Twists and turns in the language of rights. A comparative analysis of polygamous families in Europe[*]

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SUMMARY: I. *Europe facing polygamy: theoretical and empirical challenges.* II. *Polygamy as cultural and religious practice and norm.* III. *Italy: where traditional family model and its legal frame are under pressure.* IV. *France, from tolerance to décohabitation.* V. *The UK, where multiculturalism is deemed to have failed.* VI. *Concluding remarks.*

I. EUROPE FACING POLYGAMY: THEORETICAL AND EMPIRICAL CHALLENGES

Reliable data on polygamous families and marriages in Europe do not exist, and it is hard even to find unreliable estimates on the extent of the phenomenon. Journalistic data and informal surveys report about 14.000 polygamous families in Italy[1] and in between 16.000 and 20.000 in France[2]; in 2012 it was supposed that in Berlin about 30% of married Muslim men were polygamous[3]; whereas in the UK it is estimated that there may be as many as 20.000 polygamous marriages in the sole British

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1 These data, released by the *Centro Averroè*, an independent research centre based in Rome, are discussed by Casale, Enrico, "Poligami d'Italia", *Popoli,* n. 1, 2013.

2 http://www.economist.com/node/16068972 (accessed on 14th June 2016).

3 http://www.welt.de/politik/deutschland/article109544417/Polygamie-in-der-Migranten-Parallelgesellschaft.html (accessed on 14th June 2016).

Muslim community[4]. In the Netherlands, according to 2010 government esteems, polygamy concerns about 0.01% of the Dutch population[5].

Needless to highlight that in Europe polygamy is unlawful[6], and a person who marries while being still lawfully married to another commits the crime of bigamy[7]. The second marriage is void, but bigamy is a crime in itself, and the bigamist is liable to penalties which vary between jurisdictions. And yet, polygamous relationships exist and engender social, economic and legal effects that are relevant in people's lives and for the legal system (for immigration purposes, inheritance law and procedures, social security, etc…)[8].

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4 http://www.dailymail.co.uk/news/article-3414264/Want-higher-benefits-marry-one-wife-New-welfare-rules-hand-extra-taxpayer-cash-polygamists.html (accessed on 14th June 2016). It is important to notice, however, that polygamous marriages are not an exclusive "prerogative" of the Muslim community, so that the estimated number may be larger if we consider the entire British society.

5 https://www.government.nl/latest/news/2010/01/27/hirsch-ballin-restricts-recognition-of-foreign-polygamous-marriages (accessed on 14th June 2016)

6 It should be highlighted, nonetheless, that in Belgium polygamous marriage enrolment in municipal records was allowed till very recently (see: http://www.xpats.com/polygamy-continues-belgium-accessed on 14th June 2016), and in the Netherlands both in Amsterdam and Rotterdam polygamous marriages of immigrants that were celebrated in countries where having more than one wife is permitted are registered by marriage registrars (https://www.lifesitenews.com/news/netherlands-recognises-polygamous-marriages-of-muslims-reports-accessed on 14th June 2016). And, finally, in Sweden the Sweden's Center Party in its 2013 proposal "A Sustainable Future-A Proposal for a New Policy Program" claimed for the the legalization of polygamy (http://www.frontpagemag.com/fpm/178267/swedes-propose-open-borders-polygamy-bruce-bawer-accessed on 14th June 2016).

7 For a bright investigation on the Western critique vis-à-vis plural marriage, see Witte, John, *The Western Case for Monogamy Against Polygamy,* New York, Cambridge University Press, 2015.

8 Interestingly, in the USA recent shows like *Big Love* (a television drama aired between 2006 and 2011 portraying a fictional fundamentalist Mormon polygamous family in Utah) or *Sister Wives* (a reality series that began in 2011 documenting the life of a polygamous family) have started legitimizing in front of the large public polygamy, through the exhibition of "good", white, American polygamous families. For an in depth analysis of the phenomenon,

Theoretically framed in the fascinating debate on cultural relativism (on the anthropological side)[9], on the universality of fundamental rights (on the legal side)[10], on multiculturalism (on the political theory and sociological sides)[11], and underpinning feminist theories[12], the

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see Bennion, Janet, *Polygamy in primetime: Media, gender, and politics in Mormon fundamentalism*, Waltham, UPNE, 2012.

9 Among others: Herskovits, Melville J. "Some further comments on cultural relativism", *American Anthropologist*, 1958, vol. 60, n. 2, pp. 266-273; Zechenter, Elizabeth M., "In the name of culture: Cultural relativism and the abuse of the individual", *Journal of Anthropological Research,* 1997, pp. 319-347; Spiro, Melford E., "Cultural relativism and the future of anthropology", *Cultural Anthropology*, 1986, vol. 1, n. 3, pp. 259-286; Cowan, Jane K., Dembour, Marie-Bénédicte and Wilson, Richard A. (eds), *Culture and rights: Anthropological perspectives*, Cambridge, Cambridge University Press, 2001; Brems, Eva, "Enemies or allies? Feminism and cultural relativism as dissident voices in human rights discourse", *Human Rights Quarterly*, 1997, vol. 19, n. 1, pp. 136-164; Benhabib, Seyla, *The claims of culture: Equality and diversity in the global era*, Princeton, Princeton University Press, 2002.

10 *Cfr.*: Donnelly, Jack, *Universal human rights in theory and practice*, Ithaca, Cornell University Press, 2013; Cartabia, Marta, "L'universalità dei diritti umani nell'età dei 'nuovi diritti'", *Quaderni costituzionali*, n. 3, 2009, pp. 537-568; Ackerly, Brooke A., *Universal human rights in a world of difference*, Cambridge University Press, 2008; Grosso, Enrico, "Multiculturalismo e diritti fondamentali nella Costituzione italiana", in Bernardi, Alessandro (ed.), *Multiculturalismo, diritti umani, pena,* Torino, Giappichelli, 2006, pp. 109-136; Perry, Michael J., "Are human rights universal? The relativist challenge and related matters", *Human Rights Quarterly*, vol. 19, n. 3, 1997, pp. 461-509; D'Agostino, Francesco, *Pluralità delle culture e universalità dei diritti*, Torino, Giappichelli, 1996; Bobbio, Norberto, "Sul fondamento dei diritti dell'uomo", *Rivista Internazionale di Filosofia del Diritto*, n. 42, 1965, pp. 302-309.

11 Among others: Kymlicka, Will, *Multicultural odysseys: Navigating the new international politics of diversity*, Vol. 7. Oxford, Oxford University Press, 2007; Galli, Carlo (ed.) *Multiculturalismo: ideologie e sfide*, Bologna, Il Mulino, 2006; Colombo, Enzo, "Multiculturalismo quotidiano. Verso una definizione sociologica della differenza", *Rassegna italiana di sociologia*, vol. 47, n. 2, 2006, pp. 269-296; Parekh, Bhikhu C., *Rethinking multiculturalism: Cultural diversity and political theory*, Boston, Harvard University Press, 2002; Habermas, Jürgen, "Address: multiculturalism and the liberal state", *Stanford Law Review,* 1995, pp. 849-853; Taylor, Charles, *Multiculturalism.* Princeton, Princeton University Press, 1994.

12 *Cfr.*: May, Simon Căbulea, "Liberal feminism and the ethics of polygamy", in Chan, Sarah and Cutas, Daniela (ed.) *Exploding the Nuclear Family Ideal:*

scope of the present research remains nonetheless narrow. Building on previous work on polygamy, fundamental rights, multiculturalism and family studies, it seeks to question how plural marriages transform the conventional perception of the family and to challenge typical European understanding of rights and duties within and for the family.

The first, crucial question concerns if and how polygamous families can be defined as "families" on both legal and social perspective.

"Jurists conceive the family as a group of people bounded together by direct or acquired kinship ties. These legal concepts may lead to the perception that law defines the family. […] Indeed, families are a social phenomenon first, and a legal one after. Families exist before the law, and quite often beyond the law"[13]. This is the case of polygamous families in Europe: they are definitely a social phenomenon that exists not simply *contra legem*, but *praeter legem,* and yet, they still exist. Does this mean that polygamous families are to be recognised as "families" or simply that polygamous ties produce effects that can be assimilated to those produced by *de jure* families?

Should we adopt a very pragmatic approach and consider polygamous families as a sort of sum of a "legitimate", *de jure* family and one or more *de facto* families that "share" some members and live in the same home, the *locus* for affective bonds, marital relationships, educational ties?

These "anomalous" social forms host very delicate interests, that are worth legal protection. Should they be protected as family interests? Does the non-recognition of those interests as "family interests" impact on the level of rights protection and enforcement? Does it impact

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For Better or Worse, London, Bloomsbury Academic, 2012; Phillips, Anne, *Multiculturalism without culture*, Princeton University Press, 2009; Okin, Susan Moller, "Multiculturalism and feminism: no simple question, no simple answers", in Hessemberg, Avigar and Spinner-Halev, Jeff (ed.) *Minorities within minorities: Equality, rights and diversity*, Cambridge, Cambridge University Press, 2005, pp. 67-89. Okin, Susan Moller, *Is multiculturalism bad for women? Princeton*, Princeton University Press, 1999; Bartlett, Katharine T., "Feminist Legal Methods", *Harvard Law Review*, vol. 103, n. 4, 1990, pp. 829-888;

13 Bonnet, Vincent, *Droit de la famille*, Orléans, Editions Paradigme, 2009, p. 4. Translated from French by the author, as all other quotations from languages other than English.

on identities and social status? Whether polygamous families should be considered proper "families" is not simply a matter of mere legal definition.

