype that women in Islamic countries are oppressed by their violent and barbaric culture. It serves to construct a group as being 'other'. The existence of the culture frame within the legal debate on forced marriage illustrates what Sarah van Walsum called *orientalism in the courtroom*.[903] This characterisation is consistent and aligns with the characterisation nature of the vulnerability frame. This is visible when lawyers refer to the general vulnerable situation of women in the country of origin. Within this reasoning, women fleeing forced marriage are represented as 'cultural victims by default' and persecution is equated to persecution because of 'being a woman within a foreign culture'. Claimants fleeing forced marriage are vulnerable not because of forced marriage, but because of their culture. Vulnerability is not represented as being the consequence of the problems related to forced marriage but, instead, as inherent to their culture. Vulnerability is thus viewed as existing prior to forced marriage. Their inherent vulnerability, due to their culture, is the reason for facing forced marriage. This conveys the assumption that forced marriage only affects certain groups of foreign (non-western) women.

Instead of this cultural approach, lawyers can simply apply the refugee definition instead of engaging in problematic cultural views. In this context, they can argue for the persecution ground of 'political opinion' instead of social group reasoning. This can for example be done by focusing on the element of 'resistance' inherent to the act of fleeing forced marriage. When doing this, they could refer to the politicisation of forced marriage in marriage migration, civil law and criminal law. Jointly, they can argue that forced marriage is a political issue in countries of origin, just like in the Netherlands. Country reports, like those on Nigeria, facilitate this political approach. Indeed, we have seen that the 2012 Nigeria country report informs that the Child Rights Act (2003) is adopted by 24 of 36 states. The report refers to the organization named Women's Rights Advancement and Protection Alternative (WRAPA) that plays an important role in campaigning against forced marriages and communicates that due to the efforts of this organization, the number of forced marriages had been decreasing. Through dialogue and public sensitization campaigns, the WRAPA tries to prevent and fight against forced marriage. In this context, this organisation collaborates with NGOs and with the national Human Rights Commission. The report further mentions

903 Van Walsum 1995, *supra* note 901.

that the WRAPA succeeded in getting annulment of forced marriage in proceedings before the Supreme Court. In sum, this country information shows that the issue of forced marriage had been the subject of political struggle and debate in Nigeria. A woman fleeing forced marriage can be seen as having a political opinion, just like WRAPA.

In terms of frame paradigms, the frame within the debate on foster children is *cognitive* because Somalis have often been associated with fraud in various Dutch policies including family reunification and child benefit policy.[904] The frame functions as a representation of pre-stored knowledge about Somalis and it helps to organise claims of family reunification concerning foster children by linking them to a pre-existing cultural understanding of fraud. The state's understanding that family relations which are opaque to Dutch authorities potentially include fraud is pre-existent knowledge linked to new information regarding the increase in the number of Somali foster children. The cognitive nature of the frame is also visible when lawyers represent Somali family structure as being patriarchal so that the male adult son (sponsor) can be qualified as being the head of the family instead of his widow mother (grandmother of the child). Due to the fact that this knowledge (patriarchy) about Islamic countries, such as Somalia, is pre-existing, the frame as constructed by lawyers is cognitive. Although both lawyers and the state constructed the frame, it cannot be seen as interactive because lawyers did not construct the frame in response to its implicit mobilization by the state. The state constructed this frame within the fraud narrative, while lawyers occasionally employed it within the debate on the head of the family. There is thus no interaction between both constructions. In contrast, the frame within the asylum debate on forced marriage can be seen as *cognitive* but also *interactive*. The frame is *cognitive* because understanding forced marriage in terms of culture is a pre-existing knowledge in Dutch asylum jurisprudence[905] and in lawyer's arguments in gender asylum cases[906].

