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**Polygamous Marriage under Italian Law**

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## **Abstract:**

In this paper we analysed one of the main issue that the italian system has to deal with after the recent migration flows: polygamy.

At first, we focused on the two principal italian cases concerning polygamous family reunification and the italian and european laws that ban the polygamous principle.

We then tried to scan this matter from two different point of view: the one of cultural relativism and the other of feminism.

Should we recognize polygamous marriages in order to respect different group rights or should we ban them in order to protect our fundamental rights such as the equality between men and women?

In the end, we analyzed the main articles contained in the Italian Constitution and in the ECHR regarding the concept of family and the evolution of its interpretation during the years. We also tried to figure out which could be the consequences of a possible acknowledgment of polygamous families in our constitutional system.

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## **1. Introduction: the Legal Definition of Polygamy**

Continuous migration flows have produced a significant collision between the European systems and the Muslim ones specially in the field of fundamental rights and liberties of the individual, of which, as we all know, each culture has a different vision.

The item that most of all raised a very deep debate is polygamy and consequently the vision of family and the role of women within it.

The word 'Polygamy' derives from ancient greek πολυγαμία (*polugamia*).

This word "generally 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)" (V. Federico, 2014). This clarification is important and afterwards we will see why.

This institution is widely accepted among different societies worldwide: muslim, african and also mormon societies allow this kind of marriage; nevertheless it is considered illegal in most of the Western countries.

As a result of the increasing migratory flows, Western systems, as the Italian one, developed a resistance against the family patterns that are different from the ones they admit: in particular the polygamous one. This rejection is motivated by the necessity of safeguarding the rights of women, which are thought to be overridden by the fact that, in polygamous marriages, the parental authority

is normally exercised by the father alone. This patriarchal model of family clashes with the western idea of marriage which, after a long evolutionary process in the interpretation of the constitutional provisions, is now based on the principle of moral and legal equality of the spouses.

On the other hand globalization gave us the opportunity to face our actual openness to cultural diversities. However it raises the problem of multiculturalism: what western countries may consider as a necessary prohibition, at the same time can be seen as a forbiddance unfairly imposed, as violation of the right to have a family, by those countries that admit polygamous relationships.

The conflict between different cultural and legal habits opens up new horizons and reveals new issues in the field of private international law, such as the safeguard of the best interest of the child in the matter of polygamous family reunification and unilateral male repudiation as a form of divorce, which is usually rejected by our legal system because of its discriminatory nature towards wives' disadvantaged positions.

“Polygamy represents an extremely interesting case for discussing the challenges that immigration casts on European legal systems vis-à-vis the protection and enforcement of fundamental rights”: indeed each country has its own immigration policy and integration pattern which are different from the ones that are applied by other nations and “questioning how contemporary democracies contend with the complex phenomenon of polygamy will unveil crucial, and multidimensional, aspects of fundamental rights enforcement” (V. Federico, ‘Europe facing polygamy: Italy, France and the UK accept the challenge of immigration, 2014).

This paper aims at highlighting and analysing the attitude adopted by the Italian legal system towards polygamous marriages and the different reasons that justify it.

Here is a syllabus of different issues that will be discussed in the paper:

- Polygamy as a cultural practice or as a violation of human rights of women?
- Theoretical reasons behind the prohibition of polygamy in Italy
- One step back: the notion of family at a constitutional and supranational level
- Polygamy under Italian law
- The description of the two cases (Turin Court of Appeal; Court of Cassation)

## **2. Background analysis using UN Women Global Gender Equality Constitutional Database**

In this research the first step had been a background analysis using UN Women Global Gender Equality Constitutional Database: our aim was to highlight the relevance of the different notions of Family, Marriage and Polygamy in the Constitutions of Africa, Americas, Asia, Europe and Oceania. We based our work on the comparison of the data found in the section ‘Marriage and Family Life’ of the database after inserting the key words: Family, Marriage, Polygamy and Monogamy. These were the results:

Different notions of family are present in Africa (19%), followed by Asia (10%), Americas (9%), Europe and Oceania (2%).

In most of the constitutions we analyzed the notions of family are very similar: indeed it is described as the basic unit of the whole society. In some of the European constitutions this fundamental unit of society is portrayed as strictly based on marriage. On the contrary some countries as Brazil, Peru, Jamaica and also Oceania recognize the stable union of a man and a woman as a family unit with similar effects as marriage. In many Asian constitutions, though, the definition of family is linked to the states' religion, morality, belief, ethics or patriotism. These States also tend to associate women with a precise role into the traditional idea of family, by directly defining their role into society, or by mentioning motherhood and childhood as the first elements to be protected in family, in so doing differentiating immediately woman's and man's position in the ideological framework of family duties.

We found that there are just few notions of marriage worldwide: most of them are in Americas (11%), Europe (6%), Africa (4%), Oceania (2%) and Asia (1%).

In African constitutions marriage is based on the 'free and full consent of the intending spouses' and it guarantees equality between men and women. Most of the time marriage is subjected to the law but in a few cases it is ruled by religion: for example in Gambia the law consists in 'The Sharia as regards matters of marriage, divorce and inheritance among members of the communities to which it applies' (Sec. 7).

In America's constitutions, just as the European ones, is underlined the juridical equality of rights and duties of men and women within the marriage.

This institution is also mentioned in several Asian Constitutions to declare its conditions: in 9 States out of the 34 analysed it is specified that it can be contracted only on a mutual consent basis and in 13 States it integrates a condition of equal rights between the partners.

Also the notion of polygamy is not so common: it is present in the Americas (11%), Africa (5%), Europe (3%) and then Asia (2%).

In Africa, Americas and also Europe polygamy is implicitly banned as it is often underlined that marriage may be entered only by a man and a woman. It is directly banned in only 4 Asian Constitutions and in Rwanda were 'civil monogamous marriage between a man and a woman is the only recognized'. (Art. 26)

### **3. Polygamy as a cultural practice or as a violation of human rights of women?**

In order to find possible answers to this problematic question, we should start with some preliminary considerations about the main topics which the issue involves.

The contraposition between polygamy as "a cultural practice" and as "a violation of human rights" could be rephrased in the antithesis: on the one hand, cultural relativism and, on the other hand, feminism.

By cultural relativism, we mean the view that all beliefs, customs, and ethics are relative to the individual within his own social context: what is considered moral in one society may be considered immoral in another, and, since no universal standard of morality exists, no one has the right to judge and to be imposed to another society's customs.

Regarding this topic Charles Taylor in *"The politics of Recognition"* explains his idea of "authenticity", meaning in his words that "human beings are endowed with a moral sense , an intuitive feeling for what is right and wrong". He claims that understanding right and wrong is not a meter of dry calculation, but is connected to our feelings, our nature. Everyone has the right to live listening to his own inner voice in order to express his identity. Each identity has to be respected and recognized as unique. The development of the modern notion of identity has given rise to politics of difference in order to safeguard and let the distinctness of individuals or a group survive forever.

