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POLYGAMY AS A CROSS-CULTURAL DISPUTE IN EUROPE

The extent to which polygamy can be given effect in European legislations.

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Abstract

Polygamy, a system where one marries multiple spouses, is a concept that is known in certain non-European countries. However, due to migration flows, polygamous cases came to Europe, obliging judges to deal with a matter that is not even possible for the European state's own citizens. The most common form of polygamy is polygyny, a pre-Islamic practice that continued in Islam, where one man can marry up to 4 women. In this context, polygamy can be a dimension of freedom of religion. The purpose of this thesis is to analyze whether freedom of religion can be called to legitimize polygamous situations in a state that does not allow it in its legal system. If polygamy falls under the concept of freedom of religion, the question is whether limits can be set on this religious freedom when any form of discrimination arises from the polygamous situation.

Acknowledgements

This thesis started from my interest in international and European law, as well as civil and family law, from my previous master's in law at the Vrije Universiteit Brussel. I therefore found it fascinating to approach the concept of polygamy from both fields of law. Furthermore, I wanted to focus on the relationship between polygamy and migration, from an anthropological perspective, as well as the discriminatory impact on women, from a human rights perspective. As a child of Iranian refugees, I am constantly witnessing the effect of human rights violations by the Iranian regime. Therefore, my entire education has revolved around respect for human rights and gender equality. This is also the path I want to follow in my professional career, which led me to this master of Human Rights and Democratization.

This product is the result of a difficult year, since 2021 was still marked by the coronavirus. Therefore, I would first of all like to thank my supervisor, Prof. Dr. Paolo De Stefani, who has always supported me despite this hectic and unfamiliar period and has always immediately answered my questions. From the very first contact, he was willing to accompany me on this journey and gave specific and instructive advice at every meeting. I would also like to thank Prof. Dr. Olga Breskaya, religion and human rights expert, to whom I could turn for additional support. Furthermore, I would like to thank all the people around me who made it possible for me to successfully complete the presented graduation work.

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Introduction

1. The present master's thesis addresses the issue of polygamy in the European and international context. The objective of the research is to explore the relationship between polygamy in Europe and the legal regulations of states which allow the celebration of multiple marriages for one individual. The polygamous division is made between its two possible manifestations, namely polygyny (where the man is polygamous) and polyandry (where the woman has the polygamous role). As polyandry has almost no existence anymore, and certainly no cases are known in Europe, this thesis mainly focuses on the issue of polygyny. Thus 'polygamy' is to be understood hereafter as a situation in which a man has several wives.

2. The discussion of the topic will gradually answer five correlated questions, spread over five chapters. First, the notion of polygamy is defined in order to become familiar with the concept. This is followed by a discussion of the legislation on polygamy of some countries where the practice of concluding more than one marriage is lawful. The chosen countries, Morocco, Syria, Iraq, Afghanistan and Algeria, are relevant because of their high migration rates into Europe. For the citizens of the foregoing countries, the principle of religious freedom can be tensed with the European perspective of discrimination in the new context migration and polygamy. After answering the sub-question where polygamy is still allowed, we will take a closer look at the effects of a polygamous marriage in Europe and to what extent this can have legal consequences for the European states. Later, we will examine how polygamy can be an aspect of freedom of religion and what this freedom exactly encompasses according to international human rights instruments. Finally, we will look into the discriminatory consequences that a polygamous marriage can have on the position of the concerned parties. By means of the five sub-questions mentioned above, the central research question 'To what extent polygamy needs to be given effect or be countered in Europe?' shall be answered.

3. Despite the prohibition of polygamy in Europe, a polygamous marriage can still have an effect in the European states' legal system. Each country has its own legislation in the social, economic and political fields. As a result, there is also a cultural difference between countries. Something can be completely rejected in one state while it is legal in another. Like this, it is still possible in many countries to have a polygamous marriage, unlike in European states. Migration has played an unmistakable role in the development of polygamy in Europe.

European countries are still facing this concept today, among others, due to the increasing migration flows since the last century and the resulting shift in social differences. The social relevance of this research is therefore undeniable.

4. In addition to the above-mentioned social need for development and flexibilization of the concept of polygamy, there was also a legal need. The reason for this was the increase of new cases of polygamy that were contested before the European courts, but also the spread of this concept over many legal fields.

The emergence of new issues has also required the development of jurisprudence. For instance, ignoring the effect of polygamous marriages was increasingly contested, as it also denied certain rights that a traditional marriage entails. In addition, different jurisdictions appear to give different interpretations to the notion of 'public order' in order to give effect or not to a polygamous marriage. The reflection that needs to be made here is that the notion of 'public order' should be interpreted according to consistent criteria, so that the empire of the judge, who rules on this matter, is limited and there is less chance of arbitrariness.

The effects of polygamy are distributed over different areas of the law, such as (international) private law and social security law. This has led to the realisation that polygamy is also relevant in the legal field and is not just a social fact. The involvement of several legal areas in polygamy increases the chance of an incoherent interpretation of the concept. It is therefore important to provide a consistent legal definition of the concept.

5. Later, we will research how polygamy can be an aspect of freedom of religion and what this freedom exactly contains in the meaning of international human rights. The question here is if freedom of religion can create some individual rights that can be invoked by a person in order to justify his polygamous situation. Can this concept of religious freedom generate extra rights that other citizens of a country do not enjoy? Is the right to freedom of religion enough to tolerate polygamy in a state?"

6. Finally, I will look into the discriminatory consequences that a polygamous marriage can have on the position of the concerned parties. Polygamy is a potential danger to the position of women in marriage or possibly the children, and must therefore be viewed with caution. In this regard, I will elaborate if discriminations can be a justification for the restriction of the

freedom of religion and, therefore, limits can be set on polygamy. Can the freedom of religion have an application without any limits, even if it entails a discrimination between the different wives of the polygamous man (e.g. regarding the pension distribution), or between the children of his first and later marriage (e.g. regarding family reunification)?