The frame thus functions as a representation of pre-stored knowledge about Islam and helps to organise asylum claims based on forced marriage by linking them to the pre-existing cultural understandings of forced marriage. However, unlike the frame within the debate on foster children, the frame within the debate on forced marriage is also *interactive*. We have seen that an important feature of interactive frames is that they are dynamic in nature

904 See for example the 2006 policy documents on child smuggling and child trafficking by Somali: *Kamerstukken II* 2005/06, 28 638, nr. 18; *Kamerstukken II* 2005/06, 28 638, nr. 27; *Kamerstukken II* 2006/07, 28 638, nr. 29. See also the following 2006 newspaper articles: C. van der Laan, 'Somaliërs frauderen massaal', *Trouw*, 16 February 2006, available at: <http://www.trouw.nl/tr/nl/4324/Nieuws/article/detail/1440245/2006/02/16/Somaliers-frauderen-massaal.dhtml> (last accessed 6 January 2019); 'Massale fraude onder Somaliërs', *Trouw*, 16 February 2006, available at: <https://www.trouw.nl/home/-massale-fraude-onder-somaliers-~ad32899e/> (last accessed 6 January 2019); M. Vermeulen, 'Somaliërs 'helpen' elkaar graag met een paspoort', *De Volkskrant*, 24 February 2006, available at: <http://www.volkskrant.nl/leven/somaliers-helpen-elkaar-graag-met-een-paspoort~a782599/> (last accessed 6 January 2019).

905 Spijkerboer 1999/2000, *supra* note 548, at p. 112 & 131.

906 *Ibid* at p. 82 & 155. See also: Arbel 2013, *supra* note 472; A. Macklin, 'Refugee Women and the Imperative of Categories', *Human Rights Quarterly*, vol. 17(2) 1995, pp. 213-277; H. Crawley, *Gender and Refugees: Law and Process*, Bristol: Jordan Publishing Limited 2001.

and constantly reconstructed. The interactive nature of the frame is visible when we bear in mind that it was constructed for two opposite aims: inclusion and exclusion. While the state makes use of cultural framing in order to mitigate the claim or to render it incredible, lawyers employ the culture frame to aggravate the claim or to represent is as credible. This shows that the frame is *double-edged*. Furthermore, we have seen that frames are not only constructed in interaction, but also structure the way in which the interaction takes place. Frames are (re)constructed during interaction, but on the other hand they also co-construct the form of interaction. So, because the state advances a cultural understanding of forced marriage, lawyers strategically employed a similar reasoning in order to argue for inclusion. Similarly, when lawyers construct the frame to make the claim credible, the state employs the same reasoning to reject the claim. For example, when lawyers argue that the claim fits the cultural background of the claimant, the state expects that the claimant be able to provide information about her culture. Further, it deserves to be observed that by making use of the culture frame, lawyers reproduce and reinforce the cultural understanding of forced marriage promoted by the state.

In terms of the triangular relationship between the individual, the family and the state, we see that both the state and lawyers employed the family-unit approach within the frame. Within the frame as constructed by the state in the debate on forced marriage, the family-unit approach is first visible when the state considers the forced marriage of a widow to her brother-in-law as a form of family solidarity and cultural mutual support. Within this approach, the state considers family members as interlinked individuals caring for each other within the unit of the family. The family is placed as an intermediary between the individual and the state, while this latter is out of the equation. Second, we have seen that the state promotes clan protection in the case of forced marriage. By doing this, the state represents a wide group of individuals as interlinked through their belonging to the clan-family. The clan-family is here the unit of analysis and not the individual. The problem and the solution are seen as belonging to the clan-family that comes to stand between the individual and the state. Within this reasoning, the state encourages individual clan members to support each other. It is notable that this form of clan protection is denied to foster children in the context of family reunion, while it is promoted in the case of forced marriage. This shows that this way of thinking is strategically used by the state and that it is not based on beliefs. Within the debate on foster children, the family-unit approach is visible when lawyers argue for family solidarity in the sense that 'Somalis take care of their parents when they are aged and disabled and it is not acceptable to abandon them'. Within this approach, the sponsor and his parents are represented as interlinked individuals. The family is the unit of the analysis, not the individual, while the state is out of the equation.