Instead by feminism we mean what Susan Muller Okin in her essay *"Is Multiculturalism bad for women?"* explains with these words: " the belief that women should not be disadvantaged by their sex, that they should be recognized as having human dignity equal to that of men".

Especially the first orientation in its theory finds some limits, if analyzed in the historic context: western countries follow policies which are based on the respect for cultural differences and for national traditions, until these don't collide with their own supreme principles.

Hence every western government has to cope with the problem of how to reconcile two conflicting needs which both are worthy of being safeguarded.

In this perspective polygamy deals with the just raised problem because it is a custom that only several minor cultures have in common, especially if we consider polygamy in the occidental scenario which brand it as a dangerous non-observation of the more democratic principles (such as equality of the two sexes and freedom). Therefore is polygamy a tradition that deserves to be accepted, preserved, avowed and protected by western states?

The theory of the "group rights" fulfills the possibility of recognizing to smaller congregations, whose members have in common the same cultural — and also religious — ideology, their own "societal cultures", meaning their own ways of life, encompassing both public and private spheres. Nevertheless sustaining this stance has some contraindications.

First of all, what is a group right?

A group right is a right possessed by a group qua group rather than by its members severally. It contrasts with a right held by a singular person as an individual. Will Kymlicka, the foremost contemporary defender of cultural group rights, claims that the acknowledgment of special rights to these groups is necessary in order to put minorities on an equal footing with the majority, otherwise their cultures could be threatened with extinction. His belief is based on the principle of freedom and self-respect of group members : every societal culture has the right to determine autonomously the

one which is retained the best lifestyle. According to Kymlicka's thought, denying people to live pursuant to the inherited social roles means condemning them to oppressive and unsatisfying lives.

More precisely the theory of Will Kymlicka is based on what he defines "liberal multiculturalism": on the one hand it is a liberal democratic form of multiculturalism which has as framework liberal values of freedom, equality and democracy, on the other hand liberal multiculturalism is a multicultural form of liberal democracy because it includes, not only liberal-democratic constitutions, but also policies that recognize and accommodate ethnocultural minorities. This way of focalizing the problem implicates the construction of "societal cultures", in other words contexts of free choices in which individuals, ( meaning members of substate national groups) are able to rationally and reflectively choose how they prefer to live. His thesis has been interpreted in a radical manner by authors like Benhabib and Appiah: both comment that Kymlicka's use of "societal culture" somehow legitimates denying these individuals the right to revise their inherited ways of life. They guess that his theory is grounded on "culturalist premises" as if the recognition of "external protections", allowed by different states in order to guarantee that minorities could live following their traditions, operate as "internal restrictions", forcing them to adapt their own lifestyles to the inherited ones, even if they wanted not to choose these customs. In this view liberal multiculturalism would be totally aimed to make possible the cultural conservation of substate national groups, overtaking the individual rights and wills of their belongers. But Kymlicka rebuts that, according to the lecture of his opposers, substates like Catalonia, Quebec, Flanders, Puerto Rico, South Tirol would be illegitimate if ideas of maintaining cultural distinctiveness play any role in their motivations. Insofar as it has been briefly explained here, every thinker has his own opinion and the debate about the ways in which it's possible to motivate cultural projections and political recognition of "group rights" is still open in the doctrine.

Nevertheless it can be observed that on a conceptual level, the thesis of group rights appears in line with the need of western States to protect different cultural values, but on the pragmatic level, there are some obstacles regarding its application.

Susan Moller Okin has underscored the complicated connections between culture and gender which this theory entails. The first problem concerns the fact that most of the cultures, we are dealing with, focus on the sphere of sexual, reproductive life, imposing not little limits to women; the defense of these cultural practices (like polygamy, abortion, sexual harassment, clitoridectomy and purdah etc.) probably will have a greater impact on the lives of women and girls than on those of men and boys. The second connection between gender and culture, which reflects the linkage between feminism and cultural relativism respectively, is that these cultural traditions were born in order to achieve the aim of the control of women by men. The Okin's critique rotates around this consideration: the group rights that will descend from admitting the theory which defends minorities, would be *gendered*, with substantial differences in power between men and women. In other words, its application would put at risk the individual rights of women, considered as the weak sex.

An interesting aspect could be discovering what the polygamous wives think about this old traditional custom and how they justify it. During 1980s, the French government allowed immigrant

men to bring all their wives into the country therefore approximately 200.000 families in Paris were polygamous. These women were interviewed by reporters who had examined their personal opinions: the wives defined polygamy as an “inescapable and barely tolerable institution in their African countries of origin, and an unbearable imposition to the French context”. These declarations deal with the conditions in which these polygamous families were living: overcrowded apartments and the lack of private space for each wife led to behavior of hostility and even violence among the wives and against each other’s children.

However, those reported here are only some voices which belong to the big chorus composed by all the populations which legalize polygamy, especially for rooted religious reasons. Polygyny could not be allowed in western countries, if also polyandry was not admitted, but, since polyandry is less widespread than polygyny and the same religions which accept polygyny actually prohibit polyandry, this compromise turns out to be impossible. Jewish Bible, Koran, Hinduism and main tendencies of Christianity forbid or don’t support polyandry.

Regarding the magnitude which migrant flow is achieving nowadays every occidental country has to face the matter of how to accept in their own legal system the cultural and religious requirements of immigrant, considering these in accordance with its national laws and principles. The problem is that polyandry is not considered a need by these populations, only polygyny is: polygamy in both senses from an occidental viewpoint probably could be perceived like a new goal of civil rights.

In our society there are a lot of extramarital relations, for this reason the supporters of the legalization of polygamy accuse western countries of being hypocrite because they seem to not accept a situation which actually is very popular. However in our society allowing polygamous families would be an immoral concession, contrasting the value of fidelity which is fundamental in our conception of love relationship. The obligation to fidelity to the spouses is enshrined also in Italian Civil Code in the article 143 and in any case an exception from what it’s generally considered morally correct doesn’t justify the acceptance of a radical institution as polygamy.

As showed, polygamous marriage implicates many different debates of all these delicate themes.

Even if we consider the contraposition, proposed by W. Kymlicka, between the majority and the minor group right, which in the analyzed case is the supporter of the polygamy’s legalization, it’s reasonable admitting that the judicial and consequently criminal system is representative of the values and the traditions of the bigger group: this is what generally happens in all Countries, also in Italy. Nevertheless the minor group right could claim the legitimacy of some practices because these ones are parts of the culture, identity, religion of group’s members. For these reasons the doctrine has created the concept of the so called *cultural offence* or *cultural motivated crime*, meaning “ an act by a member of a minority culture, which is considered an offense by the legal system of the dominant culture; the same act, within the cultural group of the offender, is condoned, accepted as normal behavior or endorsed and promoted in the given situation” [definition of J. Van Broeck, *Cultural defence and culturally motivated crimes*].

