


# WOMEN AND IMMIGRATION LAW

New variations on classical feminist themes

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## INTRODUCTION

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In the fall of 2004, the Vrije Universiteit Amsterdam organised an international conference on women and immigration law in Europe, entitled 'Gendered Borders'. Traditionally, studies on migration and immigration law have focused on male migration. Yet women have always played an important role in international migration, and there is evidence that their share in the total number of migrants has increased in recent years. It is estimated that in the more developed regions of the world – among others Western Europe – women now represent at least 50 per cent of all migrants. The estimated total number of female migrants living in Western Europe was estimated at 9,229,682 in 2000.<sup>1</sup>

The purpose of the 'Gendered Borders' conference was to analyse and evaluate immigration law in Europe from a gender perspective. In the course of the conference, it became clear that the issues that emerged were not only relevant to immigration law, but referred back to some classical issues of second-wave feminism: labour, equality and sexual violence. Moreover, during the discussions held at the conference, we realised that many fundamental questions of feminist debate remain unresolved. What started as a conference over the apparently marginal theme of women and immigration law ended in reflections on the continuing relevance of classical feminist issues and of the undiminished urgency of the theoretical questions raised in the classical feminist debates.

These reflections provided the inspiration for this book. The chapters in this volume are revised versions of a selection of papers presented at the conference. They address a variety of issues relevant to immigration law: asylum, family reunification and labour migration,<sup>2</sup> and do so from perspectives ranging from abstract and theoretical to down-to-earth empirical. What they all share is a specific rendition of feminist themes: one presented from the periphery. As they make clear, many issues that have been declared (at least partly) resolved in dominant discourse have kept their original urgency when presented from a subdominant perspective.

In this introduction, we shall try to make clear how immigration law affects classical feminist themes and, conversely, how feminist theory and

activism might help make current-day immigration law in the EU less vulnerable to the neo-conservative political agenda. In this introduction, all cross-references to authors relate to chapters in this book.

### **New variations on classical feminist themes**

Since World War II, feminists in Europe have managed to place a number of issues on the political agenda, including the hierarchical nature of family relations, the skewed nature of the labour market, and reproductive rights and protection against gendered violence. In terms of formal equality, they have made important gains, such as equal rights in family law and equal treatment in labour law and social security law. Moreover, thanks to modern contraceptives, their hard-won access to paid labour, and social benefits provided by the welfare state, women in the European Union (hereafter EU) have won a certain degree of autonomy vis à vis male partners. One of the results of this increased autonomy has been the establishment of shelters from domestic violence, and penal reforms expressing a more responsive attitude towards victims of gendered violence. The dominant perception is, then, that most feminist issues have been (at least partly) resolved.

But viewed from the perspective of most women, many of the classical feminist issues retain their urgency. This is particularly true for those women who are simultaneously confronted with both gendered and other modes of exclusion such as sexual orientation, ethnicity/race, immigration status and/or class. For, in order to acquire or maintain their autonomy, women in the EU must be able to both maintain control over their reproductive capacities and have access to sources of income and/or material support outside of their family relations, that is: to paid employment and/or social benefits (Gill and Sharma). Particularly those women who must contend with multiple forms of exclusion are hard pressed simultaneously to hold their own in all the spheres of activity that shape the life of a full adult participant of society.

Those women who, in some way, engage with immigration law, must contend with at least two modes of exclusion: gender and nationality. By adopting their perspective, we aim to bring the ongoing gendered tensions in European societies back into view.

### **Nation and patriarchy**

Increasingly, women in the EU have gained access to paid labour. However, a hierarchy in types of labour remains, and women's work still assumes a sub-dominant position. If anything, the male-dominated sector of regulated, full-time, steady employment has gained in stature as the major prerequisite for citizenship in the social rather than the formal sense of the word, i.e. in the sense of full membership of a society (Bosniak).