The second macro question opens the door to wider legal and social horizons: are contemporary European societies moving to a sort of "personalisation" of the law going along with national/class/social origin cleavages? This is a phenomenon that is common to most post-colonial states: a significant gap between social classes that are marked by culture and "ethnicity"[14]. Law may all too easily become a marker of cultural resistance to the interference of the central state, and, without education, income and opportunity, the disadvantaged class is less likely to accept and act on reforms promulgated by the state. Which are the theoretical and empirical perspectives contemporary European countries are underpinning?

And a third crucial, empirical question pertaining to the quality of life of the people: what to do with existing polygamous *ménages*? Should they be dissolved *ex lege*? Are there policies and strategies to safeguard the most vulnerable elements of these families?

The chapter is set out as follows: section 2 briefly describes the most significant features of polygamy; sections 3, 4 and 5 deal with the case studies of Italy, France and UK, and a brief conclusion is offered in section 6.

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[14] The phenomenon is also studies under the name of legal pluralism. For an insight: Pimentel, David, "Legal Pluralism in Post-Colonial Africa: Linking Statutory and Customary Adjudication in Mozambique", *Yale Human Rights and Development Journal*, vol. 14, n. 1, 2014, pp. 2-48; Subramanian, Narendra, "Making family and nation: Hindu marriage law in early postcolonial India", *The Journal of Asian Studies,* 2010, pp. 771-798; Subramanian, Narendra, *Nation and family: Personal law, cultural pluralism, and gendered citizenship in India*, Stanford, Stanford University Press, 2014; Helium, Anne, "Human rights and gender relations in postcolonial Africa: options and limits for the subjects of legal pluralism", *Law & Social Inquiry*, vol. 25, n. 2, 2000, pp. 635-655.

II. POLYGAMY AS CULTURAL AND RELIGIOUS NORM AND PRACTICE

What is polygamy? Generally, polygamy indicates the marriage relationship between one man and two or more women. *Per se*, however, polygamy could refer to polygynous relations (one man and two or more women) as well as polyandrous ones (one woman and two or more men). Quite rare are polyandrous examples[15], whereas polygynous phenomena are much more important in both number and social and legal codifications. For the scope of this chapter we will improperly use the term polygamy to mention polygynous relations. According to a comparative anthropological research carried out by the University of Wisconsin in 1998 (the most recent existing research on this issue), out of more than one thousands societies, just 186 were strictly monogamous, in 453 polygynous marriages were occasional and in 588 they were frequent[16].

"Polygamy is not an exotic non-Western custom, practised by people who have not yet entered the modern world. Polygamy is worldwide, cross-cultural in its scope, it is found on all continents and among adherents of all world religions. Its practitioners range from modern feminists to traditional patriarchs, illustrating the great versatility of polygamy as a kinship system. An overview of the many peoples practising polygamy, in contemporary as in past societies, illustrate that a majority of the world's cultures and religions have condoned some form of polygamy"[17].

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15 While not focusing on polyandrous relations, it is interesting to note that polyandry should not be perceived as a sort of feminist answer to polygyny, with males' subjugation. On the contrary, "the reality is that the few existing polyandrous societies are as oppressive to women as any other polygamous community, if not more so" (Sigman, Shayna. M., "Everything Lawyers Know About Polygamy is Wrong", *Cornell Journal of Law & Public Policy* n. 16, 2006, p. 162).

16 *Cfr.* Gray, Joseph P., "A corrected Ethnographic Atlas", *World Cultures,* vol. 10, 1998, pp. 24-85.

17 Zeitzen, Miriam K., *Polygamy, a cross-cultural analysis*, Oxford, Berg, 2008, p. 4.

A large number of research on polygamy, especially in anthropology and ethnography[18], focuses on polygamous practices and traditions in Africa, which is indeed the continent with the highest percentages of polygamous societies[19]. This has contributed consolidating the direct connection between polygamy and social and cultural underdevelopment, so that polygamy has become a marker of primitivism[20]. Equally, the high number of polygamous relations in contemporary European societies connected with the Islam induces a fallacious unidirectional connection between Islam and polygamy[21]. But both assumptions are far from being correct. And yet, despite what we just observed, it is undeniable that it is due to migration flows that European legal systems have been more significantly challenged by the phenomenon.

It is difficult to define a society as absolutely polygamous or exclusively monogamous. There are indeed societies where there is a perfect overlapping of religious, legal and cultural traditions, as it is the case of the Mandinka people in the Republic of Gambia, where polygyny is legitimised by Islam, by the national Gambian law and by Mandinka's customs and traditions, so that Gambian society and State can be defined "polygamous"[22]. At the opposite side of the spectrum, the fundamentalist Mormon groups of the American state of Utah

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18 See in particular: Wing, Adrien, K., "Polygamy from Southern Africa to Black Britannia to Black America: Global Critical Race Feminism as Legal Reform for the Twenty-first Century", *Journal of Contemporary Legal Issues,* n. 11, 2000; Calaguas, Mark, Drost, Cristina and Fluet, Edward. R., "Legal Pluralism and Women's Rights: A Study in Postcolonial Tanzania", *Columbia Journal of Gender & Law*, n. 16, 2007, pp. 471-549; Delius, Peter and Glaser, Clive, "The myth of Polygamy: A History of Extra-Marital and Multi-Partnership Sex in South Africa", *South African Historical Journal*, vol. 50, n. 1, 2004, pp. 84-114.

19 The so-called "polygamy belt", stretching from Senegal to Tanzania, in which it is not uncommon for a third of married women to share their husbands (Fenske, James, "African polygamy: Past and present", *Journal of Development Economics*, n. 117, 2015, pp. 58-73.

20 For an in depth discussion: Maillu, David G., *Our Kind of Polygamy,* Nairobi, Heinemann Kenya, 1988.

21 For a critical discussion: Charsley, Katharine and Liversage, Anika, "Transforming polygamy: migration, transnationalism and multiple marriages among Muslim minorities", *Global Networks*, vol. 13, n. 1, 2013, pp. 60-78.

22 Wittrup, Inge, "Me and my husband's wife: An analysis of polygyny among Mandinka in the Gambia", *Folk* 32, 1990, p. 117-142.

defy national law, as well as the predominant culture and religion in the name of a religious principle anchoring polygynous marriages in a literary reading of the Old Testament[23]. Ivory Coast officially banned polygamy in 1964, but it remains one of the highest polygamous societies in Africa[24].

The literature exploring the religious foundations and implications of polygamous practices is wide and consolidated. The typical reference to Islam should not mislead the analysis. For sure, Islam and Muslim law allow for polygamous marriages[25], but despite "the tale of the Creation of the first human couple presents monogamous marriage fulfilling God's will"[26], polygamy is not alien to Jewish tradition as well. Polygamy was contemplated in the Hebrew Bible in the case of seduction (Exodus 22: 15-16; Deuteronomy 22: 28-29) enslavement (Deuteronomy 21: 10-14, Exodus, 21: 8-10); poverty and famine (Isaiah 4:1); and the premature death of one's married brother (Ruth 4:9-11). Bigamy and polygamy were acknowledged as a matter of fact, so that special provision for the maintenance and inheritance of wives and their children were envisioned (Deuteronomy 21: 15-17). And several polygamists appear in the Old Testament, among which very prominent figures, as it was the case of King David[27].

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23 Witte, John, "The Legal Challenges of Religious Polygamy in the USA", *Ecclesiastical Law Journal*, vol. 11, 2009, p. 72-75.

24 Bledsoe, Caroline, Pison, Gilles (eds.), *Nuptiality in Sub-Saharan Africa: contemporary anthropological and demographic perspectives*, Oxford, Clarendon Press, 1994, p. 11.

25 For an in depth analysis: Aluffi Beck-Peccoz, Roberta, *Le leggi di famiglia dei Paesi arabi del Nord Africa*, Torino, Fondazione G. Agnelli, 1997; Vincenzo, Ahmad, *Islam, l'altra civiltà*, Milano, Mondadori, 2003; Zeitzen, Miriam, *Polygamy, a cross-cultural analysis,* Oxford, Berg, 2008; Welchman, Lynn, *Women and Muslim Family Laws in Arab States*, Amsterdam, Amsterdam University Press, 2007; Giunchi, Elisa (ed.), *Muslim Family Law in Western Courts*, New York, Routlege, 2014.

26 De Vaux, Roland, *Le Istituzioni dell'Antico Testamento*, Torino, Marietti, 1964, p. 34.

27 King David was indeed condemned for his adultery and for the murder of Bathshebeba's husband, but not for his polygamous relationship with the wives of his harem.