The notion of cultural offence implies a conflict between a judicial rule, which incriminates the conduct as relevant on a penal level, and the cultural rule, that vice versa legitimates that behavior; this conflict is actually the collision between the 2 different and contrasting cultures, the dominant and minor ones. The recognition of the culturally motivated crimes has promoted the so called *cultural defense*, which can be explained as a defense to the prosecution for a criminal act which, according to the defendant, results from his/her cultural background. The cultural defense is functional to excuse the defendant and allows the judges to determine the appropriate level of culpability and eventually a reduction of the punishment.

Even if the cultural defense could permit to treat these particular situations with fitting measures, according to the principle of Substantive Equality enshrined by the art 3 co. 2 of Italian Constitution, pursuant to different cases have to be regarded in different ways, the procedure would become problematic, considering the other constitutional principle of Formal Equality ex art 3 co.1: *All citizens are equal before the law without distinction of sex, race, language, religion, political opinion, personal and social conditions.*

More specifically in relation to the Italian judicial system, an example of culturally motivated crime is the practice of female genital mutilation : the Italian legislator in this case has rejected the juridic relevance of the cultural influence, adopting a solution in complete opposition to the doctrine of *Cultural Defense* with the Law n. 7 of 2006 which introduced in the Italian penal code the new figure of crime that punishes female genital mutilations.

The legislator has been criticized of an use merely symbolic of the criminal law, but anyway the disvalue allocated by the legislator to this cultural practice ( Italy at the time was the first Country in Europe with the major number of women who have been subjected to infibulation, especially Nigerian and Somallian immigrated women), has been superior to the interest of protecting minor cultures : the safeguard of women and girls' rights is prevalent over any other contrasting interest.

Analogously the Law n.94 of 2009 has criminally sanctioned the cultural practice of *manghel*, the begging in public places through the use of minors, especially widespread among rom people.

To conclude, bigamy appears in the Italian criminal code at the Art 556 as the crime of who, being tied by a legal marriage, contracts a second matrimony with civil effects or the crime of who contracts the matrimony with an other person who is already tied by an previous marriage with civil effects; the crime is punished with the reclusion of maximum 5 years.

The Italian legislator hasn't still expressed about polygamy in the perspective of a cultural practice and different could be the reasons : for example the consideration that in our society there are a lot of extramarital relations, which violate the obligation to fidelity to the spouse enshrined also in Italian Civil Code in the article 143. Moreover Polygamy in the sense of polygyny ( only men can have more wives ) could not be allowed in western countries, if also polyandry ( also women can have more husbands ) was not admitted because the first one violates principle of Equality between the two sexes and of Freedom of women, but, since polyandry is less widespread than polygyny, this compromise turns out to be impossible.



Regarding the magnitude which migrant flow is achieving nowadays every occidental country, including Italy, has to face the matter of how to accept in their own legal system the cultural and religious requirements of immigrant, considering these in accordance with its national laws and principles. The problem is that polyandry is not considered a need by these populations, only polygyny is: polygamy in both senses, even if with some limitations, from an occidental viewpoint probably could be perceived like a new goal of civil rights.

### **3.1. Theoretical Reasons Behind The Prohibition Of Polygamy In Italy**

In order to understand the reasons why polygamy is prohibited, it is important to analyze the history of the Italian marriage and how it has developed during the years.

First of all we should clarify that the only marriage allowed in Italy is the monogamous one: that is a two-person contract. But where can we found the roots of this institution?

The main element is the historical one. As we all know the European society (in particular the Italian one) was deeply influenced by the greco-roman world, where the marriage has always been a strictly monogamous institution: a man indeed could have only one wife at a time (*eg* Penelope and Ulysses in Omers's masterpiece, they are one of the most famous couple of that time).

Even though there are no traces of polygamous marriage, concubinage has always existed: the husbands often had extramarital relations with their slaves and handmaid. They also had *patria potestas* over the entire family which means that the woman and their children were totally submitted to the authority of the father.

However it is in this society that, from the Late Roman Republic, started to establish the idea of the emancipation of the woman and the idea of an indissoluble marriage with sacramental dignity: from being totally under the control of the father first and the husband after, women then became the absolute mistresses of their households, they were no more confined to special quarters and could attend banquets and performances outside their own house. This change of women's status was mainly due to Rome's campaigns: while such a large number of men was absent, women had the opportunity of developing their abilities and increase their social importance.

The legacy of the Roman world has then been acquired by Christianity. This religion indeed reaffirmed the indissolubility of the monogamous marriage and introduced a principle which is contrary to the idea of the unilateral male repudiation beared by the Middle East populations as the Jewish and Islamic ones (these are based on fundamentalist interpretations of the Old Testament just like the American Mormons). Some steps of the Bible report what Jesus said: 'Moses because of the hardness of your hearts suffered you to put away your wives: but from the beginning it was not so.' (Matthew 19,8) ; 'But because of immoralities, each man is to have his own wife, and each woman is to have her own husband.' (Corinthian 7,2).

Another interesting point is that, since the first half of the 20<sup>th</sup> century, the Italian Civil Code (s. 560) upheld the monogamous principle by punishing the concubinage of the husband (substantial

polygamous family life): in spite of the patriarchal model and the idea of the husband's superiority on his wife, the polygamous relationships were strictly prohibited and sanctioned.

This rule has then been abrogated by the Constitutional Court because of "the unequal treatment referred to the man and to the woman in case of adultery", which implies "an open violation of the fundamental principle of equality between the spouses" (A. Galoppini, 'Il diritto di famiglia e delle persone',)

In the end we can see that, despite the ostensible crystallization of the notion of 'family' in the Italian legal system (due to the secular tradition of the ancient societies and of the Christian religion), the view we have of family is getting wider and wider. This institution indeed is taking a variety of forms, including marital and non-marital relationships: "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" (V. Federico, 'Europe facing polygamy: Italy, France and the UK accept the challenge of immigration', 2014).

#### **4. One Step Back: the Notion of Family at Constitutional and Supranational Level**

The notion of family is expressed in the Italian Constitution under article 29, where it is firstly stated that: "The Republic recognises the rights of the family as a natural society based on marriage".

The built-in contradiction is immediately evident in this definition, which defines *family* as a *natural* society and – at the same time – a society *based on marriage*.

Thus, on the one hand the article seems to be oriented towards a natural-law-concept, spontaneously created by persons and solely recognised by the Republic.

On the other hand, it founds this recognition on a positive-law institution, such as marriage.