7. The general purpose of this research is to study the concept and effects of polygamy in European legal practice, despite its prohibition in the national legal orders, and to what extent the freedom of religion can have an application, considering the risk of discrimination it might pose. The focus will be on the legislation with regard to polygamy of the Netherlands, Belgium and France. For this purpose, this master's thesis conducts research from both a legal and a social perspective. This study is accomplished by means of the collected legislation, case law and legal doctrine of the aforementioned countries, both via the available databases and via the available materials in the Italian libraries.

1. What is polygamy?

8. Polygamy is a form of marriage where one party is married to more than one person.¹ The Oxford Dictionary defines polygamy as “*The practice or custom of having more than one wife or husband at the same time.*”² Polygyny is the polygamous form of marriage in which the man marries multiple wives. Conversely, polyandry occurs when the woman has several husbands. The more specific term bigamy refers to the situation in which a person is bound by marriage to two people at the same time.³

Polygamy differs from the subcultural relationship form polyamory. The polyamorist creates multiple emotional, romantic and sexual relationships simultaneously and this is often described as a sexual orientation in a variety of reference works.⁴ Although both polygamy and polyamory result in an actual multi-partnership situation, the major difference is that polygamy refers to a legal arrangement involving multiple official marriages while polyamory is more of a sociological and psychological term.⁵

9. Europe follows the rule of monogamy. Polygamy is forbidden in the European state’s legal systems, both civilly and criminally, so it is impossible for a married person to enter into

¹ Britannica Online Academic Edition, *Polygamy*, Chicago, Encyclopædia Britannica, Inc. Web, 2020 ; A.J.M. NUYTINCK, *Personen- en familierecht, huwelijksvermogensrecht en erfrecht*, Deventer, Kluwer, 2018, 51; M. ANTOKOLSKAIA, “Het aangaan van huwelijk en geregistreerd partnerschap” in W.M. SCHRAMA, M.V. ANTOKOLSKAIA and G.C.A.M. RUITENBERG (red.), *Familierecht. Een introductie*, Den Haag, Boom Juridische uitgevers, 2018, 136; H. DOUGLAS (ed.), *Polygamy*, Online Etymology Dictionary, 2016; G. STRAUSS, “Is Polygamy Inherently Unequal?”, *The University of Chicago Press* 2012, (516) 516; K. BOELE-WOELKI, I. CURRY-SUMMER and W. SCHRAMA, *De juridische status van polygame huwelijken in rechtsvergelijkend perspectief*, Den Haag, Boom Juridische uitgevers, 2010, 3; B. BOURDELOIS, *Mariage polygamique et droit positif français*, Paris, GLN Joly Editions, 1993, 3; J.P. BISHOP, *Commentaries on the Law of Statutory Crimes*, Boston, Little, Brown and Company, 1873, 379.

² *Oxford Dictionary of English*, Oxford University Press, 2020.

³ Britannica Online Academic Edition, *Polygamy*, Chicago, Encyclopædia Britannica, Inc. Web, 2020 ; H. MURADI and N.A. YOUSEFI, “The Wisdom of Polygamy in Islam: The Law and Customary Practice in Afghanistan” in *Islamic Heritage leads the transformation of the Ummah*, 2015, (114) 115; J. MARY, “L’accueil en Belgique du mariage polygamique ou quand la Cour du travail de Bruxelles s’empoque avec les juges de cassation: Retour sur la controverse quant aux effets sociaux du mariage polygamique”, *Rev.dr.étr.* 2014, (557) 557; T. HARTLEY, “Recognition of polygamous marriages in English law” in P. LAGARDE, *La reconnaissance des situation en droit international privé*, Paris, Editions A. Pedone, 2013, (177) 177; G. STRAUSS, “Is Polygamy Inherently Unequal?”, *The University of Chicago Press* 2012, (516) 516; K. BOELE-WOELKI, I. CURRY-SUMMER and W. SCHRAMA, *De juridische status van polygame huwelijken in rechtsvergelijkend perspectief*, Den Haag, Boom Juridische uitgevers, 2010, 3; B. BOURDELOIS, *Mariage polygamique et droit positif français*, Paris, GLN Joly Editions, 1993, 3; S. D. SINGH, *Polyandry in Ancient India*, Brisbane, University of Queensland, 1978, 28.

⁴ Y. BEKTAS, *Polyamorie. Een onderzoek naar de voorstelling in hedendaagse non-fictionele media*, master’s thesis Law KU Leuven, 2019, 8; J. VERSCHELDE, “Wat kunnen we leren van polyamorie?” *VRT NWS* 2018, www.vrt.be/vrtnws; L. BRUNNING, “The Distinctiveness of Polyamory” *Journal of Applied Philosophy* 2018, 513-531; A.E. TWEEDY, “Polyamory as a sexual orientation”, *University of Cincinnati Law Review* 2011, 1461.

⁵ *Ibid.*

a second marriage as long as the first marriage has not been dissolved.⁶ The dissolution of a marriage occurs by divorce or the death of one of the spouses.⁷ In other words, as long as the first marriage is not dissolved by a divorce recognised under the European state's national law or by the death of one of the parties, a situation of polygamy occurs when entering into a second marriage and this does not produce legal effects and is punishable by imprisonment.⁸

2. Polygamy overseas

10. European nations have a zero tolerance for polygamous marriages (*supra*). Unlike the Western countries, not all states apply such a ban around the world. In fact, there are several states where polygamy is permitted.

2.1 Polygamy and migration

11. Polygamy is a concept that several European countries face since the last century despite the prohibition of multiple marriages in their own legal systems.⁹ This confrontation is caused by the increasing cross-border mobility of populations with social differences, as a result of the internationalization of society. Indeed, the growing migration flow of peoples in the past decades also entails a shift of (new) issues for the receiving states.¹⁰ Polygamy and migration are therefore closely linked.