## 3.4 Reflection on the framing process

The first reflection I would like to make is that the debate on foster children resulted in social change over a period of almost five years (2009-2013), while the debate on forced marriage did not over a period of almost ten years (2004-2014). In other words, while the 'boy at the dike' frame was successfully challenged within the debate on foster children, it remained frozen within the debate on forced marriage. In this paragraph, I juxtapose the two framing processes and show that lawyers have a key and crucial role in both processes. I will do this by contrasting: the relation between the frames (par. 3.4.1); the lawyers' strategies (par. 3.4.2); the interaction between legal and policy framings (par. 3.4.3); and finally by reflecting on the bridging role of lawyers (par. 3.4.4).

### 3.4.1 Relation between frames

Within the debate on foster children, the state simultaneously constructed the culture frame in order to reinforce the 'boy at the dike' frame. In response, lawyers mobilized the vulnerability frame both within and beyond courtrooms with policy change as a result. The lawyers' vulnerability frame functioned as a catalyst for the vulnerability frame constructed by NGOs and the Children's Ombudsman. A frame alliance between legal frames and policy frames was thus achieved. This frame alignment had a positive effect on the dynamism of the framing process with the result that the state reframed the 'boy at the dike' frame by re-constructing the vulnerability frame when it referred to child trafficking. Because the 'boy at the dike' frame was no longer convincing due to the powerful and largely mobilized vulnerability frame, the state transformed the 'boy at the dike' frame in order to fit the frame of child advocates. This variant of the vulnerability frame in fact served to support the 'boy at the dike frame', just like the culture frame. However, when the vulnerability frame was re-constructed by the ACVZ, the state's frames were no longer convincing and policy change occurred.

Within the debate on forced marriage, the 'boy at the dike' frame appears to be well functioning, and for this reason the state keeps silent and reinforces the frame through the culture frame in court. When lawyers employed the same culture frame, they indirectly reinforced the pre-existing 'boy at the dike' frame. This frame survived because lawyers replied by constructing the culture frame that is already employed by the state. Although they also constructed the vulnerability frame, this frame had no effect on the debate because the constructed vulnerability was a general one, which is not efficient in refugee claims requiring individual vulnerability, and because their lawyering remained within courtrooms. In this way, frame freezing occurred: both 'the boy at the dike' and the culture frames can be seen as frozen.

### 3.4.2 Strategies

In terms of strategies, lawyers succeeded within the debate on foster children to capture the parts of the state having the power to change, namely: the parliament, the Council of State and the ACVZ. Lawyers first pushed social change (abolishment of the housing rule and thus amendment of the actual family bond) via courts and the Council of State by following the strategy of 'frappez, frappez toujours!' This illustrates the potential of this legal strategy. However, the way in which this strategy worked out in the context of reunification interviews and forced marriage shows that it is not always successful. In the context of reunification interviews, lawyers pushed social change (implementation of article 12 of the CRC in policy guidelines) through the combination of the strategy of 'frappez, frappez toujours!' and alliances with NGOs and the Children's Ombudsman. Although the lawyers' advocacy for child friendly interviews was frustrated within the legal debate, lawyers did not limit their advocacy to courtrooms, but instead sought other channels to continue their advocacy for the larger cause of child-friendly interviews. By looking for coalitions beyond courtrooms, lawyers adopted a de-centred, non-instrumental and social constructionist view of law, rather than placing the courts in the centre-stage, as many lawyers are inclined to do. Cause lawyering beyond courtrooms, for example through coalitions with NGOs, is thus a successful strategy for achieving social change as it stimulates frame *alignment* and alliances with the potential to influence those parts of the state with the capacity of effecting change. After having lost the 'battle' within the legal debate, lawyers succeeded through coalition with key policy actors to push policy change and achieve the large cause of respect for child's rights, especially the right to have a voice during reunification interviews. This policy change demonstrates the potential of coalitions beyond courtrooms when the strategy of 'frappez, frappez toujours!' appears to be frustrated within the legal debate.