Which is then the ratio and which the correct meaning we should accord to the name of *family*?

Article 29 reads as follow: "Marriage is based on the moral and legal equality of the spouses within the limits laid down by law to guarantee the unity of the family". Whether in the first part of this second paragraph the attention given to equality and the condemnation for every type of discrimination seems to be absolute, which are and how far can this limits go?

To that we must also add the notion from the article 8 of the ECHR, about the Right to respect for private and family life, stating that:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of National security, public safety or the economic well-being of the Country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others”.

Once again, a principle stated without reservation in the first part, the principle of respect for private life and therefore for multiculturalism as well, finds in the second part major limits, imposed here by valours of a publicistic kind. To what extent is public order to be considered as a priority compared to individual freedom and private life?

Moving from the definition given by the Italian Constitution, it is worth pointing out that the reason why the framers decided to write down an article about family was fundamentally linked to the will to protect this private unit – mindful of the very recent experience of fascism – from the legislator itself.

Therefore, they wanted to recognise a legal order *inside* the Republic’s one, to mitigate the normative power of the legislator.

It is also worth noticing, though, that this safeguard is not meant to protect the sub-system we call family, but to protect the *individuals* who compose the family group. In fact, it does not convey rights to a family’s legal person, whereas the family attributes a *status familiae* to each of its member, who are therefore granted and protected in the respect and the development of their personality. And from this attention to individuals and to equality derives the characterisation of marriage *based on the moral and legal equality of the spouses*. The limits that then step in *to guarantee the unity of the family* have the purpose to extend this individual’s safeguard – the family – and make it resistant also to internal threats, to best protect every and each member.

From this perspective, we should also notice that a similar safeguard can be effective and sound just going through the same legal system we want to be partly isolated from.

For this reason, since the 70s the Constitutional Court many times observed that the legal safeguard granted to married people should have been extended to those family-situations where all the circumstances are equal to those of a marriage, despite the formal bond existing or not.

In sentence no. 6 of 1977 the Court was in fact inviting the legislator to provide citizens with a legal protection of this kind.

Again in 1986 (sentence no. 237) the Court rejected a question of constitutional legitimacy in which it was argued that the differential treatment between cohabiting and married couples was in conflict with art. 3 of the Italian Constitution (“All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions.”), stating that the question was unjustified since “the difference in treatments regards two objectively and substantially different situations, because of the obvious

difference between marriage and cohabitation, resulting from the fact that in the first case the family exists, while in the second case it does not”.

Thus, unions based on cohabitation are protected by article 2 of the Constitution as human associations, but not by article 29 as families, being families only those based on marriage. The difference, claims the Court, lies on the fact that cohabitation, even if supported by the *affectio quotidiana* as well as marriage, does not have the same stability, as it can be revoked even unilaterally in any moment, thus having a nature of individual-perspective more than a family-centred one.

Still, the Court pointed out again the need for the Parliament to legislate about this situation, which left very little space to reality and persons in the grid of law.

While the legislation evolved (as in the Penal Code) recognising more and more equal rights to married and cohabiting couples, the request to legally assimilate the situations was rejected again and for the same reasons in 1996 (sentence no. 8)

This same issue got more and more frequently intertwined with the matters of homosexual couples’ rights and transgender married people cases.

In this regard, sentence n. 138 of 2010 was a paradigmatic example: concerning the unequal treatment between heterosexual and homosexual couples, and the impossibility for the latter to stipulate marriage, the Tribunal of Venice claimed contrast with art. 3 of the Constitution and art. 8 of the ECHR, underlining in particular that during the last 70 years’ history “the constitutional meaning of family, far from being anchored to a typical and unalterable structure, has resulted as changeable with regard to the social variations and their impact on the legal conception of family”.

This same malleability of the concept of family was supported by the Court in sentence no. 494 of 2002. In this judgement the court was called to decide whether articles 251 and 278 of the civil code were in contrast with the constitutional principles of freedom, equality, and children’s protection. Those article of the civil code state that children born from an incestuous relation could not be recognised by their parents. The ratio behind these dispositions is that recognising a family connection rising from an incestuous union would be an attempt to public order, as incest is undeniably clashing with the common belief. On the other hand, a child who can not be recognised suffers of a significant *capitis deminutio*, being discriminated for something that goes beyond his/her responsibility. Aware of this unfair consequence of the mentioned dispositions, the Constitutional Court declared their illegitimacy explaining that: “the Constitution does not justify a notion of family *against* people and their rights”.

Actually, it is true that the legal system increasingly recognised protection to those unions similar to marriage, but still – as jurisprudence always remarked – it does not mean other unions different from formal marriage were entitled of the faculty of founding a recognised family, as a legal institution. For this reason, in the mentioned sentence of 2010 the question was rejected, since the Constitution and the Civil Code “stated and states that the spouses have to be of different gender”. And the same criteria was expressed in sentence no. 170 of 2014, where the

“forced divorce” for married couples in which one of the spouses underwent gender reassignment surgery, under the parameters of the right to equality (art. 3 Cost.) and under article 117,1, with reference to the right to respect for family life set forth under article 8 of the ECHR.

We can’t refrain from noticing an important conceptual difference between the denial stated for cohabiting couples and the one for homosexual unions.

In fact, whether in the first case there is a quite objective difference about the legal stability of the different unions, that may lead us to protect them under two different regimes, the only criteria to deny homosexual people the possibility of stipulating a proper marriage is actually the gender of the spouses – and this can very easily result as a discrimination based on sexual orientation.

This resistance of the Constitution and the legislator denote a notion of marriage – and family – that is not only legally based, but very strictly linked to its cultural and ideological origins.

As far as the conventional system is concerned, Article 8 of the ECHR, even ensuring the defence of family as a place of private aggregation of the individual, does not go as far as in defining it neither in natural nor in legal terms.

Anyhow, the Court has repeatedly shared its position in sentences as the one, recalled in the case of *X, Y and Z v. the United Kingdom* in 1997. In this judgement Z was the child born to Y as a result of artificial insemination by a donor, while X was a female-to-male transsexual, partner of Y, who was asking to be recognised as Z’s father. When the United Kingdom refused to do so, the applicants invoked before the European Court of Human Rights the violation of article 8. Even though the final decision was to not decide, in consideration of the margin of appreciation left to the States in ruling this type of issues, the Court recognised the situation of X, Y and Z as a family. In fact, it was stating that: “the notion of family life is not confined solely to family based on marriage, and may encompass other de facto relationships. When deciding whether a relationship may be said to amount to family life a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means”.

Even though the ECtHR is not much younger confronted to our Constitution, a more elastic and open notion of family , closer to the natural one, is evident.

The limits involved, instead, do not have regard only with the individual and its personality, but rather include the State as well, as a community of individuals, but also as a general and common order, as a political and economic entity.