Christianity has never allowed for polygamous relations, but, "side by side with monogamic marriage, concubinage has always existed. The system was plainly recognised in the ancient laws of Wales. In the Thirteenth Century, in England, the mistress, "the *concubina legitima*", was often the companion of the wife"[28]. And, as already mentioned, fundamentalist interpretations of Old Testament have opened the way to polygynous marriages as it is the case of American Mormons.

In India, the motherland of Hinduism, both national law and religious precepts forbid polygamy, but cultural and social pressure to have male heirs legitimises polygamous practices. "Polygamy has not been eradicated from Hindu communities, and courts have showed a non negligible tolerance towards the interests of the males"[29]. Buddhism does not legitimise polygamy, but it is noticeable that strong polygamous traditions persist in those countries where it is the dominant religion[30]. Moreover, it is exactly in Buddhist and Hindu societies (in Tibet, Nepal, and in some Indian regions) that polyandrous practices have flourished. "Among the Western nations there are, no doubt, many unreflective and incurious persons who regard the vast institution of polygamy merely as a part of the faith and practice of the ancient Hebrews, the Hindus, and the Mohammedans of former and modern times. The custom is of far greater antiquity than the older religion of the Jews and the birth of Islam"[31].

As well as the debate on the religious justification, literature inquiring the customary practices of polygamy is well developed, and the legal, social and political implications of "the traditional model of household implicating a conjugal unit, extended to include polygynous wives and

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28 Gallichan, Walter, *The Poison of Prudery*, London, T.Werner Laurie Publisher, 1929, p. 15.

29 Di Martino, Alessandra, "La protezione della famiglia in India tra pluralismo religioso e uguaglianza di genere," *DPCE*, n. II, 2010, pp. 801-832.

30 When in 1982 the Malaysian government forbade polygamy to non-Muslim population, there were strong reactions by the Hindu and Buddhist parts of society, and "the practice did not disappear but simply took another form" (Zeitzen, 2008:35).

31 Gallichan, Walter, *op. cit.*, p. 11.

their offspring, together with grandchildren, siblings and any other people who became attached"[32] widely analysed.

Finally, while discussing polygamous relations, analysis should never underestimate that family takes a variety of forms, including marital and non-marital relationships[33], "besides "traditional families" grounded on marriage where parents and children constitute the family unit, there are "*de facto* families" grounded on cohabitation and parenthood, "single-parent families" with one parent and his/her children; "recomposed families" with a couple and the children from previous unions and the common children; "homoparental families" grounded on homosexual couples"[34] and even polygamous families.

III. ITALY: WHERE THE TRADITIONAL FAMILY MODEL AND ITS LEGAL FRAME ARE UNDER PRESSURE

In Italy "the family is recognized by the Republic as a natural association founded on marriage. Marriage entails moral and legal equality of the spouses within legally defined limits to protect the unity of the family" (s. 29, Italian Constitution), and "by marriage husband and wife acquire the same rights and assume the same obligations. The spouses have the duty of mutual loyalty, moral and material assistance, cooperation in the interests of family and cohabitation. Both spouses are required, each in relation to their substance and their professional ability to work outside

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32 Bennett, Tom, *Customary Law in Southern Africa,* Cape Town, Juta & Co., 2004, p. 181.

33 Any research on polygamy can not be developed irrespectively of the family studies, under the sociological, anthropological, legal and socio-legal approaches. See, *inter alia*: Buchler, Andrea, "Islamic family law in Europe? From dichotomies to discourse, or: beyond cultural and religious identity in family law," *International Journal of Law in Context*, vol. 8, n. 2, 2012, pp. 196-210; White, James and Klein, David, *Family Theories*, Sage, London, 2008; Bengtson, Vern *et alii*, *Sourcebook of Family Theory and Research*, Sage, London, 2005; Pocar, Valerio and Ronfani, Paola, *La Famiglia e il diritto*, Roma-Bari, Laterza, 2007; Mezey, Nancy, *LGBT Families*, Sage, London, 2013; McKie, Linda and Callan, Samantha, *Understanding Families. A Global Introduction*, Sage, London, 2012; Hale, Brenda *et alii*, *The Family, Law and Society*, Oxford, OUP, 2008.

34 Federico, Veronica, "Famiglie in Francia", *DPCE*, n. II, 2010, p. 551-577.

or inside the home, to contribute to the family's needs" (s. 143, Civil Code). Marriage, that remains a prerogative of heterosexual couples, despite a very recent legislation recognising same-sex unions[35], is a two-person contract. Bigamy is a crime, sanctioned with a jail sentence from 1 to 5 years, which may be increased if the convict lied about his or her marital status (s. 556 criminal code). All this in the name of human dignity, equality and the respect of fundamental rights[36].

And yet, despite the ostensible crystallization of the notion of "family" in the Italian legal system, scholars agree that there is not one single reading of "the family", whereas there are several family structures recognised and protected by the Constitution. The family unit may have different structures and dimensions as well as entail different rights and duties according to the legal frame. The family recognised in s. 29 does not necessarily coincide with the one implicit in the notion of family enterprise or family farming cooperative, neither with the notion of homestead on which the family income is calculated to give access to social services and social housing.

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35 The law n. 76 of 2016 was approved on May 11th 2016. It grants same-sex couples many of the same rights as married heterosexual couples. The bill has been a long time in the making, and it was solicited also by a judgment of the Constitutional Court (CC n.138/2010, 14 April 2010). First analysis: D'Aloia, Antonio, "Verso la legge sulle unioni civili tra persone dello stesso sesso", *DPCE online*, n. 1, 2016, pp. 1-10.

36 The incompatibility between polygamy and the "meta-principle" of human dignity is highlighted in: Panzera, Claudio, "Frammenti di un monologo… in attesa di un dialogo. Il bilanciamento fra valori costituzionali in due casi giudiziari "scottanti" (a proposito di infibulazione e poligamia)", in Navarretta, Emanuela and Pertici, Andrea (eds), *Il dialogo tra le Corti. Princìpi e modelli di argomentazione*, Pisa, PLUS, 2004, whereas others maintain that even without invoking human dignity, polygamy can not be accepted in the Italian legal system as "it introduces an asymmetric relationship between husband and wives, which is hardly compatible with the constitutional principles of gender equality (s. 3 of the Italian Constitution), and of legal equality of the spouses (s. 29)". See Pugiotto, Andrea, "La famiglia ed I suoi diritti nella Costituzione", in Pugiotto, Andrea (ed.), *Per una consapevole cultura costituzionale*, Napoli, Jovene, 2013, p. 164. On the principle of legal equality of the spouses, among others, see: Brunelli, Giuditta, *Famiglia e Costituzione. Tra tradizione e nuovi modelli*, in Pugiotto, Andrea (ed.), *op. cit.*

The family of s 29 of the Constitution is not necessarily the very same family of s.37 providing for the working women's rights, or of s. 36 providing for workers rights, and it is neither the family of s. 31 providing for the rights of the family, or of s. 34 recognising and enforcing the right to education[37].

Thus, despite its steadfast image, the constitutional and legal frame does not follow a monolithic model of the family and of intra-familiar relations, and developments both *de jure* and *de facto* have largely contributed to open the way for a softener and multifaced notion of the family in Italy, which extends rights and duties to unmarried couples (with or without children)[38] living as if they were "families founded on marriage", equalizes rights and duties of children (irrespectively of their parents marital status)[39], and have partially recognised the claims of homosexual families to be considered as "families"[40].

Some scholars argue that, albeit structural and critical differences, the real conditions of their functioning may narrow the gap between monogamous and polygamous relations, and "the legal and jurisprudential development, as well as the social one, reveals areas of common practices, and even of overlapping, which do not allow for the idea of a radical contrast"[41]. Following this reasoning, polygamous relations would be assimilated to a sum of a family *de jure* with one or more additional families *de facto*, opening the way for a legal recognition, and guarantee, of polygamous families. In the same direction, the

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37 The literature on the subject is wide and variegated. Among others, see: Pugiotto, Andrea, "Alla radice costituzionale dei casi: la famiglia come società naturale fondata sul matrimonio", relazione svolta al convegno "Questioni attuali in materia di famiglia", Verona, 28 febbraio 2008; Lamarque, Elisabetta, *Famiglia (dir.cost.)*, in *Dizionario di diritto pubblico*, diretto da S. Cassese, III, Milano, Giuffré, 2006.

38 Constitutional Court n. 237/1986 and n.494/2002.

39 CC n. 191/1983; n. 297/1996, Law n. 219/2012, and Dlgs n. 154, 28.12.2013.

40 In the long discussion on the bill on same-sex couples, the right of homosexual parents to mutually adopt the eventual step-children has been crossed out. Nonetheless, several are the cases where Courts have ruled in favour of step-child adoption for homosexual parents, in the name of the best interest of the child (the most recent case is the Court of Cassation writ n. 12962/16).

41 Colaianni, Nicola, "Poligamia e principi del diritto europeo," *Quaderni di Diritto e Politica Ecclesiastica*, n. 1, 2002, pp. 227-261.

opening to some forms of "cultural defence"[42] to blur the boundaries of legal prescriptions may evoke the possibility for a sort of "niche of compatibility", i.e. grey zones where phenomena that are formally *contra legem* can be tolerated.