Unlike lawyers within the debate on foster children, refugee lawyers dealing with asylum claims based on forced marriage have not been involved in a broader legal and political movement beyond courtrooms, for example through coalition with NGOs. They thus followed a centred approach to law. Within courtrooms, they adopted the 'go with the flow' strategy that reaffirms the power of the state, although it might help to defend individual interests: instead of engaging in a larger cause within and/or beyond courtrooms, namely the cause of the recognition of forced marriage as persecution and/or the incorporation of forced marriage in the Aliens Circular, lawyers followed the 'go with the flow' strategy that might help to defend individual interests, but not the interest of women fleeing forced marriage as a 'group'. It thus appears that the opportunity to bring about social change increases when lawyers seek coalition beyond courtrooms with other actors such as NGOs and monitoring institutions.

### 3.4.3 Interaction between policy and legal framing

An important aspect of the framing process I would like to reflect on is the interaction between legal and policy framing. The combination of policy documents and case law in this study allows us to look at this aspect of the framing process. As discussed below, legal and policy framing are not two isolated framing activities, they are interlinked.

Within the debate on foster children, we see that the 'boy at the dike' frame and the culture frame were initially articulated in policy framing and then reproduced by the INS in decision-making and in its arguments in court. The vulnerability frame also first emerged within the parliament before lawyers reconstructed it within courtrooms in response to the 'boy at the dike' frame. Through coalition with NGOs and the Children's Ombudsman, the reconstructed vulnerability frame again reached policy framing. This chronology illustrates that legal framing within courtrooms is preceded and followed by policy framing. This shows that legal and policy framing are not two isolated framing processes, but that they are interlinked and influence each other. The link between legal and policy framing is also articulated when the state secretary refers within the political debate to the jurisprudence of courts and the Council of state regarding reunification interviews (Ch2, par. 2.3.4). In terms of the nature of framing, it deserve to be noted that the policy framing of NGOs and the Ombudsman is basically legal since their arguments are based on legal norms, namely the CRC and the ECHR. Thus, legal framing does not exclusively take place within courtrooms but also within the public debate and society in general.



In the context of the debate on forced marriage, there was no political debate on forced marriage in asylum law. There was thus no policy framing, except in the ACVZ report and Nigerian country reports. We have seen that the policy culture frame included in Nigerian country reports is reproduced within legal framing. In addition, both political and policy silence within other country reports are reproduced within legal framing, by the silence of the Council of State. Silence is also reproduced through the lawyer's strategy of 'go with the flow' and by keeping themselves hidden within courtrooms. Regarding the policy framing included in the ACVZ report, this should be seen as legal framing because the ACVZ basically relied on the refugee definition and previous national case law. The INS reproduced the ACVZ framing in its decisions and in its legal arguments in court. Regarding legal framing by lawyers, we see that this is constrained by precedent. The lawyer's constant use of the persecution ground of 'particular social group' illustrates the power of the precedent in legal framing. Since this argument is the most popular and successful in cases of female asylum seekers, and since some courts as well as the ACVZ accepted this persecution ground, legal framing by lawyers is constrained and it was difficult to convince the court to admit the ground of political opinion for example. The 'go with the flow' strategy also exemplifies how the precedent works. Since FGM, HBV and homosexuality are more successful claims in

comparison with forced marriage, it is difficult for lawyers to change the flow partly imposed by the failure to independently classify forced marriage as an issue in country reports.

This contrasted picture enables us to conclude that legal framing, when combined with policy framing, can escape legal precedent and stimulate social change. Indeed, the combination of the two processes in the case of foster children resulted in implementing article 12 of the CRC in times that the Council of State consistently argued that this provision is not applicable in the case of reunification interviews. In contrast, as will be further discussed below, the lack of a coalition and interaction between the lawyers' legal framing and policy framing in the case of forced marriage is partly behind the absence of legal change.