As we saw, this approach is not totally bounding, since the same judgement asserts that those are “areas where there’s little common ground amongst the member States of the Council of Europe” and thus “the respondent State must be afforded a wide margin of appreciation”.

Yet, in several cases the European Court took action reminding some fundamental principles contained in the notion of family within the meaning of article 8 that could not be derogated by

Governments, even if for a recognised and justified purpose. This is, for instance, the case of *Marckx v. Belgium* (1979).

The case was here arising from the fact that, under Belgian law, no legal bond between an unmarried mother and her child resulted from the mere fact of birth: an application had to be submitted for the establishment of maternal affiliation. Still, the maternal affiliation of an illegitimate child had limited effects as regards both the extent of his family relationships and the rights of the child and his mother in the matter of inheritance on intestacy and voluntary dispositions. For this reason, the applicant was claiming a violation – amongst others - of articles 3 and 8 of the Convention, resulting from the *capitis deminutio* representing a discrimination of the illegitimate child. The Court ruled that there had actually been a breach of those articles, and limited the States' margin of appreciation by reminding that "The Court recognises that support and encouragement of the traditional family life is in itself legitimate or even praiseworthy. However, in the achievement of this end recourse must not be had to measures whose object or result is, as in the present case, to prejudice the "illegitimate" family".

This was just one of the first steps moved by a supranational authority: in 1981 the Parliamentary Assembly of the Council of Europe issued a Recommendation no. 924 criticising discrimination against homosexuals in certain member States; in Recommendation no. 1474 (2000) it called on member States to enact legislative making provision for registered homosexual partnerships; in Recommendation no. 1470 (2000) it recommended to the Committee of Ministers that it urged member States "to review their policies in the field of social rights and protection of migrants in order to ensure that homosexual partnerships and families are treated on the same basis as heterosexual partnerships and families"; furthermore, in Recommendation 1728 (2010) it called on member States to "Ensure legal recognition on same-sex partnerships".

These acts came together with the Charter of Fundamental Rights of the European Union, where article 21 states: "Any discrimination based on any ground such as sex, race, colour ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a National minority, property, birth, disability, age or *sexual orientation* shall be prohibited" – and the application of measures to ensure effectiveness in the member States.

Having regards to the case-law, the first judgement where the ECtHR recognized that even homosexuals couples are just as capable as heterosexual couples to enjoy the right to family life within the meaning of article 8 was the case of *Shalk and Kopf v. Austria* (2010). Shalk and Kopf, both of male gender, claimed the fact that they were denied the possibility to marry by article 44 of the Austrian civil code, that establishes that marriage can be contracted only between two individuals of opposite sex. The Court here underlined that there had been no violation of article 12 of the Convention about the right to marriage: "the question whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State. In that connection, the Court observes that marriage has deep-rooted social and cultural connotations which may differ largely from one society to another. The Court reiterates that it must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society". On the opposite, considering the right to private and family life

ensured by article 8, the Court defined “artificial” maintaining the view that a same-sex couple cannot enjoy “family life” for the purposes of Article 8.

For the same reason, in a totally similar case, the European Court condemns Greece in the sentence *Vallianatos and others v. Greece* (2013) for discriminating homosexual families by excluding homosexual couples from the possibility of entering into civil unions. The Court there stated that: “the aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it”.

However, it is clear how these same authorities believe that marriage is left to be regulated by the domestic law of each Country, as art. 9 of the Charter asserts, together with other “delicate moral or ethical questions” and with regard to the collectivity’s interest and public order. This point of view led to a very recent sentence, issued by the European Court in 2015 (sentence *Oliari and others v. Italy*) which is actually the continuation of the issue raised before the Italian Constitutional Court in sentence 138 of 2010. The European Court took then a strong position stating, as in the previous cases, the violation of article 8, but also pointing out that Italian Government had “overstepped their margin of appreciation” failing their positive obligation to ensure the applicants – and in general homosexual individuals - the recognition and protection of their union and being “reluctant to apply the Convention in a way which is practical and effective”.

The approach of the European Court seems then to be in line with a progressively increasing attention to civil liberties, rather than to public order, at least as far as family is concerned. Even though this may lead to an even more conflictual relationship between the single States’ sovereignty and the existence of a supranational authority, it could be argued that there is no point in keeping ourselves tight in such a bond that is not even effective in ensuring the respect of those that we call human rights.

#### **4.1. Polygamy under the European Convention on Human Rights**

At a first glance to the ECHR, polygamy is not to be legally prohibited and may also seem protected, in force of art. 8, which assures the right to respect for family life and condemns the interference of public authority with the exercise of this right.

Moreover, the Council Directive 2003/86/EC (September 2003) on the right to family reunification seems to suggest that de facto consequences of polygamous marriages are to be recognised by the Member States, family reunification being considered as “a necessary way of making family life possible” since “it helps to create sociocultural stability facilitating the integration of third Country nationals in the Member States, which also serves to promote economic and social cohesion” and especially “Member States should give effect to the

provisions of this Directive without discriminations on the basis of (...) religion or beliefs, political or other opinions”.

Yet, if we consider the last part of art. 8, it is said that this safeguard includes the exceptions necessary to preserve public order, national culture and values and individuals’ freedoms.

Furthermore, the Directive 2003/86/EC itself contains restrictions, expressly mentioning amongst these polygamy.

The initial approach of the European Council was to leave to the Member States the faculty to regulate whether the polygamous marriage (and the resulting de jure situations) could have been recognised or not, as the matter was considered to be part of those “delicate moral or ethical questions” regarding marriage in general.

This general approach of self-government given to States in the area of moral and ethical questions is the reason why the European Court of Human Rights rejected many cases asking for the recognition of polygamous marriages, as being entitled to art. 8’s protection. For example, the 1992 case *E.A. and A.A. v. The Netherlands* was a case facing a family reunification issue: being A.A. the son from the first marriage of E.A., a Moroccan national who entered the Netherlands in 1979 and who contracted there a second (bigamous) marriage, and asking E.A. for a residence permit for his son, the demand was rejected by The Netherlands for the reason that “as polygamy is contrary to the Dutch public order, even assuming that these was an interference with the applicants’ right to respect for family life, it was justified under art. 8 para. 2 of the Convention”.

In fact the European Court, even though recognising the situation as covered by the wide concept of family life drew by the same Court, pointed out that the Dutch authorities’ refusal was based on the Aliens Act and “necessary in a democratic society for the economic well-being of the Country” and reminding that “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”.

This same criteria led the Court towards the decisions of other cases, but that’s not all.

Actually, the Directive 2003/86/EC unequivocally states that: “in the event of a polygamous marriage, where the sponsor already has a spouse living with him in a territory of a Member State, the Member State shall not authorise the family reunification of a further spouse” regardless of the State’s law, and that “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”.