Nonetheless, the mainstream scholarship maintains that the stumbling block of the respect of human dignity and fundamental rights is too high to be overcome, and "it is not the tradition to constitutionally defend itself. Rather, the fundamental rights of each individual member of the family will grant the endurance of the monogamic model in the future"[43].

Noticeably, however, those same meta-principles of equality and human dignity that are considered the cornerstones of any social entity recognised by the Constitution and especially of the family, have been object of very different interpretations in the recent past of Italian constitutional history. Up until 1975 (with the reform of family law, law n.151 of 19 May 1975), the marital relations between husband and wife have been highly unequal and deeply imbued by the idea of male dominance, so that the principles of *patria potestas* (i.e. fatherhood authority) and of marital supremacy were considered not in breach of the Constitutional principles of equality and human dignity, as well as they were the differences between children born within or outside the wedlock or the different treatment of infidelity, which was punished as a crime if practised by wives, but not sanctioned if practised by husbands. But even against this background that suggests the need for an historical and evolutionary understanding of the notions of equality and human dignity, polygamy remains outside the border of what can be considered, even along an understated perspective, compatible with the fundamental principles of the Italian legal system.

Against this background, polygamy might be simply dismissed as a crime, without further inquiry into the complexity of the phenomenon. No doubt that polygamy is contrary to fundamental principles of the Italian legal system. Nonetheless, R. Aluffi highlights that "it is true that we should respect a women who got married according to her country

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42 For an in-depth analysis of the notion of cultural defence, see: Ruggiu, Ilenia, *Il giudice antropologo*, Franco Angeli, Milano, 2012.

43 Pugiotto, Andrea, *op. cit.*, p. 177.

religion and legal system, and who cannot simply be denied her rights [and status] once arrived in our country"[44]. In the name of rights, the risk is on the one hand to jeopardise even further the status of the most vulnerable members of marginalised families; and, on the other, to patronize those women that voluntarily enter into polygamous relations, and to ignore and deny their capacity to decide over their best interest. Both media and academic debate, in fact, seem to ignore that polygamy may be a sound choice. It is true that generally women have little or no agency of their own in the countries where polygamy is mostly diffused, so the tendency is to consider this marriage typology as being imposed on them. And yet, considering women passive subjects by default is in itself a serious violation of their dignity and rights, and it perpetuates their social, cultural and legal inferiority.

According to recent estimates, there are more than 14.000 cases of polygamous relations in Italy[45]. A number which is not impressive, but neither absolutely irrelevant, especially if measured in relation to local realities and if confronted to the range of issues at stake.

Despite case-law first and legislation afterwords have deeply modified the notion of "traditional family" founded on heterosexual marriage, still polygamous homesteads cannot be considered "families". And, for example, the definition of the homestead for the calculation of social benefits is strictly limited to "the applicant, his/her spouse, and their minor children or children of age if disables"[46]. Nevertheless, once challenged by important migration flows, the legal system and public administration have been requested to find viable solutions to accommodate different notions of family relations, and a more complex interweave of rights and duties which do not simply impact on typically private comparative and international law, but touch the fundamental rights of the State's constitutional structure.

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44 Caferri, Francesca, "La poligamia nascosta tra gli Islamici d'Italia", *La Repubblica,* 2 April 2008.

45 According to the above mentioned esteems of the *Centro Averroé* in Rome in Italy in 2013 there should be about 14.500 polygamous families, plus a consistent number of temporary marriages that are allowed according to the Islamic law, but are difficult to trace. See: Casale, Enrico, *op. cit.*

46 Circolare INPS n. 25928, Sept. 2006.

The Council of State has allowed for the transcription in Italy of Islamic marriages, if there are no impediments that Italian legal system considers irremovable (Advice of 7 June 1988), and the Court of Cassation has reaffirmed the effectiveness and legal soundness of marriages celebrated abroad even according to legal systems that allow for polygamy and/or repudiation if or till they are not annulled (judgment n. 1739/1999). Section 16 of law No. 218 of 31 May 1995 on the Reform of the Italian System of Private International Law establishes that any foreign law can not be enforced if its effects are in contrast to public order[47]. This means that *per se* foreign laws allowing for polygamous marriages are not void for the Italian legal system, but they become so just in the case marriages are indeed polygamous, and just *vis-à-vis* all wives but the first. This approach, that is common to other legal systems, as we will illustrate further on, is not unscathed by intrinsic contradictions. Polygamy breaches the constitutional principles of equality and human dignity, and nonetheless polygamous marriages that take the form of monogamous relations are assumed not breaching those values, despite the fact that they are founded on the values of inequality between the spouses, of male dominance, and the same legal and cultural rules underpinning marriages that take the form of plural relations. It is obvious that one of the pillars of contemporary legal systems is the principle of *utile per inutile non vitiatur* and that transcriptions and recognition of marriages regularly celebrated abroad along the *lex loci celebrationis* have a relevant international relations dimension. In this case pragmatism primes over values. Should the same pragmatism lead to a re-conceptualisation of the denial of the nature of "family" to polygamous homesteads to accommodate the needs of the most vulnerable members of plural relations? As we will reason further on, the answer is no. In the case of plural marriages principles prime over pragmatism.

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47 Noticeably, contrary to the German idea of *Gute Sitten* (with public order principally, even not exclusively meaning public morality), the Italian notion of public order is rooted in the Napoleonic code and it has a broader meaning. Indeed, the Constitution makes reference to the notion of public order encompassing the ideas of safety and security; of peaceful coexistence; of the whole spectrum of fundamental principles underlying the legal system; as limit to individual liberties. Public order, thus, has the character of a public good.

The case of family reunification is a paradigmatic example of the complexity of the phenomenon. Enforcing article 13 of the ILO Convention C143 of 1975, providing for the "reunification of the families of all migrant workers legally residing" in the State territory, Italian law n.943 of 30 December 1986 (the first comprehensive law on migrant workers) allowed for the reunification of the migrant worker with his/her spouse, under age children, and parents. The Constitutional Court has recognised the importance of the integrity of the families, allowing for, *inter alia*, the right/duty of children education that s. 30 of the Italian Constitution guarantees and enforces (CC n. 28 of 1995), while mentioning the existence of contingent limitations to the value of the integrity of the family in order to counterbalance it with other crucial values and principles. In a subsequent case, the Court has reinforced the value of family reunification grounding it on the children's fundamental rights to maintain strong, effective, loving relationships with both parents, regardless the parents' marital status (CC n. 203 of 26 June 1997). Italian legislation on migrant workers has deeply changed since 1986, but the reunification of the families has always been guaranteed, even if tempered by pretty strict limits (mainly connected to the workers' income and accommodation). And the law has maintained the nuclear notion of family, including spouse, children under age and parents, but it has as well recognised and guaranteed the right of the child to be reunificated to the parents.

Quid juris if the family to be reunificated is polygamous? Two Ministerial circulars explicitly restrict the right to reunification to "one single spouse, as in the Italian legal system bigamy is a crime" (Circ. Min. Interno 7 October 1988 e Circ. Min. Interno 1 October 1988). And the Administrative Tribunal of Emilia Romagna, an Italian Region, has followed the same path, rejecting the claim for family reunification by a worker from Morocco with his two wives and five children (judgment n.926, 14 December 1994). Nonetheless, quite interestingly the courts have adopted a different approach in the case of a child claiming for the right to family reunification for the mother, even if the father is already in Italy with a different wife (Corte di Appello di Torino, 18 apirle 2001, tribunale di Bologna, ord. 12 marzo 2003, Tribunale dei minori di Bari, 20 agosto 2002, Corte di Appello di Bari, decr. 31 dicembre 2001). In this case the interests at stake are not simply "the right of the State to regulate the entrance in Italy and the right of migrants to family unity and family

life, that have equal value" (CC, writ n. 454/2005), but the stronger interest of the child to recreate the family unit, albeit in a polygamous form. According to the Court of Appeal of Turin, "allowing the permit to stay in Italy for the mother [who is the second wife of a foreign worker permanent resident] is finalized not to guarantee a marital relationship, that would be contrary to our legal system, but to grant the right of a child under age not to be separated from the mother" (Corte Appello Torino, writ 18 aprile 2001). The prevalence of the children's right to maintain loving and caring relations with both parents has allowed for a substantial breach of the law, and has overclouded other fundamental values (equality and human dignity first and foremost). Moreover, it is interesting to notice that the court has found the household formed by a polygamous family, where two wives, the husband and the children of both wives share the same flat, an appropriate environment for the growth and education of the children[48].

Quite recently, however, law n. 94 of 15 July 2009 has explicitly forbidden the reunification in the case the spouse residing in Italy is already married with another person living in Italy. And this seems to have closed the door to claims for family reunification by polygamous families.