Social citizenship is associated with a separate sphere of its own, defined in terms of human dignity and individual freedom, which allows for self-fulfilment, social interaction and civil involvement (Mundlak). Immigration law and notions of social citizenship are related, since immigration law regulates legal admission to a national society. This is a selective process, and the criteria used to select immigrants are related to notions of social citizenship. Thus a criminal record, for example, will often preclude admission. Hence, immigration law can give an insight into how the dominant concept of social citizenship is being constructed.

A major project of social and Christian democracy has been to ensure its citizens of the rights and privileges associated with social citizenship (Mundlak). But both the sphere of paid labour and the sphere of freedoms that social citizenship implies can only exist thanks to the reproductive labour that is traditionally performed by women within family relations – labour that is unacknowledged, unseen and unpaid (Bosniak). This reproductive sphere is not pre-determined, but constructed along with, and in apposition to, the male-dominated spheres of paid labour and social citizenship.

Although paid labour and social citizenship are explicitly linked to each other as interdependent spheres, the reproductive sphere is still largely constructed as radically distinct from both. Involvement in the reproductive sphere provides little or no credentials for integration into social citizenship, so that women who are heavily committed to responsibilities in the reproductive sphere receive at best marginal support from the welfare state. On the other hand, the dominant model of full-time paid labour does not accommodate competing commitments in the reproductive sphere.

Performances that take place within the reproductive sphere are not accredited a market value; nor are they perceived of as aspects of human dignity inherent to social citizenship, that should be protected through services and/or measures of social security provided for by the welfare state (Mundlak; Haidinger). As a result, important components of women's identities as adult participants in society are excluded from the dominant model of social citizenship. At the same time, by keeping the predominantly reproductive sphere largely isolated from both market and state involvement, the European welfare state preserves patriarchal notions of men's identity as adult participants in society: that of breadwinner and head of the family.

In a number of ways, immigration law reveals how relevant patriarchal relationships still are, and how intimately they have become tied in with processes that regulate access to membership, in both the formal and the social senses of the word. As Mullally's contribution shows, family norms, reproductive rights and freedom of movement are closely linked. By leaving a country, women can escape the control of a patriarchal moral order, thus challenging and disrupting that order by claiming certain freedoms abroad. On the other hand, by entering another country, migrant women pose a challenge – as potential mothers – to rules that link national belonging to

birth and/or family bonds. The immigration and nationality law regimes of receiving countries reveal anxieties concerning the uncontrolled sexuality of female migrants (Mullally).<sup>3</sup>

Immigration law also exposes how the right to establish one's domicile within the nation – surely a prerequisite for social citizenship – continues to be the privilege of those who adhere to the dominant male model of citizenship, defined in terms of a full-time breadwinner. This is evident in the income requirements that apply in rules regulating family reunification (De Hart; Mullally). Immigrant wives, for their part, are kept in a dependent position within their family relations during the first years of their stay in the EU (Raissiguier; Gill and Sharma). In some EU countries they are even excluded from regulated labour relations and the accompanying securities offered by the welfare state (Haidinger).

### Class and the gendered division of labour

As argued above, in order to resist patriarchal authority and win autonomy within the reproductive sphere, women must have access to paid employment and/or social benefits. But to do that, women must comply with a dominant model of social citizenship that provides little or no scope for meeting responsibilities in the reproductive sphere. To the extent that they are committed to such responsibilities, they remain dependent on their (male) partner and/or other family members, either to provide the material security that they are unable to acquire for themselves, or to relieve them of at least some of their reproductive responsibilities, or both at the same time.

Some women in the EU, particularly those who form part of dual-earner households, have been able to avoid or at least diminish such dependency by shifting their reproductive responsibilities onto shoulders even less visible than their own – those of outsiders with no access to citizenship at all (Haidinger; Mundlak). As Agustín argues in her chapter, this shift involves not only a transfer of care work, but of sex work as well.