European citizens cannot enter into more than one marriage, as the national law of the European states prohibits polygamy (*supra*). More difficult is the question of a migrant who has legally entered into several marriages in his country of origin and asks for recognition of these

⁶ Questions and Answers European Commission, Q. nr. E-3321/10, 10 May 2010 (M. DE SARNEZ), www.europarl.europa.eu; Questions and Answers European Commission, Q. nr. E-4761/05, 15 December 2005 (A. MÖLZER), www.europarl.europa.eu.

⁷ *Ibid.*

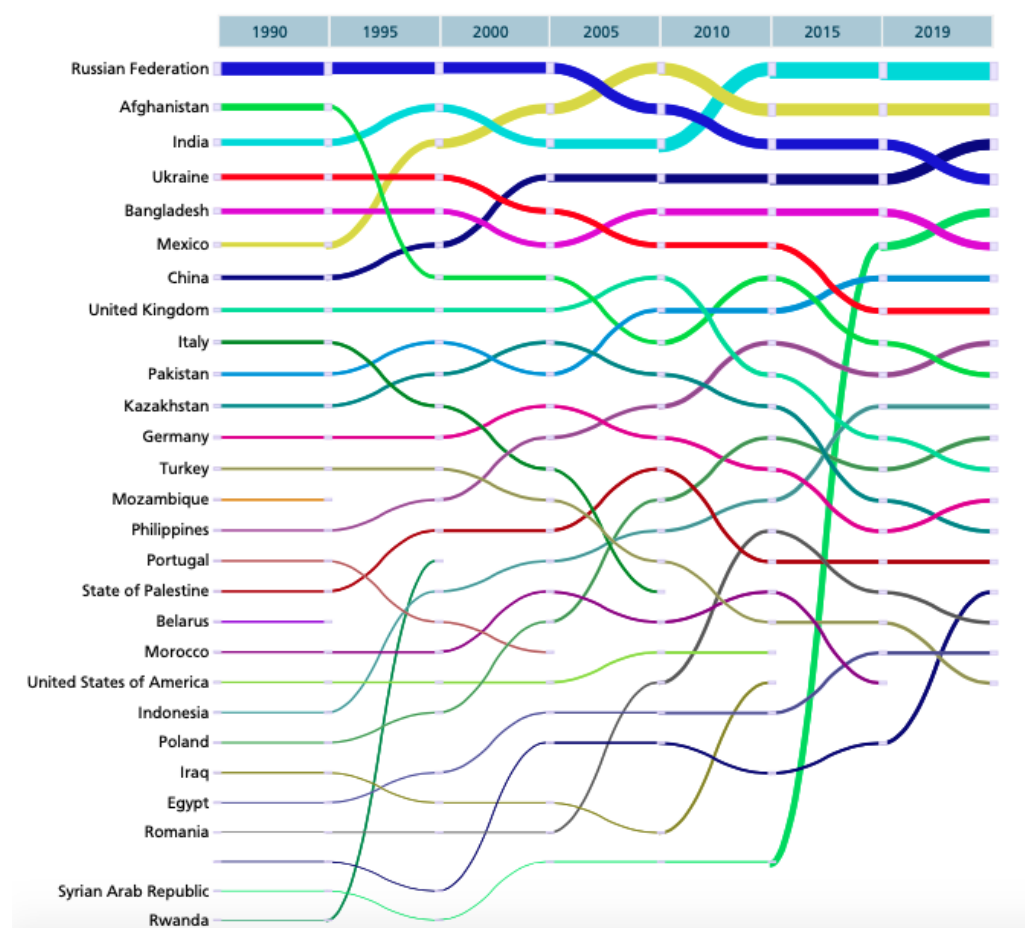
⁸ Belgium: Art. 147 Burgerlijk Wetboek; art. 391 Strafwetboek (5 to 10 years imprisonment); Germany: §1306 Bürgerliches Gesetzbuch; §172 Strafgesetzbuch (up to 3 years imprisonment); France: art. 147 and 188 Code civil; art. 433-20 Code pénal (up to 1 year imprisonment); Netherlands: art. 237 Wetboek van Strafrecht (up to 4 years imprisonment).

⁹ Questions and Answers European Commission, Q. nr. E-3321/10, 10 May 2010 (M. DE SARNEZ), www.europarl.europa.eu; Questions and Answers European Commission, Q. nr. E-4761/05, 15 December 2005 (A. MÖLZER), www.europarl.europa.eu.

¹⁰ MYRIA, *Migratie in cijfers en in rechten 2020*, Brussels, Myria, 2020, 29; M. FALLON, S. FRANCQ and J. MARY, "La reconnaissance des mariages carrousels, pluriels et virtuels devant la Cour de cassation" (note under Cass. 11 January 2016), *RCJB* 2017, 247; D.J. FALEN, "Polygamy: A cross-cultural analysis by Zeitzen, Miriam Koktvedgaard", *Social Anthropology* 2009, (510) 511.

polygamous marriages in a European state. Before the migration, such a question was hardly addressed and a second marriage was automatically considered as non-existent in the European states. The non-recognition of polygamous marriage leads to unjust situations, as the person in question or his/her spouse are deprived of certain European rights. For reasons of unfairness, European states have been forced to examine and develop new concepts, which it had hardly encountered before. Today, it is possible to give legal effect to foreign polygamous marriages in the legal systems of European countries, despite the prohibition of polygamy for their own citizens. However, this is not automatic, so that this right can be denied when it is judged that this would be contrary to the public order of the state (*infra*). After all, since the last century, the integration of various religions and cultures has increasingly put the ‘liberal state’ to the test.¹¹ Migration has played an undeniable role in the development of polygamy in Europe.

12. Twenty countries or area of origin with the largest diaspora populations¹²:



¹¹ F. RAZA, “Limitations to the Right to Religious Freedom: Rethinking Key Approaches”, *Oxford Journal of Law and Religion* 2020, 9, (435) 462.

¹² Migration Policy Institute tabulation of data from the United Nations, Department of Economic and Social Affairs (2019), Trends in International Migrant Stock: Migrants by Destination and Origin (United Nations database, POP/DB/MIG/Stock/Rev.2019), www.un.org/migration/data/; <https://ec.europa.eu/eurostat/pdf>.