So, polygamy is a crime, and in principle polygamous families are not entitled to the right to family reunification. But what happens to existing polygamous homesteads? The Italian legal system recognises the family as a "social group" (s.2 and 29) but this does neither entail that families acquire legal personality, nor that they are entitled with collective rights[49]. Rather, the point is to grant individual rights that can be best expressed within the family, and whose entitlement is specifically reserved to family members. Who then should be granted visitation rights to prisoners or to hospitalised polygamous husbands? Of course, just to the "official" wife. It is just the official wife to be granted social security as member of the worker's family and in absence of a specific will, it will be her (together with all the children) to inherit the husband's

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48 Ferrando, Gilda and Querci, Agnese, *L'invalidità del matrimonio ed il problema dei suoi effetti,* Milano, IPSOA, 2007, p. 101.

49 Mercolino, Guido, "I rapporti patrimoniali nella famiglia di fatto," *Dir. Famiglia*, n. 3-4, 2004, p. 4.

wealth, her to have to right to succeed in the home lease, her to be entitled to the worker's retirement pension. As the second wives are not recognised any status related with their homestead, how should they be protected from domestic violence if the measures guaranteeing wives (increased penalties for certain forms of domestic violence, granting of permits to foreign victims, easier reporting of domestic violence, faster removal from home and irrevocability by the complainant of domestic abuse's complains)[50] can not be extended to them? Denying them a status may impact not only on their identity and self-representation, but may compromise their rights protection and enforcement.

There is very little case-law and it does not cover all hypothesis mentioned above. The reason for this shortage of case-law is due more to the particular conditions of vulnerability of the weak members of polygamous relations than to the small number of polygamous cases in Italy. In fact, the large majority of polygamous families are foreigners, and less aware and informed of their rights and duties, and moreover women and young children are even less aware of their rights, due to linguistic and cultural difficulties and to the lack of social resources as enlarged family relations, extra-familiar networks and the possibility of reaching legal and social aid, as well as the shortage of economic means. Nonetheless, it is interesting to notice that the Italian Court of Cassation in an *obiter dictum* in judgment n. 1739 of 2 March 1999 did not preclude the possibility for all wives living in polygamous homestead to claim for inheritance rights. This means that while being *contra legem*, polygamous marriage may produce legal effects even in Italy.

Equally interestingly, the Constitutional Court has recognised divorced spouses the right to a share of the former partner's retirement pension, in concurrence with the surviving spouse (CC n.419/1999) not simply as a sort of extension of the alimony, but as a guarantee of the patrimonial rights connected with the duration of the marriage. We could wonder whether this idea of concurrence among spouses in the right to retirement pension may open the way for a broader recognition

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[50] Strengthened measures and more severe sanctions have been recently introduced in the Italian legal system through law n. 119 of 15 October 2013, in the frame of an increased political, social and legal attention to reduce gender related violence and abuses.

of social security guarantees for polygamous homestead. As long as no jurisprudence exists, this will remain a purely theoretical question.

IV. FRANCE: FROM TOLERANCE TO *DECOHABITATION*

The report of the *Commission nationale consultative des droits de l'homme* of the National Assembly in 2006 referred to more than 20.000 cases of polygamous families in France, i.e. about 180.000 people living in polygamous homesteads, of whom between 40.000 and 60.000 children under age. More recent esteems, as already mentioned, count between 16.000 and 20.000 polygamous *ménages*. As for the Italian case, the numbers are not impressive, but the localisation of the phenomenon, concentrated particularly in specific areas of Paris and Ile de France, Seine-Maritime, Lille, Rhône, Strasbourg, Mulhouse and Marseille allerts experts and policy-makers as a possible threat to integration, social cohesion, and public order.

Section 147 of the French Civil code prevents spouses to marry before any previous marriage has not dissolved. Bigamy is a crime, and criminal sanctions are inflicted to the spouses and even to the public officers involved (s. 433-20 Criminal code)[51]. It is impossible to celebrate polygamous marriages as "polygamy is contrary to French public order, and it makes the second marriage void from its origin, without any possibility of a regularisation *a posteriori* through a divorce pronounced after the second marriage" (Tribunal of Grenoble, 23 January 2001).

France is considered the homeland of universalism. The Constitutional Council has repeatedly affirmed the principle of uniformity of rights and liberties all over the territory of the State (CC84-185 DC, 18 January 1985; CC96-373 DC, 9 April 1996; CC2001-454DC, 17 January 2002), and scholars maintain that the aforementioned case-law clearly shows that rights have to be undifferentiated throughout the Republic, for

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[51] Already in 1810 the Napoleonic Penal Code expressly prohibited bigamy: "Whoever being engaged in the bond of wedlock shall contract a second marriage before the dissolution of the preceding one shall be punished with hard labour for a time" (s. 165).

whoever[52]. Nevertheless, s. 75 of the Constitution allows people of Overseas territorial communities (Guadalupe, Guyana, Martinique, Réunion, Mayotte, Saint-Pierre-et-Miquelon, isles Wallis e Futuna and French Polynesia) to "retain their personal status until such time as they have renounced the same". This means that personal status laws allowing for polygamy may be allowed. And it has been the case of Mayotte, a small island whose population is 90% Muslim, where polygamous marriages and the institute of repudiation have been legal until 2005 (law 2003-660 of 21 July 2003), but existing polygamous *ménages* continue to be legal up to present[53]. Quite a curious accommodation of interests.

In principle, except for the case of Mayotte until 2005, no polygamous marriage can be celebrated in France, but polygamous marriages celebrated abroad may have legal effects in the country through the notion of "soft public order" stating that the reaction against a provision contrary to public order may differ depending on the fact that such a provision prevents the fruition of a right in France or that at stake there are the effects of a right acquired abroad without any fraud" (*Arrêt Rivière*, Civil Court of Cassation 17 April 1953)[54]. So, through the notion of soft public order it is possible for polygamous marriages legally celebrated abroad to produce effects and consequences that have a legal dimension in France. This is exactly the case for family reunification.

In France, the importance of the reunification of migrant workers families has been recognised since 1945 (when s. 3 of the decree of 24 December 1945 attributed the Ministry for Population and Public Health the competences to favour family reunification in order to strengthen social integration and social cohesion), and in 1993 the

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52 The scientific literature on this point is extremely wide. One for all: Favoreu, Louis, *Droits des libertés fondamentales*, Paris, Dalloz, 2000, p. 497.

53 For the analysis of the impact of legal pluralism in Mayotte, see: Schultz, Patrick, "Le statut personnel à Mayotte: Les autochtones français d'outre-mer: populations, peuples?", *Droit et cultures*, vol. 37, 1999, pp. 95-114; Blanchy, Sophie and Moatty, Yves, "Le statut civil de droit local à Mayotte: une imposture?", *Droit et société,* vol. 1, 2012, pp. 117-139.

54 Much has been written on the notion of *ordre public atténué*. See, *inter alia*: Henriot, Patrick, "L'étranger sous le regard du juge. La condition d'étranger devant les juridictions françaises", *Diritto, immigrazione e cittadinanza*, vol. 3-4, 2015, pp. 72-83.

Constitutional Council has recognised the right of foreign workers permanently resident in France to "family life" as a fundamental right. (CC, 13 August 1993). In the case of polygamous homestead, since the judgment of the Council of State of 11 July 1980 (the so-called *arrêt Montcho*) until 2006 it has been possible to claim the right of family life, and the relative family reunification[55]. In reality, already the *loi Pasqua* n. 93-1027 of 24 August 1993 dealing with immigration, conditions for entrance, treatment and staying of foreigners in France had denied the right to family reunification for polygamous families, but it was not fully enforced till the Ministerial circular of 17 January 2006[56]. This prescribes more complex reunifications proceedings and more meticulous controls for citizens of countries allowing for polygamous marriages.

The case of family reunification is one of the fields where the "flagrant incoherence"[57] of the French legal system in respect of the treatment of polygamy is more acute. On the one hand through the principle of soft public order polygamy may produce legal effects in relation to second wives living in the countries of origin (as the right for all wives to claim for spousal maintenance —as stated by an old jurisprudence[58]— or for inheritance rights)[59], whereas, on the other hand, the very one phenomenon, through the denial of family reunification, impedes the enjoyment of those same rights on the French territory[60].

But what is the fate for families legally living in polygamous *ménages*?[61] The Pasqua law is not retroactive, so that *cartes de séjour* (residence

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55 For an in-depth analysis of the forms of polygamous family reunification before the *loi Pasqua*, see: Quiminal, Catherine and Bodin, Claudette, "Mode de Constitution des ménages polygames et vécu de la polygamie en France", *Étude réalisée pour la Direction des Populations et de la Migration*, Paris (1993).

56 *Cfr.,* Lochak, David, "Polygamie et loi Pasqua: nouvelles retombées", *Plein Droit*, n. 24, 1994, pp. 9-15.

57 Rude-Antoine, Edwige, "La validité et la réception del l'union polygamique par l'ordre juridique français: une question théorique controversée", *Journal des anthropologues*, n. 71, 1997, pp. 39-56.

58 Arrets of the Court of Cassation of 28 January 1958 and of 19 February 1963.

59 See Court of Cassation, 3 January 1980, and 8 December 1983.

60 Andrez Emmanuelle and Spire, Alexis, "Droits des étrangers et statut personnel", *Plein droit*, vol. 51, n. 4, 2001, pp. 3-7.