The work of both domestics and sex workers is tainted by its association with the reproductive sphere. At the same time, both types of work disrupt the construction of the reproductive sphere as distinct from the male-dominated spheres of paid labour and social citizenship. In the case of domestic workers, this happens by bringing paid work into the intimate sphere of the home; in the case of sex workers, by bringing those acts of intimacy most strongly associated with the reproductive sphere outside of the home and into the sphere of paid labour. The resulting tension is resolved in the case of domestic workers by denying that their work is to be placed on a par with paid labour (Haidinger; Mundlak); in the case of sex workers, by treating their work as an aberration and thus refuting its worth as a qualifier for social citizenship (Agustín; Crowhurst).

Denied legitimacy, these women cannot benefit from even the limited

protection provided by family relations, nor from the protection provided by labour law and the accompanying security net provided by the welfare state (Mundlak; Haidinger). Such an arrangement can only exist as long as the women involved are prepared to accept it. Lack of legal status is clearly one of the factors that explains their willingness to do so. In combination with their exotic identity, the illegitimate nature of their work also helps obscure the tensions within EU societies that they have been enlisted to resolve. As long as the reproductive work that they do is perceived as taking place somehow outside of the nation, the legitimacy of full-time labour as the primary mode of access to social citizenship can continue to go unchallenged (Mundlak).

Although women have been granted formal equality, the possibility of even approaching substantive equality as full participants in society threatens to become the privilege of a specific class of women: those with legal status and sufficient means to hire the services of those lacking both status and access to alternative sources of income. For those EU women who cannot afford to delegate their reproductive responsibilities, full integration into social citizenship is becoming increasingly problematic. Hence denial of the work being done by migrant domestic workers not only leads to a sharpening of the class distinctions between those workers and their citizen employers, but to a sharpening of the class distinctions between their citizen employers and the less affluent citizen women as well.

### Ethnicity and gendered violence

As argued above, a current project of European welfare states is to enable a specific mode of social citizenship, based on the male model of the full-time breadwinner. To the extent that state and semi-state institutions must confirm whether or not applicants qualify for help or support, they are not only agents of welfare, but also of control. Immigration law ties into this project in two ways: first, by conferring legitimacy on women who enter as citizens' wives, but then only to the extent that they are prepared to relinquish their autonomy; and second, by denying legitimacy to those women whose labour threatens to expose the inherent contradictions in the dominant mode of social citizenship.

One of the themes that is reflected most consistently throughout this book is how migrant women who lose legitimacy by leaving their citizen husbands and women who are denied legitimacy because of the work that they do, are alternatively demonised or represented as victims of manipulation, deceit, and/or violence at the hands of non-European men (Crowhurst; Mullally). Concern with the violence that many immigrant women have to contend with has rekindled an ongoing feminist debate concerning gendered violence, but now from a specific, culturalist perspective (Bhabha).

The core of this debate concerns the nature of gendered violence. Should



it be seen as the expression of men's inherent aggression and women's vulnerability? Or should it be seen as the expression of an ongoing struggle for control: over women's labour, their sexuality and reproductive capacities, their access to resources, their children? Those who adhere to the first view advocate further state repression of male aggression and more protection for (potential) female victims. Those who adhere to the latter view call for measures to support women in their struggle to gain control over the various facets of their lives.

In immigration law, the terms of this debate have shifted in the sense that where formerly men and women have been essentialised in biological or psychological terms, now they are being essentialised in ethnic terms. Through a gendered representation of the alien Other, immigration law – and in its wake, feminist debate – have become closely entwined with a growing preoccupation, within the EU, with matters of ethnic identity. To an increasing extent, distinctions between EU citizens and third-country nationals are being constructed through contrasting representations of gender relations. European societies are being drawn in terms of gender equality and women's autonomy, while male 'third-country nationals' are being represented as archaic, patriarchal and/or violently misogynist, and female 'third-country nationals' as passive, vulnerable, and oppressed. Ironically, those wishing to gain residency rights within the EU for themselves or their families have to play the roles that portray their ethnic difference: that of a full-time breadwinner with a dependent spouse, or that of the passive victim of male aggression (De Hart; Raissiguier; Crowhurst). As a result, ethnic tensions are reinforced, rather than being resolved.