Once again, we have to face what looks as an evident conflict between major values - having on one side family life, minors’ rights and the multiculturalism recognition, while on the other public order, gender equality and safeguard of a State’s own culture and values.

However - unlike what concerns family in general, where the limits given to one position and the other are wide and their precise definition is left to each Member State - , in this specific case the Council of Europe does take a firm position, ruling clearly against polygamy, considered contrary to the Western conception of equality, because of its often intrinsic discrimination of women.

Nonetheless, it is undeniable that polygamous families exist in Europe: about 15,000 de facto cases are present in Italy and 20,000 in France, while 1,000 legal polygamous situations are registered in the UK, with further more unrecognised ones.



“Family are a social phenomenon first, and a legal one after. Families exist before the law and quite often beyond the law” wrote the Italian jurist Bonnet. This is the same point of view shared by the European Court of Human Rights in her definition of family life (see para. 3) and partially what the Italian Constitution states.

What happens then to all these “unrecognised” families? Is it right to prevent them from those individual rights granted from the family status, having considered that not perceiving those social formations as families won't eliminate the actual situation? And on the other hand, what is the right balance between the recognition of multiculturalism and the defense of human rights, such as gender equality, or between natural and positive law?

### **5. Polygamy under Italian Law (Civil Code, Criminal Code, D.lgs No. 286 of 1998, Law no. 218 of 1995)**

The Italian law does not recognize the institute of polygamy: in Italy a man is not allowed to have more than one wife. In this regard, article 86 of the civil code establishes that “non può contrarre matrimonio chi è vincolato da un matrimonio precedente”, while article 556 of the criminal code states that “chiunque, essendo legato da matrimonio avente effetti civili, ne contrae un altro, pur avente effetti civili, è punito con la reclusione da uno a cinque anni. Alla stessa pena soggiace chi, non essendo coniugato, contrae matrimonio con persona legata da matrimonio avente effetti civili”.

Law no. 218/1995, which regulates the Italian private international law, shows the same approach towards polygamy. Articles 26 and following state that, in general, the Italian legislation recognizes marriages contracted in respect of the national law of the spouses (or the law of the state in which their married life prevalently takes place). However, article 16 of the same Law limits the application of this discipline: “la legge straniera non è applicata se i suoi effetti sono contrari all'ordine pubblico”, meaning that the principles at the base of the Italian political and economic system have to always be respected. This rule's ratio is to protect both the institutions and the citizens of the State: some institutes, if authorized, could potentially violate human fundamental rights and endanger the internal and external security of the country. Consequence of this regulation is that polygamous marriages legally contracted abroad are not valid in Italy. The institute of polygamy is contrary to public order.

The Italian prohibition of polygamous marriages also affects the country's family reunification regulation. Article 29 of the Legislative Decree number 286/1998 (Italian immigration law) states that “lo straniero può chiedere il ricongiungimento per i seguenti familiari: coniuge non legalmente separato e di età non inferiore ai diciotto anni; figli minori, anche del coniuge o nati fuori del matrimonio, non coniugati, a condizione che l'altro genitore, qualora esistente, abbia dato il suo consenso; figli maggiorenni a carico, qualora per ragioni oggettive non possano provvedere alle proprie indispensabili esigenze di vita in ragione del loro stato di salute che comporti invalidità totale; genitori a carico, qualora non abbiano altri figli nel Paese di origine o di provenienza, ovvero genitori ultrasessantacinquenni, qualora gli altri figli siano impossibilitati al loro sostentamento per

documentati, gravi motivi di salute”. However, this rule has a limit: the Italian system cannot authorize a family reunification if the spouse or the dependent parent living abroad is bounded by a prior polygamous marriage with a foreign citizen already legally married with another spouse in Italy. If family reunification was allowed even in these circumstances, the Italian law would end up recognizing a polygamous marriage contrary to public order.

It’s also important to remember that article 117 of the Constitution establishes that the Italian legislation should not violate the disciplines proposed by the international system. The decision of not recognizing polygamous marriages respects this rule. Article 5 of the 29th session of the Convention on the Elimination of All forms of Discrimination against Women of 2003 (on sex role stereotyping and prejudice) reminds all the States Parties that they “shall take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women”. In addition to that, article 16 of the same convention (on marriage and family life) states that all States Parties are expected to “take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations" and to "ensure, on a basis of equality of men and women, the same rights and responsibilities during marriage and at its dissolution”.

In order to respect all these principles, the Italian legislation does not recognize polygamous marriages. The first Italian judgment concerning polygamy is an example of this approach. In the Eighties a Moroccan man living in Italy asked the visa for his two wives and their eleven children. The T.A.R. of Emilia Romagna in 1994 did not authorize the family reunification in order to respect public order and safeguard the principle of equality between the spouses.

Despite this discipline, it’s important to underline that the Italian case law does not always maintain this rigid approach towards polygamy. The Italian system regulates every case keeping in mind the actual interests in play. For example, the Italian Court of Cassation, in its sentence number 1739 of 1999, deals with the topic of potential polygamous marriages (marriages contracted in foreign countries where polygamy is allowed). The conflict arose when the woman S. N. I., heir of her deceased husband A. P., asked for the attachment of the inherited property against her two coheirs A. and P., daughters of the said man. The woman, in fact, was worried that her inheritance rights could be violated as a consequence of the two sisters’ incautious financial behavior. A. and P., in defense of their position, claimed that their coheir did not have any actual rights on the property: the marriage between A. P. and S. N. I. was contracted abroad in respect of an Islamic law that admitted polygamy, and since this institute was contrary to public order, the union could not be recognized by the Italian system. After three judgments, the Court of Cassation decided that there were not enough motives to concede the attachment of the property against A. and P. On the other end, though, the Court also stated the legitimacy of S. N. I.’s claims on her husband’s inheritance. The marriage in exam, in fact, was contracted in respect of the Italian private international law (law no. 218/1995) and the fact that said marriage could be a polygamous one did not affect in any way

the inheritance rights of the wife. This case law shows how the Italian judgments do not always maintain a negative approach towards polygamy.

The case law is particularly tolerant towards polygamous marriages when the judgment deals with the principle of the best interest of the child. Article 24/2 (on the rights of the child) of the Charter of Fundamental Rights of the European Union of 2000 states that: “in all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration”. The same principle is also indirectly stated in the Italian legislation: article 316 of the civil code establishes that parents are responsible for their children. The term “responsible” clearly underlines the fact that adults do not have an absolute power over minors: parents’ duty is to guarantee their children’s physical and psychological wellbeing. In respect of these dispositions, judges discipline conflicts keeping in mind the best interest of the minors involved. In this regard, the non-recognition of a polygamous marriage should not negatively affect the children of the couples. This aspect is particularly relevant in family reunification cases.