### 3.4.4 Bridging role of lawyers

A final aspect I would like to reflect on concerns the *bridging* role of lawyers. Within the framing process concerning foster children, frame takeover would not have happened without the bridging role of lawyers. The ideology of lawyers, NGOs and the Children's Ombudsman regarding children rights were bridged and linked to each other thanks to cause-driven lawyers who sought collaboration and alliances after having lost the legal battle (concerning reunification interviews) in courts. Lawyers expanded and widened their target group by mobilizing NGOs and the Ombudsman to action, namely: advocacy for the implementation of article 12 of the CRC and thus for giving the child space to have a voice during interviews and family reunification in general. The lawyers' crucial role is further illustrated by the way in which they reacted in the framing process regarding forced marriage. The fact that lawyers failed to act beyond the courtrooms can partly be behind the political disinterest of NGOs in the issue of forced marriage in asylum law. We have seen that NGOs did not pay attention to the issue of forced marriage in asylum law. Because there was no cause-driven lawyering beyond courtrooms, social change was frustrated. Obviously, when lawyers keep the issue of forced marriage hidden in courtrooms and fail to inform NGOs (and other monitoring bodies) about the practice around it, the chance that NGOs include forced marriage in their advocacy agenda becomes small, especially when women fleeing forced marriage cannot easily directly complain to NGOs. In other words, when lawyers do not play their *bridging* role, like lawyers dealing with the cases of foster children, there is a chance that the issue would not reach NGOs. Similarly, the failing of NGOs to include forced marriage in TOR reports could be due to the lack of signals from lawyers. Should lawyers communicate that country reports do not contain information about forced marriage and that, for this reason, they are limited in terms of evidence sources, then NGOs would most probably include forced marriage in their TOR advocacy agenda. Lawyers limited their role to individual lawyering within courtrooms. Particularly, they failed to form alliances with refugee organizations (such as the Dutch Refugee Council) and/or other NGOs working on the issue of forced marriage in the context of integration and marriage migration (such as

Femmes for Freedom). By failing to act beyond the courtroom, lawyers failed to undermine the state's silence and the 'boy at the dike' frame. Their non-proactive attitude beyond courtrooms prevented frame alignment between their frames and eventual NGOs frames. In this way, transfer of a potential stronger vulnerability frame to a state entity, such as the parliament or the ACVZ, is prevented and for this reason social change was frustrated.

## SECTION 4: CONCLUDING WORDS

In this closing section, I present the overall conclusion of the thesis (par. 4.1), some methodological reflections (par. 4.2) and suggestions for further research (par. 4.3).

### 4.1 Overall conclusion



The previous sections together form the answer to my overreaching question and lead to the overall conclusion of this thesis, namely that the dilemma of doing justice, through law, to individual freedoms without jeopardizing family life, and vice versa, is negotiated in two divergent ways but in both cases three similar frames dominate the debate. The 'boy at the dike' frame portrays asylum seekers as potential intruders by questioning the legitimacy of their family bonds; the vulnerability frame victimizes them; and the culture frame is nurtured by orientalist understandings of their family lives. The first is a unilateral default state frame, while the other two frames are double-edged as they are constructed both by the state and by lawyers. While the state constructs the vulnerability and the culture frame to reinforce its default frame, lawyers mobilize both as counter-frames. Within state frames, the relationship between the individual, the family and the state is unstable. The state endorses the individualistic approach when it devalues and questions family bonds based on foster care and when it represents those family ties as a potential source of oppression. In contrast, the state embraces the family-unit approach when it privatizes forced marriage; when it widens the scope of state protection to include protection by male family members; and when it represents forced marriage as a negotiable cultural affair. In the first scenario the state claims control over the family, while in the second it refrains from claiming any control over the family. In both scenarios, however, the state strives to maintain and reinforce migration control. The effectiveness of counter-frames constructed by lawyers depends on the strategies through which they are mobilized. While children lawyers stimulated social change by embracing a de-centred approach to law, refugee lawyers dealing with forced marriage failed to challenge the pre-existing power relation because they went with the flow and adopted a centred approach to law.

## 4.2 Methodological reflections

Because this study employed critical frame analysis to analyse not only policy documents but also case law, it is important to reflect on how it is applied and what its added value has been in comparison with other approaches such as the legal-dogmatic approach.