61 A very inspiring anthropological research on African women's strategies to re-negotiate their status and their conditions in the family once arrived in

permits) acquired before 1993 can not be nullified, but their renewal is subject to strict conditions. The Ministry of Interior circular LIB/ETRB/RF/S of 25 April 2000 has established that, except for the first spouse entered in France[62] whose permit is automatically renewed, either the matrimonial regime is "modified into a monogamous marriage" (through the separation of the polygamous marriage into two or more households —the so-called *décohabitation*— or the repatriation of the "additional" spouses) or the permit is downgraded into a visitor permit, that is temporary. Here again the French policy-makers seem to have entered into a vicious legal impasse[63].

The pressure to force the *décohabitation* is heavy and the whole matter particularly delicate: the members of polygamous families that refuse to split can not be regularised, but cannot be expelled either, as s. L521-2 of the *Code de l'entrée et du séjour des étrangers et du droit d'asile* protects long residents (more than 15 years in France) from expulsion[64]. In order to support spouses willing to leave polygamous homesteads, Ministerial circular DPM/AC/14/2001/358 of 10 June 2001 provides for social housing and social assistance, but the process is difficult, as underlined by civil society associations, under social, cultural, and even economic perspectives[65]. According to estimates, the *décohabitation* has

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France provides useful insights to consider the internal dynamics of "French" polygamous families. *Cfr.* Quiminal, Cathérine, "Parcours de femmes d'Afrique subsaharienne en France: de la polygamie à la famille monoparentale", in Bisilliat, Jeanne (ed.), *Femmes du Sud, chefs de famille*, Paris, Karthala, 1996, pp. 223-232.

62 Note that this does not mean the "first wife", but simply the first to enter in France.

63 Lochak, David, "La double peine des épouses de polygames", *Droit social*, n. 11, 2006, pp. 1032-1036.

64 Interestingly, however, law 2003-1119 *relative à la maîtrise de l'immigration, au séjour des étrangers en France et à la nationalité* does not protect from expulsion parents of documented children under age if they live in a polygamous homestead.

65 Imlou, Sonia, *La poligamie en France, une fatalité?*, Institut Montaigne, 2009; Rassiguier, Catherine, "Ces mères qui dérangent: immigrées africaines en France", *Les cahiers du CEDREF. Centre d'enseignement, d'études et de recherches pour les études féministes*, n. 12, 2004, pp. 25-43; Gaullier, Pauline, "La décohabitation et le relogement des familles polygames [Un malaise politique émaillé

not been very successful[66]. Moreover, the delivery and the renewal of the residence permits and the working permits following the disintegration of polygamous homesteads varies from department to department. The administrative proceedings become unpredictable with the obvious consequence of jeopardising even further the rights of already fragile people[67]. And ever since the enforcement of the policy of *décohabitation* no governmental research or assessment have been carried out to evaluate the policy's effectiveness and to eventually to develop additional assistance measures for vulnerable persons[68].

The political and media debate on polygamy gets reinvigorated from time to time in relation to the supposed rapid growth of new polygamous migrants[69]. And the theme has a particular appeal in the political debate[70], as mobilization can be fostered under different perspectives: from the cultural clash in the name of women's rights to the economic standpoint in the name of the protection of the French welfare system

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d'injonctions contradictoires]", *Recherches et prévisions*, vol. 94, n. 1, 2008, pp. 59-69.

66 Imlou, Sonia, *op. cit.*

67 For the discussion, *Cfr.* Gaullier, Pauline, *op. cit.* p. 63.

68 One of the few exception is an interesting research carried out by the Fondation Abbé Pierre, *Cfr.* Gaullier, Pauline, "*Le relogement et l'accompagnement à la décohabitation des ménages polygames: études de cas, enseignements et préconisations*", unpublished report for the Fondation Abbé Pierre et l'AORIF, 2008.

69 Interestingly, "in a lot of European countries, marriage is not just an aspect of the immigration problem, it is the immigration problem", Caldwell, Christopher, *Reflections on the Revolution in Europe: Immigration, Islam and the West,* London, Anchor, 2010, p. 228.

70 This is the case, for example, of the claims of Chantal Brunel, MP of the department Seine-et-Marne, from the UMP (conservative party), asking in April 2010 for "a state of the art department by department of polygamous families to evaluate the services delivered to those families, and to impede eventual abuses. Wives of polygamous men, in fact, are sometimes registered as single mothers, and the whole family benefits from additional services and allowances". See: http://www.lefigaro.fr/actualite-france/2010/04/26/01016-20100426ARTFIG00455-la-polygamie-un-phenomene-difficile-a-apprehender-.php (accessed on June 20th 2016).

against the over-exploitation of the social benefits by large migrant families[71].

Within polygamous families, France provides for a stronger protection of French spouses, so that even before the Pasqua law, no family reunification was permitted in the case the first wife was a French citizen (Tribunal de Versaille, 31 March 1965). How this differentiation should be regarded as? A discrimination on the ground of culture and origins or simply the ineffectiveness of the principle of "soft" public order in relation to French citizens? The case is really dating back, and there have not been other similar cases, so that it could be misleading to draw further conclusions from such an old case, but it is relevant as it shows the attitude *vis-à-vis* a social practice that has been tolerated but never integrated into a broader approach. Polygamy has remained an issue for migration policies, relevant for public order, and not an issue to be addressed in the frame of family policies. In this perspective, polygamy is perceived as a non-French phenomenon.

And, in fact, it should be noticed that s. 21-24 e 21-4 of the *Code de l'entrée et du séjour des étrangers et du droit d'asile* prescribe the "assimilation to the French community" as *conditio sine qua non* for the acquisition of the French citizenship through naturalisation. The Council of State's case-law has been consistent in declaring polygamy an insurmountable obstacle for the assimilation. And indeed the ministerial circular n. 2000-254 of 12 May 2000 concerning naturalisations confirms the Council of State case-law and maintains that polygamy is the marker of a "serious lack of integration that justify the denial of naturalisation".

V. THE UK, WHERE MULTICULTURALISM IS DEEMED TO HAVE FAILED

In 2011 the Under-Secretary of State at the Ministry of Justice maintained that no assessment was made of the number of polygamous households, but unofficial estimates counted more that 1.000 cases of legally recognised polygamous marriages and a much wider number of

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71 *Cfr.* Toullier, Adeline, "Les tergiversations du droit de la protection sociale face à la polygamie", *Droit social*, vol. 3, 2007, pp. 324-331.

unrecognised ones[72]. Obviously, considering the numbers of immigrants in the UK, and their origin, these estimates seems highly underestimating the phenomenon. As in Italy and in France, the numbers are not large, and yet the question of the recognition of polygamous marriages and of their effects is not irrelevant in both the public discourse and legal reasoning, as clearly shown by a relatively consistent scientific literature[73] and media reports[74]. Contemporary debates around polygamy, as in Italy and in France, have arisen almost exclusively in policy discussions about immigration, whereas historically the issue was related to the British colonial empire.

The first case related to polygamy, however, dates back 1866 (Hyde v. Hyde LR 1 P&D 130) and refers to a fully Western case of polygamy[75]: an Englishman who joined a Mormon congregation in London, moved to Utah (USA) and entered into a potentially polygamous marriage. Once resumed his domicile in UK, he petitioned for divorce as his wife had married another Mormon in the meanwhile. The Court stated that the law of England is "wholly inapplicable to polygamy"[76].

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72 Fairbairn, Catherine, *Polygamy-Report to the House of Common*, SN/HA/50551, 12 July 2012.

73 Martin, Jason, "English Polygamy Law and the Danish Registered Partnership Act: A Case for Consistent Treatment of Foreign Polygamous Marriages and Danish Same-Sex Marriages in England", *Cornell International Law Journal*, vol. 27, 1994, pp. 419-446; Sona, Federica, *Polygamy in Britain*, OLIR working paper, 2005; Shah, Prakash A., "Attitudes to Polygamy in English Law", *International and Comparative Law Quarterly,* vol. 52, 2003, pp. 369-400; Zeitzen, *op. cit.*; Campbell, Angela, *Sister wives, surrogates and sex workers: Outlaws by choice?* New York, Routledge, 2016.

74 See, for example: http://www.dailymail.co.uk/news/article-3414264/Want-higher-benefits-marry-one-wife-New-welfare-rules-hand-extra-taxpayer-cash-polygamists.html (accessed on 24th June 2016).

75 Noticeably, "until the 20th century colonizers viewed polygamy as a practice inimical to Christianity and civilization, and courts traditionally refused to recognize polygamous marriages formed in foreign jurisdictions. From 1930s onwards, English courts adapted this position to meet the realities of a country hosting an influx of migrants from many countries, some of which permitted polygamy". Campbell, Angela, *op. cit.*, p. 106.

76 Under the British law bigamy is a criminal offence in England and Wales since 1604, when the Parliament took action to restrain "evil persons" to marry more than one wife. *Cfr.* Campbell, Angela, *op. cit.*, p. 98.