If we study in general the migration flow in Europe since the beginning of this century, we see that the largest movement takes place between the European states themselves.¹³ If we then leave aside the European countries, migrants from Morocco, Syria, India, Afghanistan and Iraq are the most strongly represented in the European territory.¹⁴ The legality of polygamy in some of these countries thus has potential repercussions on our national legal order when immigrating to a European country after concluding a polygamous marriage in the country of origin, or in the case of binational people, when they return to the country of birth to conclude a second marriage (one can think for example of ‘Belgo-Moroccans’ or ‘French-Algerians’). For the frequently occurring nationalities in Europe, an analysis of their legislation on polygamy follows (*see* 2.2). In 2020, 95,774 refugees arrived in Europe, of whom Afghanistan (19,9%), Iraq (10.9%), Syria (10.0%) and Guinea (5.5%) are the main countries from which the refugees originate.¹⁵

2.2 Where polygamy is permitted

13. For many non-European nations, the practice of more than one marriage is still not prohibited by law, unlike in Europe. When a European State is confronted with emigrants from other countries, it is important to examine the legislation of these states on polygamy. Here, private international law comes into play.

14. Polyandry is a very rare phenomenon. Only in the Tibetan Highlands (a region shared by India, Nepal and the Tibet Autonomous Region of China) and the French Polynesian Marquesas Islands has polyandry been present until recently. Polyandry is generally seen as a response to particular local conditions, such as a shortage of women and economic necessity. The most common form is fraternal polyandry, in which a woman simultaneously marries several brothers in a family.¹⁶ Since this form of polygamy only occurs in a very small number of cases, and certainly does not occur in Europe, it will not be discussed further in this thesis.

¹³ European Commission, Statistics on migration to Europe 2019, <https://ec.europa.eu/statistics-migration-europe>; MYRIA, *Migratie in cijfers en in rechten 2020*, Brussels, Myria, 2020, 30.

¹⁴ *Ibid.*

¹⁵ UNHCR, "Europe Monthly Report" (February 2021); UNHCR, "Europe Monthly Report" (December 2020); Commissariaat-Generaal voor de Vluchtelingen en de Staatlozen (CGVS), Asielstatistieken Juni 2020, www.cgvs.be.

¹⁶ Britannica Online Academic Edition, *Polygamy*, Chicago, Encyclopædia Britannica, Inc. Web, 2020; Y. BEKTAS, *Polyamorie. Een onderzoek naar de voorstelling in hedendaagse non-fictionele media*, master's thesis Law KU Leuven, 2019, 17; CICADE, *Droit de la famille des femmes françaises & maghrébines, Le mariage polygamique*, 2016, www.cicade.org; J. CARLIER, "La polygamie devant la Cour d'arbitrage", *Journ.Jur.* 2005, 1;

15. Throughout the history of polygamy, it may be observed that the practice of marrying multiple spouses is linked to religion, as a utterance of custom. Religion can have an influence on multi-partnerships. Thus, according to the Koran, a Muslim man is allowed to take up to four wives as long as he can support them all and treat all wives equally.¹⁷ This is why polygamy (read: polygyny) is permitted in many Arab countries, where Islam determines the legal system.¹⁸ The countries where polygamy is permitted are mainly on the African continent and in the Middle East.¹⁹ ²⁰ India used to have polygamy under Hinduism, but this came to an end with Indian independence.²¹ At the time of Jesus, polygamy was also possible under Jewish law. European Jews abandoned this system in the Middle Ages, but until the 20th century it

Polyandry in Ancient India, Brisbane, University of Queensland, 1978, 167; P.M. HERMANS, "Polyandrie in Tibet", *Anthropos* 1953, 637-641.

¹⁷ Y. BEKTAS, *Polyamorie. Een onderzoek naar de voorstelling in hedendaagse non-fictionele media*, master's thesis Law KU Leuven, 2019, 17; T. HARTLEY, "Recognition of polygamous marriages in English law" in P. LAGARDE, *La reconnaissance des situation en droit international privé*, Paris, Editions A. Pedone, 2013, (177) 177; K. BOELE-WOELKI, I. CURRY-SUMMER and W. SCHRAMA, *De juridische status van polygame huwelijken in rechtsvergelijkend perspectief*, Den Haag, Boom Juridische uitgevers, 2010, 4; E. ALOFS and D. CUYPERS, "De doorwerking van polygamie in de Belgische rechtsorde, in het bijzonder in de Belgische sociale zekerheid: een status quaestionis na de arresten van het grondwettelijk hof van 4 mei 2005 en 4 juni 2009", *TSR-RDS* 2009, (534) 536; M.-C. BOURDON, "IRAN: non à la polygamie", *Chatelaine (French edition)* 2008, 1; G. ASCHA, "Polygamie in de moderne Arabische rechtsliteratuur", *Recht van de islam* 1994, 25; L. BUSKENS, "De recente hervorming van het Marokkaanse familierecht", *Recht van de islam* 1994, (59) 68; I. NAJJAR, "Formation et évolution de droits successoraux au Proche-Orient", *RIDC* 1979, (805) 805; Y. LINANT DE BELLEFONDS, "Le code du statut personnel irakien du 30 décembre 1959", *Brill* 1960, (79) 86; BUI-TUONG-CHIEU, *La polygamie dans le droit annamite*, Paris, Rousseau et Cie, 1933, 21.

¹⁸ The term 'polygamy' used in this thesis refers in what follows to the specific form 'polygyny'. The examples and cases cited further on are based on the study of marriages from countries that only know the institution of 'polygyny'. Thus 'polygamy' is to be understood hereafter as a situation in which a man has several wives.