In the first place, it is important to observe that refugee case law consists of competing views on problems and solutions put forward by the administration, lawyers and judges. In this context, it is useful to bear in mind that law is ''a central meaning-making institution within which challengers do 'interpretative work' (...) and socially construct their grievances, identity and objectives'.[907] Case law should therefore be suitable for frame analysis, just like policy documents. The way in which case law can be analysed is described in the section on data analysis (section 6, Ch1). A key element is to look for aspects beyond the master frame of 'rights' and 'law', as legal framing is not necessarily and exclusively about rights violations. The criteria to be taken into account when looking for guiding frames are threefold: frequency of the frames based on the perception of the researcher; complexity of the frame in the sense that different actors construct the same frame for different aims; and the broadness of the frame in the sense of whether it tells a comprehensive story including not only the problem definition and solutions, but also a representation of asylum seekers concerned. Further, it is critical to look for implicit frames which seem like common sense, because they are the most powerful ones.

This thesis shows that frame analysis of case law, as employed in this study, has an added value in comparison to a legal-dogmatic analysis. A legal-dogmatic analysis would also help to identify restrictive policies, the vulnerability reasoning and culture-based argumentation. However, the debate would not be presented around these three patterns and would rather be centred on law and rights. In contrast, presenting these patterns in the form of frames helps to comprehensively map the diverse ways in which involved actors negotiate the dilemma under study. Frame analysis has here not only enabled the identification of existing frames, but also helped gain insight to the content of the frame in terms of its dimensions: what is the problem's cause and who is responsible? What should the solution be? Who should or should not take action? How are asylum seekers portrayed? Frame analysis also offers insight to the complexity of the frame and allows for the identification of double-edged frames. These insights would not easily be gained through a legal-dogmatic approach within which rights and law frame the analysis.

907 Pedriana 2006, *supra* note 153, at p. 1723.

Another added value of frame analysis as employed is this study is reflected in the findings based on the voice/silence dimension. This analytical tool enabled the analysis of whose narratives are silenced, whose are given prominence and the processes by which this is achieved. A legal-dogmatic approach would in principle not pay attention to the 'voice/silence' issue and would usually focus on 'what is said' rather than 'what is not said'. So, without this critical dimension, less attention would be paid to the silence of the Council of State on forced marriage and the 'go with the flow' strategy of lawyers because a legal-dogmatic approach would most probably focus on cases which are rich in discussion of forced marriage and overlook those in which the issue is silent. Thus, when analysing case law, it is important to pay attention not only to 'what is said' but also to silences in courtrooms. Furthermore, without this critical dimension we would not identify the key role of the TOR country reports and the role of lawyers and NGOs in this context. Finally, without the voice dimension we would not pay attention to the potential of a strategy that combines legal and policy framing through coalitions between lawyers and other refugee advocates. In this vein, it is important here to observe that this study has showed that a critical frame analysis of case law is enriched when combined with that of policy documents. This helps to contextualise the legal framing process and to identify interaction between the two framing arenas.



## 4.3 Further research

It is important to bear in mind that this study covers a specific period of time. Because the debate is likely to change over the years, frames would also change. Hence, it would be interesting in terms of further research to conduct a critical frame analysis of both debates over other periods, to identify frame shifts and possibilities of (past) frame alignment. It is equally crucial to note that this study addresses two family-related asylum claims and does not articulate the whole landscape of the debate on family-related asylum claims. In this vein, it is pertinent for future research to conduct a larger cross-issue study examining the dilemma of doing justice, through law, to individual freedoms without jeopardizing family life and vice versa. When doing this, including interviews with key actors (lawyers, NGOs, policy makers and asylum seekers who are at the heart of the debate) would complement and enrich the analysis.