#### **Gender conflict: not resolved but denied**

Immigration law forms one of the techniques used to delineate a national society. One of its effects is to stamp all who engage in this branch of law with the mark of the outsider, expressed in both legal and ethnic terms. As a result, issues that mesh with immigration law tend not to be acknowledged as pertinent to the national society involved, but are viewed as specific to those branded as outsiders. The same applies to those gendered tensions, within EU societies, in which immigrant men and women play their part.

Lines of nationality and ethnicity have come to interfere with the distinctions of gender and class, linking legal access to the nation to patriarchal relations, and defining social citizenship in terms that exclude many women. In the process, the relevance of the resulting gender conflicts for the national societies involved are being denied. However, once we accept that gender conflicts involving immigrants are being played out in the heart of European societies, it becomes clear that gender conflicts have not been resolved there, but have simply been projected onto people who have been symbolically placed on the outside.

In addressing these unresolved tensions, we run up against a number of questions. Already familiar to feminist theorists, they re-emerge in the context of immigration law. Should sex be defined as work? Should care be defined as a civic virtue? And should women strive to have the reproductive sphere integrated into the sphere of paid labour and/or into that of social citizenship, or is the price – in terms of privacy and family life – too high to pay, not only for men, but for women as well?

#### **Women and immigration law in present-day Europe**

Towards the end of the 1990s, immigration law in the EU bore the stamp – albeit in varying degrees – of neo-conservative thought. By this we mean a way of thinking that declares European (or western) arrangements to have universal value; that aims to protect European identity against the invasion of the foreign, inherently non-European (hence non-universalist) legacies of particularly male immigrants; and which assumes this is best done by giving the state considerable discretionary powers.

Gradually, this way of thinking came to incorporate the issue of women and immigration law into its political agenda. As argued above, the western feminist project has come to be seen as finished, by both media and dominant political fora. The purportedly emancipated position of European women is being contrasted with that of their immigrant (especially Muslim) sisters, who supposedly differ in that they are still suffering under a patriarchal system and are in urgent need of consciousness raising. Part of this process has been a selective sensitivity to the issue of gendered violence in the context of immigration and asylum law.

#### **Women in asylum law**

Asylum seekers in Europe come predominantly from countries that have freed themselves from European colonisation within the past 50 years, and from states that have emerged from the former communist countries (former Yugoslavia, Chechnya). These frequently fragile states have been further disrupted by structural adjustment policies imposed upon them over the past few decades by the International Monetary Fund (IMF).

Frequently, the resulting tensions have sparked off coups or civil wars, where particular groups (often defined in terms of religion or ethnicity) have sought to oust the sitting regime or to establish an independent territory of their own (Sri Lanka, Chechnya, former Yugoslavia). Such civil wars have often involved sexual violence against 'enemy' women in order to undermine enemy morale and/or promote ethnic purity. In the subsequent struggle to (re)establish and maintain national coherence, moral precepts regarding women's behaviour have often been stressed as normative markers of shared identity, with far-reaching consequences for both women's freedom to participate in public life

and their position within family relations. This has been evident in countries as diverse as Iran and Croatia.

In some regions, most notably the Horn of Africa and Western Africa, national coherence has collapsed completely, resulting in continuous warfare, often fuelled by foreign supplies of arms, in which violence becomes an end in itself. In such situations, women have become particularly vulnerable to (sexual) violence, while dependence on their own militias has made them vulnerable on that front as well. This has resulted in a radical limit to women's freedom of movement within such war zones (Markard). In sum, many women flee situations in which they feel threatened by members of their own families, by militias putatively set up to defend them, or by enemy fighters in a civil war.

Feminist critique of western asylum law has long argued that the concepts used to apply the refugee definition recognise women only as the wives or daughters of male refugees. Women's political activism is ignored, and sexual violence is relegated to the private sphere, beyond the scope of asylum law.