The Italian tolerance towards polygamy in children involved cases finds legitimacy in the European institutions. Article 4/4 of the directive number 2003/86 of the European Union (on the right to family reunification) 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 authorize the family reunification of a further spouse". By a way of derogation from the previous statement, though, the directive also establishes that: "Member States may limit the family reunification of minor children of a further spouse and the sponsor". With this discipline the European Union limits the recognition of the right to family reunification and prohibits polygamous marriages. At the same time, though, the supranational institution keeps in mind the importance of the principle of the best interest of the child: the restriction upon the reunification of the minor children of a further spouse and the sponsor is not mandatory, each Member State can decide whether or not to authorize the family reunification.

## **6. Description of the Two Cases**

Italian case-law doesn’t include many cases concerning polygamy: as a matter of fact, as analyzed in the previous paragraphs, the Italian cultural background (Roman Catholic influence and small Muslim immigration) is pretty homogeneous as monogamous marriages are concerned, being so really different from French or American situations.

The very first time Italian judges came across a potential polygamous marriage was in 1994: a Moroccan man, who had moved to Italy years before to work, asked for family reunification with his two wives and five of his eleven children.

The Court, in ruling n. 926/1994 TAR Emilia-Romagna, branch of Bologna, denied the permission since his request was against public order and decency. Anyways the Court also allowed the two women to enter Italy by a special permission based on working matters called “sanatoria”: they couldn’t enter as “wives” but they could as “workers”.

It is the first case then in which we can see a de facto polygamous marriage tolerated -and partially ignored- by authorities.

Nevertheless, in the perspective of our work, it is of interest to focus on these other two cases, each one with a different ending.

The first case was set in Piemonte (northern Italy) and dealt with a man, E.A., with two wives and two children from each wife.

E.A. got married twice in Morocco (where polygamous marriages are allowed), firstly to B.H.F. from whom he had a girl and secondly to F.Q. from whom had a boy.

He lived with both of them in Mondovì (Cuneo, Piemonte) and when his second wife's residency permit was about to expire he applied to the Juvenile Court in order to avoid her repatriation and detachment from E.S., their son.

Indeed, the man claimed that, choosing whether to go with the mother to Morocco or to stay in Italy, the child would have incurred some psychological damages as concerns growth and healthy development.

The Court, rejecting his appeal, affirmed instead that there were no exceptional reasons for the child to stay, since the detachment from the nuclear family is a common situation for immigrants; besides, granting the permission would mean allowing a situation, the one of polygamy, that in Italy is forbidden and bypassing the immigration ban for matters against our judicial system's fundamental principles.

Nevertheless the Turin Court of Appeal criticized the previous verdicts: the fact of being separated from one of the parents was actually a sufficient reason to give F.Q. the permission to stay in Italy.

As a matter of fact the Court affirmed that “[i]n both cases the child, who's lived by the side of both parents in advantageous familiar, residential and social conditions, [...] would be suddenly detached from one of them and deprived of co-parenting; living, hence, a really prejudicial situation for the psychophysical development of such an early-aged-boy”. Besides “[t]he permission, in this case, is granted exclusively in the major interest of the minor child, as to guarantee his parent's proximity, not being relevant the fact that he [the parent] is or not married to the other parent, or that he's married in a monogamous or polygamous regime.” Since the motion was tabled in the interest of the child and not to defend a polygamous marriage recognition, against our public order, the discussion needed to be brought back to the protection of minors.

For all these reasons the Court, quoting articles 28, 29 law no. 40/1998, art. 3 New York's Convention on the Rights of the Child 1989, conceded in ruling 4984/2013 Q.F. to remain in Italy with her son and husband.

By doing so, the Court actually allowed again (as it had happened in Bologna case) a de facto polygamous marriage within our legal system.

Even though it could surprise, it is actually a pretty common situation in Italy: there are almost 20000 factual polygamous marriages existing without any obstacle. An interesting trick indeed is that if only one marriage is registered in Italian civil law, the others, celebrated in mosques or during religious ceremonies do not have any civil effect.

In the second case instead, it was the son to apply to the Court. Since his mother, at the moment living abroad, did not have the basic means to live or any other children to lean on, he asked a residency permit in order to take care of her.

The problem rised because her husband, the boy's father, was actually married to another woman, for whom was asking for family reunification. Therefore the situation could have given rise to a polygamous marriage.

In the judgement of second instance the Court granted the visa advancing that the law which forbids familiar reunification in case of double marriage (or potentially polygamous marriage) had entered into force right after the instance had been deposited; besides, it had been the woman's son the one that asked for the permission, not the husband. This meant that the purpose was not the reunification of the two wives in order to accomplish a factual polygamous marriage; therefore there were no reasons to deny the request.

The Court of Cassation, though, contested the second judgment's instances: first, since a law becomes effective it also turns into an interpretation parameter as it should have happened with the legislative decree no. 286/1998 especially regarding art. 29; second, "[i]t is not necessary that the Administration proves that the applicant acted in behalf of his parent because the ban of polygamy is not affected by factual conditions such as cohabitation or alimonies payments, but it occurs and persists until the legal suspension of one of the two marriages" the Court affirmed: the prohibition of polygamy is so strong for its conflict with Italian public and constitutional order that even its possibility is rejected.

The woman for these reasons wasn't allowed to get the residency permit, the Court ruled.

There's an important difference, connected also with immigration flows and their evolution, between the case cited in the introduction and these two: while in 1994 the request of family reunification was raised by the husband, meaning to reconnect the original nuclear family, in 2001 and 2013 the instance is presented by the child or in his only interest (at least formally). This means that the original family has expanded and needs more recognitions: from an original one-person working emigration we have arrived to a hole family emigration, to requests for residency permit in reason of the parental connection with the original immigrant or for the maintenance of family unity.

The T.A.R. of Bologna faced only adults and their requests, the Courts of Appeal and Cassation instead had to deal with new matters and values: the minor's best interest and the general right to reunification of a child with his mother rised. Besides, they also came into problems not forecast in the past: what to do when the "sanatoria", the residency permit expire? Is it right to divide a family?

In addition to that, even though the two cases compare almost the same values, they have a different ending in reason of the different weight given to them. The Court of Cassation aligns with The European Commission of Human Rights caselaw: in application no. 14501/89 by E.A. and A.A. against the Netherlands and in application no. 19628/92 by R.B. against the United Kingdom a strong tendency against polygamous marriages is pursued.

In the first case, the applicant was a father asking for a residency permit for his son. Nevertheless he was already living with one of his two wives in the Netherlands and "the policy concerning family reunification for bigamous aliens, which is to authorise it for only one spouse and children born out of their relationship" was an obstacle to his request: he had the child from another wife still living in Morocco.