Nevertheless, by the mid of the twenty century, the important influx of immigrants from former colonies, where polygamy was common and legal, made common law developing "a more favourable stance towards polygamy" so that in the early 1970s "a valid polygamous marriage produced the normal rights and obligations of marriages" when celebrated in a country where it was allowed for, according to the *lex loci celebrationis,* but it was invalid if celebrated in England[77]. In fact, bigamy is a crime under s. 57 of the Offences Against the Persons Act 1861[78].

In both the former British colonies of the West Africa and the Indian sub-continent polygamy is a typical modality of marriage under traditional customary law as well as Islamic rule. From the late 1970s, the changing pattern in migration flows especially of Pakistanis and Bangladeshi seeking family reunion made the legal system react with the explicit ban on the admission of second wives under the Immigration Act of 1988[79]. Thus, section 2 of the Immigration Act 1988 and paragraphs 278-280 of the Immigration Rules (HC 395 of 1993-4 as amended) prevent two spouses from being sponsored under the spouse visa route by the same partner. Nevertheless, it is possible for all parties to a polygamous marriage to be legally present in the UK, as second spouses may qualify for entry to the UK in their own right, in a different immigration category[80].

Much of the case-law subsequent to the 1988 legislation involved not only polygamous wives (with a consolidated jurisprudence strictly

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77 Martin, Jason, *op. cit.*, p. 423-24.

78 Nevertheless, it is interesting to highlight that the Attorney-General in a written answer in October 2011 stated that polygamy, unlike bigamy, is not a specific criminal offence. "Polygamy is not recognised as a specific offence by the criminal law. The Crown Prosecution Service (CPS) does not maintain a record of the number of defendants charged with or convicted of bigamy rather than polygamy (which is a specific offence under the criminal law in England and Wales)". See: http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm111017/text/111017w0003.htm# (accessed on 24th June 2016).

79 *Cfr.* Shah, Prakash A., *op. cit.*

80 Of course, this is the case for France and Italy, too. Interestingly, however, French and Italian experts (both academics and practitioners), media, public opinion and policy-makers seem to ignore or underestimate this specific aspect of the phenomenon.

applying the ban against second wives) but also their children, so that the 1994 Restatement of the Immigration rules, para 296, specifically stated that "nothing in these rules should be construed as permitting a child to be granted entry clearance, leave to entry or remain, where his mother is party to a polygamous marriage and any application by her for admission or leave to remain for settlement would be refused […]". Moreover, in the case *Azad v ECO, Dahka* (INLR [2001] Imm AR 318) the Court of Appeal refused a child of polygamous marriage being entitled to claim for British citizenship, despite the fact that the 1976 Legitimacy Act recognised as legitimate the children of polygamous marriages, and thus, in principle, they should have been able to inherit British citizenship status from their English-domiciled parents[81]. Along with other cases, this opens the way to the criticism of mono-culturalism against the British judicial system[82], but more relevantly for the purpose of this chapter, it manifestly discriminates against a child because of the marital status of his/her parents, in counter-trend with, for example, Italian case-law.

In a recent case (July 2012), the Immigration and Asylum Chamber of the Upper Tribunal denied a Nepalese child of a polygamous marriage the admission not because of her status but because she did not meet the general criteria for joining a sole parent (which was exactly her case). The Tribunal, however, stated that "the fact that anyone who is lawfully resident in the United Kingdom, whether a British national or otherwise can live in a relationship akin to a polygamous household with more than one partner, does not mean that it is illogical and inconsistent to deny aliens the right to come to the United Kingdom for the purpose of establishing such a household" (*SG (child of polygamous marriage) Nepal [2012] UKUT 00265(IAC),* para 39).

In October 2011, in a written answer, the Under-Secretary of State at the Ministry of Justice maintained that

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81 For a critical discussion of the process of acquiring British citizenship, see: Tyler, Imogen, "Designed to fail: a biopolitics of British citizenship", *Citizenship studies*, vol. 14, n. 1, 2010, pp. 61-74.

82 Parkes, Roderik and Pryce, Steve, *Immigrants and the State in Britain*, Working Paper Research Unit EU Integration Stiftung Wissenschaft und Politik German Institute for International and Security Affairs, December 2007.

> "There is some anecdotal evidence of people entering into polygamous marriage in the UK through religious ceremonies that are not registered by the State and are not recognised under UK law. Due to the fact that these marriages are not legally recognised there is no indication of how many such polygamous relationships exist. Any parties to such relationships do not share the same rights as a legally married couple, such as access to financial remedies available on divorce or inheritance rights on the death of one of the spouses, and are treated as cohabitants. The Government have carried out some work with the Muslim community to encourage mosques to undertake the civil aspects of marriage and to raise awareness of the need for marriages to be legally recognised"[83].

Against rigid laws and narrow interpretations of the legislation by the courts, however, the welfare system shows a softener approach, in order to accommodate diversity and the needs of a plural society, so that some social benefits can be paid in respect of more than one spouse. Since 1987, for example, different forms of income support can be extended to "additional" wives. Thus, for income-replacement benefits such as income support, income-based jobseeker's allowance and income-related employment and support allowance, the husband and first wife claim as a couple. Subsequent wives receive an additional sum which is less than the single person rate. The benefits are only payable for wives residing in Great Britain. The fact that the sum allocated to second wives is lower than if they claimed as single persons should indirectly discourage polygamous practices, but the relevant point for our discussion is the formal acknowledgement of the existence of such *contra legem* practices by the Public Administration on the one hand, and the need for public recognition of a social status by polygamous families on the other hand. The fact that people in need choose to claim for smaller benefits in the name of the public recognition of an identity and a status is an extremely interesting point in the discussion of this phenomenon

Furthermore, housing benefit and council tax benefit entitlements may be claimed by polygamous families living in one property, whereas they cannot be extended to second wives if living separately. But

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83 *Cfr.* Fairbairn, Catherine, *Polygamy*, Briefing Paper 01051, 6 January 2016, House of Commons Library, 2016, p. 4. Noticeably, there is no public document not research on this work carried out with the Muslim community, as there is no evidence of its effects.

contributory benefits make no provision for polygamous marriages, so that no wife gets bereavement benefits if the homestead has been polygamous, whereas if at the time of his death the husband leaves a single widow, she may qualify for bereavement benefits. Moreover, quite a consistent case-law upholds the refusal to allow widows of polygamously married husbands to claim for widowed mother's allowance, pension scheme and widow's benefits *(Bibi v Chief Adjudication Officer*, 1998; *R v Department of Health, ex parte Misra*, 1996; *Al Mansorri v Social security Commissioner*, 1995; *A-M v A-M*, 2001)

Nonetheless, the whole UK welfare system is replacing all existing means-tested benefits and tax credits for families of working age with Universal Credit (the reform will be completed by 2017), and the Government has decided that the Universal Credit rules will not recognise additional partners in polygamous relationships[84]. What could be interpreted as partial attempts to provide remedies to the needs of the most vulnerable members of polygamous homesteads will be therefore progressively cancelled. Nonetheless, from a purely economic perspective, "treating second and subsequent partners in polygamous relationships as separate claimants could in some situations mean that polygamous households receive more under Universal Credit than they do under the current rules for means-tested benefits and tax credits. This is because the amounts which may be paid in respect of additional spouses are lower than those which generally apply to single claimants"[85]. But this will mean denying "family" recognition to polygamous homestead, that is more money against the recognition of the status of being a "legitimate" wife.

Going back to the theoretical questions at the basis of this analysis, it is clear that polygamous families are not considered "families" by the

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84 In a written answer in 2014, the Secretary of State for Work and Pensions maintained: "The Government has decided that universal credit, which replaces means-tested benefits and tax credits for working-age people, will not recognise polygamous marriages. Instead, the husband and wife who are party to the earliest marriage that still subsists can make a joint claim for universal credit in the same way as any other couple. Any other adults living in the household would each have to claim as a single person on the basis of their own circumstances". *Cfr.* Fairbairn, Catherine, *op. cit.*, p. 10.

85 *Ibid.*, p. 10.

British legal system. And even when some benefits may be claimed by the members of plural homesteads, it is not in the name of the "family", but simply as "additional" individual members.

In empirical terms, the risk is to drive the phenomenon even more underground with severe abuses against the most fragile ones. Dis-empowering already marginalised people through the denial of a recognised status may jeopardise even further their rights, as "women and children may simply be abandoned without a divorce recognised under the personal law of the parties and without recourse to official for a for remedy"[86].

VI. CONCLUDING REMARKS

At the supranational level, the right to respect to family life (art. 8 European Convention on Human Rights) and its wide case-law established by the Strasbourg Court of Human Rights, as well as the right to family reunification disciplined at the European Union level by the Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, are not absolute, as they are subject to restrictions, and polygamy is explicitly mentioned as one of the cases.