In the end, feminist campaigns have proved quite successful in getting regulations introduced, stipulating that sexual violence – whether instigated by militias, family members or enemy forces – qualifies as an act of persecution as defined by the Refugee Convention. Consistent to this, the need for asylum procedures that enable women to talk about their experiences with sexual violence has become widely acknowledged. However, quite independent from these developments, asylum procedures in Europe have by now deteriorated to such an extent that it has become questionable whether women will be able to benefit from these substantive improvements.

So while current asylum policies are explicitly attentive to those asylum seekers who can provide graphic illustrations of the inadequacy of 'non-western cultures' (e.g. victims of female genital mutilation), they have at the same time incorporated so many barriers to admission, that many asylum seekers never make it to the EU in the first place (third-country policies, pre-boarding checks). Of those who do make it that far, few, including women, stand a fair chance during the sharpened procedures.

### Trafficking, family migration

Recently, other areas of immigration law have also come to express concern for gendered violence, but again in highly selective ways. Thus images of sexual slavery and abuse connected to the issue of human trafficking help legitimise further restrictions on immigration, increased border control, and the ongoing criminalisation of unregulated travel. The expressed concern for the women involved, however, only reaches as far as this repressive agenda goes. Women are offered protection if, and only as long as, they can be of use in the prosecution, conviction, and incarceration of those charged with

transgressing criminal and immigration laws. Only those women who are willing and able to attest to their status as victim, and thus confirm the legitimacy of these repressive acts, are granted even this degree of protection (Crowhurst). What is consistently denied is that the repressive measures these women are asked to support actually exacerbate the problems they must confront (Andrijasevic; Agustín).

Another example of the hypocrisy of immigration law has been the reaction to increased gender equality within family and nationality law. Ironically, such reforms have not resulted in women citizens enjoying a right to domicile equal to that held previously by men. Anxious to prevent foreign men from gaining easy access to legal residence by marrying citizen women, immigration authorities have placed new restrictions on family reunification. Among other things, protection against the expulsion of foreign family members following a criminal conviction has been reduced. As a result, citizen women married to foreign men still lack security of residence for their families, while citizen men have acquired a new possibility to achieve patriarchal authority within their marital relations, namely by marrying an immigrant wife who will be dependent on them for her right of residence (de Hart).

In most EU countries, immigration law is starting to express some awareness of immigrant wives' vulnerability to domestic violence. However, the underlying cause of this vulnerability – these women's dependent status – remains unacknowledged. Instead, the violence they are subjected to is depicted as typical of 'non-western culture'. Again, policies that are putatively introduced to protect the women involved focus on prosecuting and incarcerating male perpetrators and further limiting possibilities for family migration. In some instances (for example, in the Netherlands) a woman's right to continued residence depends on her initiating criminal charges against her husband, an act that is not necessarily to her advantage (Gill and Sharma).

In sum, immigration law in Europe is currently responsive to those gender issues that can serve to dramatise the perceived inadequacies of 'non-western cultures' or prove the need for increased immigration control. However, it masks the many ways in which it creates and reinforces migrant women's dependencies and vulnerabilities, and how it weakens women's position vis à vis men.

### Taking on the neo-conservative challenge

The rise of coherent forms of neo-conservatism that incorporate issues of gender and migration creates a problem for those feminists who oppose the neo-conservative agenda. First, the focus on migrant women's oppression reinforces an implicit assumption that feminist goals have been achieved within the EU nations. Second, it reinforces essentialist notions of culture, portraying Muslim culture in particular as hostile to feminism, helping to

legitimate western economic and military hegemony over other parts of the world. Third, it may be used to support the introduction of restrictive immigration law measures, under which women will, directly or indirectly, become the victims.