¹⁹ Y. BEKTAS, *Polyamorie. Een onderzoek naar de voorstelling in hedendaagse non-fictionele media*, master's thesis Law KU Leuven, 2019, 17; J. FENSKE, "African Polygamy: Past and Present." *Journal of Development Economics* 2015, (58) 58; T. HARTLEY, "Recognition of polygamous marriages in English law" in P. LAGARDE, *La reconnaissance des situation en droit international privé*, Paris, Editions A. Pedone, 2013, (177) 177; K. BOELE-WOELKI, I. CURRY-SUMMER and W. SCHRAMA, *De juridische status van polygame huwelijken in rechtsvergelijkend perspectief*, Den Haag, Boom Juridische uitgevers, 2010, 4; E. ALOFS and D. CUYPERS, "De doorwerking van polygamie in de Belgische rechtsorde, in het bijzonder in de Belgische sociale zekerheid: een status quaestionis na de arresten van het grondwettelijk hof van 4 mei 2005 en 4 juni 2009", *TSR-RDS* 2009, (534) 536; M.-C. BOURDON, "IRAN: non à la polygamie", *Chatelaine (French edition)* 2008, 1; G. ASCHA, "Polygamie in de moderne Arabische rechtsliteratuur", *Recht van de islam* 1994, 25; L. BUSKENS, "De recente hervorming van het Marokkaanse familierecht", *Recht van de islam* 1994, (59) 68; I. NAJJAR, "Formation et évolution de droits successoraux au Proche-Orient", *RIDC* 1979, (805) 805; Y. LINANT DE BELLEFONDS, "Le code du statut personnel irakien du 30 décembre 1959", *Brill* 1960, (79) 86; BUI-TUONG-CHIEU, *La polygamie dans le droit annamite*, Paris, Rousseau et Cie, 1933, 21.

²⁰ List of countries whose domestic law allows polygamy: Afghanistan, Algeria, Angola, Bahrain, Bangladesh, Benin, Burma, Brunei, Burkina Faso, Cambodia, Cameroon, Central African Republic, Chad, Comoros, Congo, Djibouti, Egypt, Equatorial Guinea, Gabon, Gambia, Indonesia, Iran, Iraq, Jordan, Kenya, Kuwait, Laos, Lebanon, Lesotho, Liberia, Libya, Mali, Mauritania, Morocco, Nigeria, Oman, Pakistan, Qatar, Saudi Arabia, Senegal, Somalia, Sri Lanka, Sudan, Swaziland, Syria, Tanzania, Togo, Uganda, United Arab Emirates (CICADE, *Droit de la famille des femmes françaises & maghrébines, Le mariage polygamique*, 2016, www.cicade.org).

²¹ The Hindu Marriage Act of 18 May 1955; T. HARTLEY, "Recognition of polygamous marriages in English law" in P. LAGARDE, *La reconnaissance des situation en droit international privé*, Paris, Editions A. Pedone, 2013, (177) 177; K. BOELE-WOELKI, I. CURRY-SUMMER and W. SCHRAMA, *De juridische status van polygame huwelijken in rechtsvergelijkend perspectief*, Den Haag, Boom Juridische uitgevers, 2010, 5; J. CARLIER, "La polygamie devant la Cour d'arbitrage", *Journ.Jur.* 2005, 1; worldpopulationreview.com.

was still sporadic in Jewish communities in the Middle East. Judaism is still very much the law in Israel today, but polygamy is now forbidden.²² Polygyny was also found in the Old Testament but was abandoned in the New Testament and soon abandoned by Christians.²³ However, polygamy still existed for a long time among the Mormons in American states such as Utah, as they remained faithful to the Old Testament, until the 1890 Manifesto brought an end to plural marriage.^{24 25} In this concept, polygamy is a dimension of the freedom of religion.

16. In what follows, the national legislation on polygamy of Morocco, Syria, Iraq, Afghanistan and Algeria will be discussed. The choice for a discussion of these countries is not coincidental but is specifically determined by the strong migration from the aforementioned countries to Europe in the past decades (*supra*).

Some EU Member States have signed international conventions with certain countries that allow polygamy on the matter of social security.²⁶ By this way, the recognition of the effects of polygamous marriages is facilitated on the Member State's territory. In essence, these conventions result in the sharing of the survivor's pension and widow's allowance in equal parts between all the polygamous wives of a deceased husband.

²² Y. BEKTAS, *Polyamorie. Een onderzoek naar de voorstelling in hedendaagse non-fictionele media*, master's thesis Law KU Leuven, 2019, 17; J. WITTE, *The Western Case for Monogamy over Polygamy*, Cambridge University Press, 2015, 35; T. HARTLEY, "Recognition of polygamous marriages in English law" in P. LAGARDE, *La reconnaissance des situation en droit international privé*, Paris, Editions A. Pedone, 2013, (177) 177; worldpopulationreview.com.

²³ Y. BEKTAS, *Polyamorie. Een onderzoek naar de voorstelling in hedendaagse non-fictionele media*, master's thesis Law KU Leuven, 2019, 17; worldpopulationreview.com.

²⁴ A. JANSSENS, *Polygamie en de gevolgen voor rust- en overlevingspensioen*, master's thesis Law UGent, 2015, 17; J. WITTE, *The Western Case for Monogamy over Polygamy*, Cambridge University Press, 2015, 3; T. HARTLEY, "Recognition of polygamous marriages in English law" in P. LAGARDE, *La reconnaissance des situation en droit international privé*, Paris, Editions A. Pedone, 2013, (177) 182; K. BOELE-WOELKI, I. CURRY- SUMMER and W. SCHRAMA, *De juridische status van polygame huwelijken in rechtsvergelijkend perspectief*, Den Haag, Boom Juridische uitgevers, 2010, 5; F. STENHOUSE, *Exposé of Polygamy: A Lady's Life Among the Mormons*, Colorado, University Press of Colorado, 2008, 35; worldpopulationreview.com; www.churchofjesuschrist.org; www.pbs.org/mormons-polygamy.

²⁵ Some movements derived from Mormonism still practice a form of plural marriage today. They are often referred to as 'fundamentalist Mormons'. They are, however, not recognized as 'Mormons' by the Church of Jesus Christ of Latter-day Saints (B.C. HARDY, "Review of 'Richard S. Van Wagoner, Mormon Polygamy: A History Signature Books (1989)'", *Church History: Studies in Christianity and Culture* 1994, 255–309).