In the second case, instead, the applicant claimed her right to be reunited with her mother, denied by the Court since her father was already living in England with his second wife (as in the case just now cited, he had contracted a polygamous marriage).

As a matter of fact both governments allow only one wife to enter the State and have a residency permit in order to align to the monogamous marriages tradition which is typical of European countries. On the one hand in the first case cited the Court affirmed that “ the Commission would emphasize the close connection between the policy of immigration and consideration of public order (no. 12122/86, Dec. 16.10.86, D.R. 50, p. 268, p. 272).

The Commission is therefore of the opinion that the interference with the applicants’ right to respect for family life is in accordance with the law and justified as being necessary in a democratic society for the economic well-being of the country under the second paragraph of Article 8 (Art. 8), as a legitimate measure of immigration control.”. On the other hand according to the second case the Court quoted “ Section 2 of the Immigration Act 1988, which prevents more than one foreign wife joining the husband already settled in the United Kingdom and is intended to prevent the formation of polygamous households, the practice of polygamy being deemed unacceptable to the majority of people who live there.” As a matter of fact, “[t]he aim of the provision would appear, therefore, to be the preservation of the Christian based monogamous culture dominant in that country. The Commission considers that such an aim is legitimate and falls within the scope of the protection of morals or the rights and freedom of others within the meaning of Article 8 para. 2 (Art. 8-2) of the Convention” and “in establishing an immigration policy on the basis of family ties, a Contracting State cannot be required to give full recognition to polygamous marriages which are in conflict with their own legal order”.

Therefore, these judgments give more importance to public order and to the traditions of the Country engaged than to the immigrant’s right to familiar reunification.

We might now ask ourselves why the Turin Court of Appeal doesn’t align with such an eminent case-law, considering then the differences between the preconditions.

First, in both the ECHR’s cases and in Court of Cassation the applicant asks for a residency permit for his/her mother, the latter’s husband being married also to another woman. All of them ask for family reunification mentioning immigrants’ regulations and waiving polygamous bans. The appellant to the Turin Court of Appeal, instead, is the husband himself asking for a residency permit for one of his two wives, adducing his son’s best interest.

Besides, E.A.’s wife already had a temporary residency permit, reason why her husband applied: to have it reconfirmed. The women involved in the other cases, instead, were aliens living abroad and wanted to enter for the first time their child’s Country, besides, their husbands were already co-habiting with one of their wives.

The judgment of Turin Court of Appeal could be criticized with particular reference to the role of the child: while in the other cases it was the child himself to apply in his and his mother best interest, here it is the child’s father to apply for his best interest. We could then speculate about a possible manipulation of the child in order to have his own father’s best interest recognized: having to wives co-habiting with him, a factual polygamous marriage.

Besides, what if E.S. was an adult? The Court probably wouldn't have quoted the New York's Convention on the Rights of the Child nor the psychophysical growth of the person concerned; the outcome hence would have been different.

Is it right, though, making a difference between minors and majors? Isn't the right to familiar reunification, the right to have oneself's mother nearby, a right that should be recognized to everyone, indifferently from his age, sex or traditions?

What will happen when E.S. will be a grown-up, when he will relocate? Will Italian judges let a factual polygamous marriage exist or will them repatriate his mother, F.Q., adducing that the psychological growth of the child is over? How could they do it, after she's been living in Italy for twenty years?

Art 8 of ECHR states that the right to have and live in a family must be settled "in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

But how can we balance a fundamental need of a child, the right to live with both parents, with the growth of a situation against our public order or traditions?

How far can this clash of values go?

We may interpret these judgments and their different epilogues as a development of ideas and opinions: rights have their own history and growth, they wait years and years to be affirmed, meeting obstacles and crossroads on their way to recognition.

In addition to that, we may consider that while in France and United Kingdom -just to cite two countries- immigration flows have started many years ago causing the transformation of these two States in melting pots where different cultures and traditions face each other and clash, Italy got acquainted with aliens and their cultural burden only few years ago.

In Italy, therefore, these kind of rights are being balanced and compared to our values almost for the first time; this is an element that could justify the different orientation of the Courts from 1994 to 2013 trying to find the appropriate way to defend every situation in lack of the proper protection but also our traditions and values, fiercely asked and finally obtained.

## **7. Conclusive Remarks: the Effects of the Legal Recognition of Polygamous Marriage in the Italian Legal System**

In order to end our dissertation, we have tried to figure out which consequences the legal recognition of polygamous marriage would have in Italy.

Regarding this topic, our speculations could appear utopian, since nowadays in the Italian legal system polygamy is harshly prohibited and punished as a crime, but we test ourself with this challenging argument in order to provide more elements which work as parameters of evaluating this possible (even if presently unlikely) situation.

First of all, if we consider the option of including polygamy into our legal system by recognising marriages contracted between more than two people, in order to avoid gender discriminations we should include polygamy both as polygyny and polyandry.

In fact, polygamy itself does not formally imply discrimination, but it is the cultural background of the spouses that can easily lead to this kind of conclusion.

Even if we ruled polygamous marriages and stated a specific action to react to a situation of abuse or gender submission, the victim wouldn't always denounce, since it is the preminent position of the man in the familiar structure that gives birth to polygamy, being the woman submitted to the role of the man. Therefore, even considering polygamy just as a "different" kind of marriage, the cultural roots of those who practise it imply a strong religious and patriarchal vision of family that is in contrast with our crucial value of equality.

Article 3 of the Italian Constitution states: "[t]utti i cittadini hanno pari dignità sociale e sono eguali davanti alla legge, senza distinzione di sesso, di razza, di religione, di opinione politiche, di condizioni personali e sociali. È compito della repubblica rimuovere gli ostacoli di ordine economico e sociale, che, limitando di fatto la libertà e l'eguaglianza dei cittadini, impediscono il pieno sviluppo della persona umana e l'effettiva partecipazione di tutti i lavoratori all'organizzazione politica, economica e sociale del Paese".

In this view, polygamy means a violation of these values because the several wives would be disadvantaged in comparison to the husband, who is, in this patriarchal conception of family, the only one legitimate to exercise the control over women.

Having stated this, polygamy would also have critical effects on other aspects of social life, such as family regulation and civil rights.

The first issue to be considered would be the massive increase of immigration in Italy, not only one wife with each husband would ask for a residence permit justified by the provisions about family reunification, but also all the other wives and their children (see, T.A.R. Bologna, 1994).

Another point that should be considered is the one concerning all those rights deriving from marriage, such as inheritance rights, medical assistance, pension rights, etc.

As a matter of fact, all of these rights should be extended to all wives, creating contrast and complications, on the one hand, into the family unit, on the other, into the legal system.

Also, the interpretation of the notion of family at a constitutional level would become controversial: how should we deal with the principle of fidelity between the spouses?

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