However, such dilemmas should not discourage us from pursuing the feminist agenda. As Bhabha argues, we must deal with the dilemmas that immigration law confronts us with. A liberal family migration regime can offer men opportunities to re-establish patriarchal authority. If we think restrictions on family reunification are not the right answer, can we explain why? Is repressive state intervention the only way to protect women's autonomy within family relations, or can we come up with alternative proposals to increase the scope of women's agency? We would like to propose two ways in which feminist aims could be pursued in the field of immigration law.

First, as Resnik argues, law is made and applied at several levels that interact. Since neo-conservatives seem to be most powerful at the national level, it may be strategic to seek political support on other levels. The European Union, for example, offers an alternative framework. On the local level too there may be possibilities for resisting national policies; after all, that is where the harsh results of those policies are most directly felt. It may be also that the national judiciary is prepared to protect human rights endangered by national measures. And specialised (quasi-judicial) instances, such as the European Court of Human Rights or the CEDAW (Convention to Eliminate All Forms of Discrimination Against Women) Committee, may offer options in asylum and family reunification law that are not always available at a national level.

Second, as Bosniak argues, legal concepts are not one of a piece, and the inconsistencies in dominant discourse can be exploited. The fact that women's emancipation is a central motif in the neo-conservative project of legitimising European hegemony bolsters the argument that restrictive measures actually encourage women's oppression. Similarly, the argument that procedural rules rob sexual violence victims of the protection granted them by substantive policy rules can be used to invalidate these procedural rules.

Feminists have been campaigning for three decades on issues relating to immigration law. Recently, the topic of women and immigration law has finally made it onto the dominant political agenda, but mainly to the extent that this theme helps legitimate western hegemony abroad and the prosecution, incarceration, and deportation of foreigners at home. What European law and policy makers have been slow in acknowledging is that there are issues to be dealt with regarding immigration law itself.

Moreover, by locating gender conflict outside of the national order – that is, in a 'non-western' country, in an exotic culture or in the clandestine realms of criminal activity – present-day immigration law deflects attention from the gendered tensions inherent in current EU societies – tensions that involve both citizen and immigrant women.

The challenge then is twofold. First, to make clear how the seemingly marginal perspective of immigration law highlights those classical, unresolved feminist themes that reach to the heart of the EU's present-day societies. Second, to make use of the multiple levels of law making, and the inconsistencies in law, to articulate feminist issues through immigration law, to propose alternatives, and to make some impact on the dominant immigration law agenda. That gender has made it onto that agenda is an accomplishment in itself. The question now is how to influence the way gender affects that agenda. This book hopes to make a first step in meeting all these challenges.

Part I includes three essays that deal with the topic of women and immigration law on a level of abstraction that transcends the European context and takes geopolitical power relations into account. These chapters offer conceptual insights into the dilemmas that feminists face when addressing immigration law, the contradictions of legal discourse, and the multiple levels of law making and application. Part II includes articles about asylum, sex work, domestic work and family life that reflect a European perspective and it suggests strategies that apply to the EU as a whole. Part III provides concrete illustrations of women's interactions with national immigration law regimes.

### Notes

- 1 *UN 2004 World Survey on the Role of Women in Development: Women and International Migration*, New York: United Nations, 2005, p 10.
- 2 The chapters on labour migration focus on domestic workers and sex workers. Obviously, many migrant women in Europe are employed in other sectors. In terms of immigration law, however, most current debates in Europe presently focus on those sectors of the transnational labour market that are being (partially) excluded from regulation, i.e. domestic work and sex work, although some work is being done on labour migration law and female skilled workers. For references see: Eleonore Kofman (2003) 'Women Migrants and Refugees in the European Union', available at: <http://www.oecd.org/dataoecd/15/2/15515792.pdf>.
- 3 In the Netherlands, for example, the child of a foreign mother and a Dutch father only acquires Dutch nationality automatically when its parents are legally married at the moment of its birth. When this is not the case, the child can only acquire Dutch nationality via option, and only after having spent at least three years in the company of its Dutch father (Rijkswet op het Nederlanderschap, Art 6).