²⁶ Conventions de sécurité sociale entre la France et Algérie (01/10/80, art. 34), Bénin (06/11/79 art. 19), Cameroun (05/11/90, art. 30), Congo (11/02/87, art. 30), Cote d'Ivoire (16/01/1985, art. 24), Gabon (02/10/1980, art. 48-4), Mali (12/06/1979, art. 24), Maroc (09/07/1965, art. 15), Mauritanie (22/07/1965, art.12), Niger (22/03/76, art.54), Sénégal (29/03/74, art. 31), Togo (07/12/1971, art. 14); ²⁶ Algemeen Verdrag tussen het Koninkrijk België en het Koninkrijk Marokko betreffende de sociale zekerheid, BS 25 June 1971; Algemeen Verdrag betreffende de sociale zekerheid tussen het Koninkrijk België en de Democratische Volksrepubliek Algerije, BS 25 oktober 1969.

2.2.1 Morocco

17. Although Morocco is no longer in the top 10 of current nationalities immigrating to Europe in 2021, Moroccans are still massively present on the European territory. The large majority of the Moroccans who live abroad, *i.e.* 85 percent, reside in European countries, making them one of the largest non-European immigrant population in Europe.²⁷

18. Polygamy in Morocco is included in the new Moroccan family legislation, the "Code du statut personnel et des successions", also known as the Mudawwana, as reformed in 2004.²⁸ According to the Mudawwana, polygamy is possible for any Moroccan national, albeit under certain strict conditions.^{29 30} Under Moroccan law, a Moroccan can continue to enjoy the rights conferred by the Mudawwana at all times, even if he has meanwhile acquired the nationality of the country of residence.³¹ The aforementioned custom can thus cause many legal conflicts between the national law of the new (European) state and the Moroccan law for people enjoying dual nationality.³²

²⁷ MYRIA, *Migratie in cijfers en in rechten 2020*, Brussels, Myria, 2020, 7; A. JANSSENS, *Polygamie en de gevolgen voor rust- en overlevingspensioen*, master's thesis Law UGent, 2015, 73; H. DE HAAS, "The Moroccan Emigrant Population", *Bundeszentrale für politische Bildung* 2009, www.bpb.de/gesellschaft/migration.

²⁸ Mudawwana al-'Usra of 5 February 2004 (hereafter: Mudawwana); E. VAN GENECHTEN and Y. STEVENS, "Pensioenen werknemers, zelfstandigen en overheidspersoneel en inkomensgarantie voor ouderen", *TSR* 2011, (589) 617; F. TALHAOU, "De nieuwe Marokkaanse familiewetgeving: van de ketenen van de Moudawana naar meer gelijkheid tussen man en vrouw in het gezin?" in I. LODEWYCKX, J. GEETS, and C. TIMMERMAN (eds.), *Aspecten van Marokkaanse huwelijksmigratie en Marokkaans familierecht*, Steunpunt Gelijkekansenbeleid, 2006, 59-69.

²⁹ J. MARY, "L'accueil en Belgique du mariage polygamique ou quand la Cour du travail de Bruxelles s'empoque avec les juges de cassation: Retour sur la controverse quant aux effets sociaux du mariage polygamique", *Rev.dr.etr.* 2014, (557) 558; E. VAN GENECHTEN and Y. STEVENS, "Pensioen en werknemers, zelfstandigen en overheidspersoneel en inkomensgarantie voor ouderen", *TSR* 2011, (589) 617; K. BOELE-WOELKI, I. CURRY-SUMMER and W. SCHRAMA, *De juridische status van polygame huwelijken in rechtsvergelijkend perspectief*, Den Haag, Boom Juridische uitgevers, 2010, 3-4; E. ALOFS and D. CUYPERS, "De doorwerking van polygamie in de Belgische rechtsorde, in het bijzonder in de Belgische sociale zekerheid: een status quaestionis na de arresten van het grondwettelijk hof van 4 mei 2005 en 4 juni 2009", *TSR-RDS* 2009, (534) 536.

³⁰ However, the above-mentioned sentence should be nuanced on the basis of Article 3, §1, 1) of the Moroccan Nationality Code: "A l'exception des Marocains de confession juive qui sont soumis au statut personnel hébraïque marocain, le Code du statut personnel et successoral régissant les Marocains musulmans s'applique à tous les nationaux. Toutefois, les prescriptions ci-après s'appliquent aux Marocains ni musulmans, ni israélites : 1) la polygamie leur est interdite." In other words, polygamy is not possible for Moroccans who are neither Muslim nor Jewish, requiring the declaration of the religious affiliation.

³¹ Art. 2, section 1, 1. Mudawwana: "Les dispositions du présent code s'appliquent:

1. à tous les marocains, même ceux portant une autre nationalité"; ALOFS and D. CUYPERS, "De doorwerking van polygamie in de Belgische rechtsorde, in het bijzonder in de Belgische sociale zekerheid: een status quaestionis na de arresten van het grondwettelijk hof van 4 mei 2005 en 4 juni 2009", *TSR-RDS* 2009, (531) 535. The acquisition of a new nationality, from the country of residence, does not entail the loss of the Moroccan nationality.

³² Also, the child of a Moroccan, born in another country, is considered a Moroccan according to the Kingdom of Morocco and can therefore invoke the Mudawwana regulations based on his dual nationality. In addition, the Mudawwana is applicable to refugees and apatrides, relationships between two people where one of the parties is Moroccan and relationships between two Moroccans if one of them is Muslim (art. 2(1) Mudawwana).