# Epilogue

*Deux poids, Deux mesures*

Sahro's story illustrated that when migration law overlaps with the family, a dilemma emerges: how to do justice, through law, to individual freedoms without jeopardizing family life, and vice versa? When this dilemma is negotiated, the state creates personal ties and builds boundaries between the individual, the family and the state by defining the role of each. The study reported in this thesis permits to take a broad look at such processes. It first shows that while the state adopts the individualistic approach in the context of family reunion for foster children of refugees, it embraces the family-unit approach in the case of asylum claims based on forced marriage. Second, this study shows that the state approach to family ties in refugee law diverges from its approach in regular migration law. In contrast to the individualistic approach within the policy regarding foster children of refugees, the state follows the family-unit approach in the policy regarding regular family reunion for children. And, in contrast to the family-unit approach within the debate on forced marriage in refugee law, the state follows the individualistic approach when it concerns forced marriage in regular family reunion. The two tables below outline the elements of this disjuncture:

**Table 1.** Disjuncture in policies governing family reunion for children (2009-2013)

| **Regular migration law:** *Family-unit approach* | **Refugee law:** *Individualistic approach* |
|---|---|
| Article 8 ECHR is guiding. | Article 8 ECHR is not applicable. |
| Family life only ends under exceptional circumstances. | Family life ends easily. |
| The parent's decision to leave the child behind is reversible. | The parent's decision to leave the child behind is irreversible. |
| Diversity in parenthood is tolerated.<br><br>Family bond is 'private': state non-intervention. | Diversity in parenthood is suspect and unwanted: fraud and child trafficking.<br><br>The one-headed family model is promoted.<br><br>Family bond is 'public': state intervention. |

**Table 2.** Disjuncture in policies responding to forced marriage (2004-2014)

| **Regular migration law:** *Individualistic approach* | **Refugee law:** *Family-unit approach* |
|---|---|
| Politicization and problematisation of forced marriage. | Political silence and un-problematisation of forced marriage. |
| Forced marriage is a human rights violation. | Forced marriage is excluded from the scope of human rights and the Refugee Convention. |
| State intervention: the state ascribed itself a positive obligation to protect (potential) victims. | State non-intervention: privatization of protection (protection by male family members, NGOs and the clan-family). |

On the one hand, the state tells foster children and their parents that they are not ready to enjoy one of the freedoms children enjoy in the context of regular family reunion, namely a dynamic family life. On the other hand, the state informs women and men who seek asylum

after having fled forced marriage that they are not entitled to enjoy one of the freedoms valued in regular migration law, namely the freedom to choose a spouse. This divergence in state approaches articulates a '*deux poids, deux mesures*' policy. This policy is, in my view, not exclusively based on ideological understandings of family norms but mainly on the state willingness to strategically control the entrance of specific groups of asylum seekers. The individualistic approach, on the one hand, and the family-unit approach, on the other, function as strategic tools to be used to (not) interfere with the family lives of asylum seekers whenever the state sees fit. The specious 'individualism/family-unit' dichotomy seems, therefore, to function as a strategic tool similar to the 'colonial repugnance clause' that was used by most colonial powers to set 'the limits of what they would tolerate from the subjugated people' and 'to interfere with the internal affairs whenever the colonial governments saw fit'.[908] The frame serves to mask and justify the state strategic choice. While state frames faced successful resistance in the case of foster children due to cause-driven lawyers who embraced a decentred approach to law, it was reinforced in the case of forced marriage due to lawyers who went with the flow and adopted a centred approach to law.

908 K. Von Benda-Beckmann, 'Western law and Legal Perceptions in the Third World', in: Berting et al (eds), *Human Rights in a Pluralist World: Individuals and Collectivities*, London: Meckler 1990, pp. 225-236, at p. 235 cited in van Walsum 1995, *supra* note 901.

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Younous Arbaoui (1978) worked as primary school teacher in the early 2000s, while studying law at the University of Marrakech. After having completed his bachelor in public law, he moved to Amsterdam in 2004 to study Dutch, international and European law. During his studies, he worked as a volunteer at the *Rechtswinkelmigranten* in Amsterdam. In 2011, Younous joined the VU migration law section as junior researcher and then started his PhD research combined with teaching. Between 2015 and 2017, Younous was involved in various research projects while finishing his PhD. He conducted research for Amnesty International, the Dutch Refugee Council and the International Organization for Migration. In this latter context, he established the *Clinique Juridique Hijra* (migration legal clinic) which offers free legal advice to asylum seekers in Tangier. Between 2017 and 2019, Younous worked as advocacy & coordination officer for the *Plateforme Nationale Protection Migrant* in Rabat.