While affirming that "family reunification is a necessary way of making family life possible. It helps to create sociocultural stability facilitating the integration of third country nationals in the Member State, which also serves to promote economic and social cohesion, a fundamental Community objective stated in the Treaty" (point 4), the Directive 2003/86/EC explicitly states that "in the event of a polygamous marriage, where the sponsor already has a spouse living with him in the territory of a Member State, the Member State concerned shall not authorise the family reunification of a further spouse. By way of derogation from paragraph 1(c), Member States may limit the family reunification of minor children of a further spouse and the sponsor" (art. 4.4). So: family has a crucial value for integration and social cohesion, and children's superior interest should prime in weighting competing interests, but there is no consensus on whether polygamous

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86 Shah, Prakash A., *op. cit.,* p. 398.

relations should be regarded as families and polygamous children's best interests can be sacrificed in the name of public order, equality and human dignity. This is to say that polygamous homesteads would not serve the objectives as other families do in terms of integration, social cohesion and economic stability and enhancement.

The notion of family life has been dynamically interpreted by the European Court of Human Rights allowing for the protection of *de facto* 'family' ties where the parties are living together outside of marriage (*Keegan v. Ireland*, 290 Eur. Ct. H.R. (ser. A) § 44 (1994), *Kroon and Others v. the Netherlands*, 297-C Eur. Ct. H.R. (ser. A) § 30 (1994); *Elsholz v. Germany*, 2000-VIII Eur. Ct. H.R); adulterous families [*Johnston and Others v. Ireland*, 112 Eur. Ct. H.R. (ser. A)]; the transsexual's right to marry (*Christine Goodwin v. the United Kingdom*, 2002-VI Eur. Ct. H.R.); and recomposed families [*K. and T. v. Finland*, Eur. Ct. H.R. §§149, 150 (2001)]. Since 1989, it has assumed that family life may exist between parents and children born into second relationships or children born as a result of an extra-marital or adulterous affair (*Jolie & Lebrun v. Belgium*, appl. No. 11418/85, 14 May 1986, DR 47)[87]. And yet, despite some analysis argue in favour of the Strasbourg Court recognition of polygamous relations as being entitled to art. 8 protection[88], it should be noted that

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87 Much has been written on the European Court of Human Rights' case-law on art. 8 and the interpretation of the notion of "family". See, *inter alia*: Stalford, Helen, "Concepts of Family under EU Law-Lessons from the ECHR", *International Journal of Law, Policy and the Family*, vol. 16, n. 3, 2002, pp. 410-434; Marella, Maria Rosaria, "The Non Subversive Function of European Private Law: The Case of Harmonisation of Family Law", *European Law Journal*, vol. 12, n. 1, 2006, pp. 78-105; Hart, Linda, "Individual Adoption by Non Heterosexuals and the Order of Family Life in the European Court of Human Rights", *Journal of Law and Society*, vol. 36, n. 4, 2009, pp. 536-557; Bamforth, Nicholas, "Families but not (yet) marriages? Same-sex partners and the developing European Convention 'margin of appreciation'", *Child and Family Law Quarterly*, vol. 23, n. 1, 2011, pp. 128-143; Ferrando, Gilda, "Genitori e figli nella giurisprudenza della Corte Europea dei Diritti dell'Uomo", *Famiglia e Diritto,* vol. 11, 2009, pp. 1049-83.

88 Almeida, Susana, *The respect for (private and) family life in the case-law of the European Court of Human Rights: the protection of new forms of family,* communication presented on the 24th of August of 2009, at the *5th World Congress on Family Law & Children's Rights*, Halifax, Canada.

in the case *E.A. and A.A v. the Netherlands*, App. No. 14501/89, 6 January 1992, the European Commission on Human Rights stated that "when considering immigration on the basis of family ties, a Contracting State cannot be required under the Convention to give full recognition to polygamous marriages which are in conflict with their own legal order" (para. 2). And the absence of an obligation to recognise polygamous unions as formal marriages was already mentioned in *Alam and Khan v. the United Kingdom*, App. No. 2991/66, 1968 Y.B. Eur. Conv. H.R. 788 (Eur. Comm'n H.R.).

Moreover, more recently in the case *Şerife Yiğit v. Turkey* App. No.3976/05, 2 November 2010, the Strasbourg Court uses the spectre of polygamy to upheld Turkey's law that required couples to marry monogamously in a civil ceremony before a state official. The Court notes that "in adopting the Civil Code in 1926, which instituted monogamous civil marriage as a prerequisite for any religious marriage, Turkey aimed to put an end to a marriage tradition which places women at a clear disadvantage, not to say in a situation of dependence and inferiority, compared to men. For the same reason it introduced the principle of gender equality in the enjoyment of civic rights, particularly in relation to divorce and inheritance, and prohibited polygamy." (para 81).

Therefore, the issue is not whether some families are "more equal than others" paraphrasing G. Orwell, but that polygamous relations are not recognised, not even in a "soft" perspective, as families, and are not entitled to the same protection, rights and benefits of monogamous families in both concrete and abstract, identity terms. And this may happen, as already underlined, to the detriment of the most vulnerable members, children and women.

France, UK and Italy have different immigration policies, different integration patterns (universalism versus multiculturalism), different ideas on family and family role in society, but in all these three countries polygamy debate still evokes too sensitive themes to allow for addressing polygamy's central conundrum: ensuring fairness and the respect of human dignity in such a complex context.

Going back to the first question singled out in the introduction, i.e. whether polygamous families can be defined "families", the discussion of the cases of Italy, France, the UK and of the European Court of Human

Rights case-law leads to a negative answer. Neither from a legal nor from a socio-political perspective polygamous homestead are entitled to the status of "families"[89]. Even in France and in the UK, where there was an initial opening towards a *de facto* recognition of polygamous entities as *loci* for familiar relationships, there has been a progressive withdrawal. The position of those scholars that question about "extending the forms of valid marriage to include polygamy" making a parallel with the progressive recognition and legalization of same-sex unions seems untenable[90]. Same-sex (or transgender) unions, in fact, do not question what is problematic in polygamous relations: inequality and different status among the members of the *ménage*, and do not impact negatively on their human dignity.

The second question has an equally negative answer. "The substance and symbolism of polygamy is hard to square with gender equality and dignity for women"[91] as in marital multiplicity the power is bargained and distributed very rarely in favour of women. In a way, equality and human dignity are too strongly embedded in the legal culture of European societies to allow for a legal pluralism that may erode them. Even though the case of Mayotte is very intriguing, we can doubtlessly conclude that Italy, France and the UK speak with one voice in rejecting polygamy as form of legitimate "social groups" where individuals may "express their personality", paraphrasing s. 2 of the Italian Constitution. The risk, if we consider it a risk, of a "personalisation" of the law going alone with national origin seems thus to be avoided, at least in this field. No *nuance* of equality, rights and dignity is compatible with European legal systems.

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89 From a socio-psychological perspective, more research would be needed to inquire into identities and self-representations of the members of those homesteads to understand how co-wives and step-siblings describe and perceive themselves.

90 Witte, John, "Why *Two* in One Flesh? The Western Case for Monogamy over Polygamy", *Emory Law Journal*, vol. 64, p. 1675. J. Witte's analyis, indeed, leads the author to conclude that: "the West can now simply and politely say to the polygamist who bangs on its door seeking admission or permission to practice polygamy: "No thank you; we don't do that here," and close the door firmly", p. 2015.

91 Andrews, Penelope, "Who's afraid of Polygamy?", *Utah Law Review*, vol. 11, n. 2, 2009, p. 379.

And yet, it is the third question concerning the quality of the life of a number of women and children living in our European societies that is difficult to address. Marital multiplicity generates specific social and psychological costs and vulnerabilities, and as of today Italy, the UK and France have proved being inadequate to face the challenge. To overcome the dilemma, some scholars argue in favour of a pragmatic approach, that leaves aside "the polygamy question framed as good versus bad, decriminalization versus prohibition" to move to the assessment "whether and how polygamy might be recognised and regulated, consistently with contemporary norms of equality and fairness in family life"[92]. This approach may open a different perspective and lead the discussion on a less contested terrain, engaging policy-makers in a pragmatic and problem-solving reflection on how to preserve people's rights, status, identities and self-representations without opening the door to practices that are contrary to the basic principles of the European civilization. Moreover, from a rather different standpoint, we have to notice that in existing research little attention is given to the experience of women associated with polygamy. Polygamy is always depicted as being imposed on women against their will[93], but this assumption risks perpetuating patriarchal interpretations of family dynamics. Therefore the danger is to contribute dis-empowering women, while trying to grant their fundamental rights.

The chapter does neither advocate for the recognition nor for the tolerance of social practices heavily marked by women's subordination[94], rather the interesting aspects of the theme lies in the fact that it challenges the very heart of Western democracies legal systems, unveiling inconsistencies and contradictions, and urges for new solutions for accommodating the interest of plural societies and, fore and foremost, the needs for protection and guarantee of the most vulnerable members of polygamous relations, consistently with contemporary social norms.

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92 Davis, Adrienne, "Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality", *Columbia Law Review*, vol. 110, n. 8, 2010, p. 1936.

93 Which indeed is the case in the majority of the cases, according to existing research.

94 For an opposite view: Den Otter, Roland, *In defence of plural marriage,* New York, Cambridge University Press, 2015.