19. There are certain reasons that a Moroccan man can invoke to justify taking an additional wife. One valid reason could be when there are no children from the first marriage, or at least no sons. In other cases, a girl may be sold as a second wife when her parents are in financial distress, or a man may be forced to take a widow under his wing in addition to his other wife(s).³³ In other words, if a man wishes to enter into a second marriage, he must justify it on the basis of objective and exceptional motives.³⁴

Despite its legality, Morocco has tightened up the possibility of multiple marriages enormously over the years in order to reduce their number. As mentioned above, according to Sharia Law, the divine law of Islam, a polygamous marriage can only be concluded when equality between each spouse is guaranteed. In other words, the Moroccan judge will only agree to this situation if there is a guarantee that the man can support more than one family.³⁵ Concluding a

³³ A. VAN VOSSOLE, "Het overerven van weduwen", *Tijdschrift voor Genderstudies* 2011, (18) 21; K. BOELE-WOELKI, I. CURRY-SUMMER and W. SCHRAMA, *De juridische status van polygame huwelijken in rechtsvergelijkend perspectief*, Den Haag, Boom Juridische uitgevers, 2010, 4; M. LADIER-FOULADI, *Population et politique en Iran. De la monarchie à la République islamique*, Paris, ined, 2003, 62; S. D'HONDT, *Relatievorming en gezinshereniging getoetst aan het gelijkheidsbeginsel, de bescherming van het gezinsleven en de interne en internationale beslissingsharmonie*, PhD thesis Law KU Leuven, 2003, 987; G. PISON, "La démographie de la polygamie", *Population (French Edition)* 1986, (93) 103; J. LECERF, "Note sur la Famille dans le monde arabe et islamique", *Brill* 1954, (31) 53.

³⁴ Art. 42 Mudawwana; J. MARY, "L'accueil en Belgique du mariage polygamique ou quand la Cour du travail de Bruxelles s'empaigne avec les juges de cassation: Retour sur la controverse quant aux effets sociaux du mariage polygamique", *Rev.dr.étr.* 2014, 558; J. DE HOUWER, *De grondvoorwaarden van het huwelijk vanuit internationaal privaatrechtelijk perspectief*, master's thesis Law KU Leuven, 2013, 5; E. VAN GENECHTEN and Y. STEVENS, "Pensioenen werknemers, zelfstandigen en overheidspersoneel en inkomensgarantie voor ouderen", *TSR* 2011, (589) 617; E. ALOFS and D. CUYPERS, "De doorwerking van polygamie in de Belgische rechtsorde, in het bijzonder in de Belgische sociale zekerheid: een status quaestionis na de arresten van het grondwettelijk hof van 4 mei 2005 en 4 juni 2009", *TSR-RDS* 2009, (534) 536; F. TALHAOU, "De nieuwe Marokkaanse familiewetgeving: van de ketenen van de Moudawana naar meer gelijkheid tussen man en vrouw in het gezin?" in I. LODEWYCKX, J. GEETS, and C. TIMMERMAN (eds.), *Aspecten van Marokkaanse huwelijksmigratie en Marokkaans familierecht*, Steunpunt Gelijkekansenbeleid, 2006, (59) 63.

³⁵ Art. 40-41 Mudawwana; Commission Nationale Consultative des Droits de l'Homme, Etude et propositions: la polygamie en France, www.cncdh.fr/rapportpolygamie.pdf; H. ENGLERT and J. VERHELLEN, "L'application du droit marocain de la famille en Belgique 2004-2015", in M-C. FOBLETS (ed.), *Le code marocain de la famille en europe. Bilan comparé de dix ans d'application*, Brugge, Die Keure, 2017, 277; CICADE, *Droit de la famille des femmes françaises & maghrébines, Le mariage polygamique*, 2016, www.cicade.org; E. GENEVA, "Morocco: Polygamous Man Arrested on Night of His Second Wedding", *Morocco World News* 2014; J. MARY, "L'accueil en Belgique du mariage polygamique ou quand la Cour du travail de Bruxelles s'empaigne avec les juges de cassation: Retour sur la controverse quant aux effets sociaux du mariage polygamique", *Rev.dr.étr.* 2014, 558; J. DE HOUWER, *De grondvoorwaarden van het huwelijk vanuit internationaal privaatrechtelijk perspectief*, master's thesis Law KU Leuven, 2013, 5; C. HENRICOT, "L'impact de la polygamie et de la répudiation sur les droits sociaux. Aperçu de la jurisprudence des juridictions du travail", *Soc.Kron.* 2012, 61; K. BOELE-WOELKI, I. CURRY-SUMMER and W. SCHRAMA, *De juridische status van polygame huwelijken in rechtsvergelijkend perspectief*, Den Haag, Boom Juridische uitgevers, 2010, 4; E. ALOFS and D. CUYPERS, "De doorwerking van polygamie in de Belgische rechtsorde, in het bijzonder in de Belgische sociale zekerheid: een status quaestionis na de arresten van het grondwettelijk hof van 4 mei 2005 en 4 juni 2009", *TSR-RDS* 2009, (531) 536; F. TALHAOU, "De nieuwe Marokkaanse familiewetgeving: van de ketenen van de Moudawana naar meer gelijkheid tussen man en vrouw in het gezin?" in I. LODEWYCKX, J. GEETS, and C. TIMMERMAN (eds.), *Aspecten van Marokkaanse huwelijksmigratie en Marokkaans familierecht*, Steunpunt Gelijkekansenbeleid, 2006, (59) 63; S. D'HONDT, *Relatievorming en*

polygamous marriage is only possible with the permission of a judge and in the presence of the first wife.³⁶ The new wife is informed by the judge of the already existing marriage of her future husband.³⁷ In order to conclude the second marriage, both the first and the new wife must give their consent.³⁸

20. Polygamous family situations can be prevented by concluding a clause of monogamy, whereby the parties agree that no additional marriages may be contracted.³⁹ In other words, the husband undertakes to remain monogamous and, in the event that he does not comply, the first wife is entitled to demand the dissolution of the marriage. If an imbalance could arise or if a clause of monogamy was included in the first marriage, the judge will not grant permission for the next marriage to take place.^{40 41} A polygamous situation can be prevented in any event in the absence of the consent of the first wife, even if no clause of monogamy was included. The

gezinshereniging getoetst aan het gelijkheidsbeginsel, de bescherming van het gezinsleven en de interne en internationale beslissingsharmonie, PhD thesis Law KU Leuven, 2003, 987; L. BUSKENS, "De recente hervorming van het Marokkaanse familierecht", *Recht van de islam* 1994, (59) 70.

³⁶ Art. 43 Mudawwana; K. BOELE-WOELKI, I. CURRY-SUMMER and W. SCHRAMA, *De juridische status van polygame huwelijken in rechtsvergelijkend perspectief*, Den Haag, Boom Juridische uitgevers, 2010, 4; E. ALOFS and D. CUYPERS, "De doorwerking van polygamie in de Belgische rechtsorde, in het bijzonder in de Belgische sociale zekerheid: een status quaestionis na de arresten van het grondwettelijk hof van 4 mei 2005 en 4 juni 2009", *TSR-RDS* 2009, 536; F. TALHAOU, "De nieuwe Marokkaanse familiewetgeving: van de ketenen van de Moudawana naar meer gelijkheid tussen man en vrouw in het gezin?" in I. LODEWYCKX, J. GEETS, and C. TIMMERMAN (eds.), *Aspecten van Marokkaanse huwelijksmigratie en Marokkaans familierecht*, Steunpunt Gelijkekansenbeleid, 2006, (59) 63.

³⁷ Art. 46 Mudawwana; Belgian Cassation 3 December 2007, *T.Not.* 2011, 541; J. DE HOUWER, *De grondvoorwaarden van het huwelijk vanuit internationaal privaatrechtelijk perspectief*, master's thesis Law KU Leuven, 2013, 5; K. BOELE-WOELKI, I. CURRY-SUMMER and W. SCHRAMA, *De juridische status van polygame huwelijken in rechtsvergelijkend perspectief*, Den Haag, Boom Juridische uitgevers, 2010, 4; E. ALOFS and D. CUYPERS, "De doorwerking van polygamie in de Belgische rechtsorde, in het bijzonder in de Belgische sociale zekerheid: een status quaestionis na de arresten van het grondwettelijk hof van 4 mei 2005 en 4 juni 2009", *TSR-RDS* 2009, 536; J. CARLIER, "La polygamie devant la Cour d'arbitrage", *Journ.Jur.* 2005, 1; L. BUSKENS, "De recente hervorming van het Marokkaanse familierecht", *Recht van de islam* 1994, (59) 68.

³⁸ *Ibid.*

³⁹ Art. 40 Mudawwana; Belgian Cassation 3 December 2007, *T.Not.* 2011, 542; H. ENGLERT and J. VERHELLEN, "L'application du droit marocain de la famille en Belgique 2004-2015", in M-C. FOBLETS (ed.), *Le code marocain de la famille en europe. Bilan comparé de dix ans d'application*, Brugge, Die Keure, 2017, 285; J. MARY, "L'accueil en Belgique du mariage polygamique ou quand la Cour du travail de Bruxelles s'empoque avec les juges de cassation: Retour sur la controverse quant aux effets sociaux du mariage polygamique", *Rev.dr.étr.* 2014, 558; E. ALOFS and D. CUYPERS, "De doorwerking van polygamie in de Belgische rechtsorde, in het bijzonder in de Belgische sociale zekerheid: een status quaestionis na de arresten van het grondwettelijk hof van 4 mei 2005 en 4 juni 2009", *TSR-RDS* 2009, (534) 536; J. CARLIER, "La polygamie devant la Cour d'arbitrage", *Journ.Jur.* 2005, 1; S. D'HONDT, *Relatievorming en gezinshereniging getoetst aan het gelijkheidsbeginsel, de bescherming van het gezinsleven en de interne en internationale beslissingsharmonie*, PhD thesis Law KU Leuven, 2003, 987; B. BOURDELOIS, *Mariage polygamique et droit positif français*, Paris, GLN Joly Editions, 1993, 60; F. RIGAUX and M. FALLON, *Droit International Privé, II, Droit Positif Belge*, Brussels, Maison Larcier, 1993, 320.

⁴⁰ *Ibid.*

⁴¹ The Belgian judge has already refused to recognize a second marriage on the grounds of a clause of monogamy that was included in the marriage contract (Labour Court Brussels 27 May 2010, *JTT* 2011, 92).

first wife can namely ask for divorce.⁴² This is probably an attempt to strengthen the protection of the woman's position in the imbalance that polygamy can cause.⁴³ In practice, the man's position is stronger and he can disown his wife at any time, which raises the question to what extent the woman has a real freedom of choice when applying for the monogamy clause.⁴⁴

21. As previously mentioned, Morocco concluded a treaty with several Member States on social security in order to deal with and facilitate the cooperation between Morocco and the Member State, and more specifically, the possible recognition of legal effects of Moroccan polygamous marriages by the Member State.⁴⁵

2.2.2 Syria

22. Syrian family law is also still influenced by Islam. Although monogamy is the rule in Syria, polygamy is possible, even without the consent of the first spouse.⁴⁶

Nevertheless, certain restrictions apply here as well. Thus, the man is asked to provide proof that he has the financial means to take a second wife under his wing, as well as a justification for the second marriage, such as the first wife's inability to bear children. If no valid reason is given or if there is a fear of unequal treatment between the wives, the court may prohibit the polygamous marriage.⁴⁷

⁴² E. ALOFS and D. CUYPERS, "De doorwerking van polygamie in de Belgische rechtsorde, in het bijzonder in de Belgische sociale zekerheid: een status quaestionis na de arresten van het grondwettelijk hof van 4 mei 2005 en 4 juni 2009", *TSR-RDS* 2009, 536; J. CARLIER, "La polygamie devant la Cour d'arbitrage", *Journ.Jur.* 2005, 1; L. BUSKENS, "De recente hervorming van het Marokkaanse familierecht", *Recht van de islam* 1994, (59) 68.

⁴³ See "5. Polygamy and discrimination."

⁴⁴ S. D'HONDT, *Relatievorming en gezinshereniging getoetst aan het gelijkheidsbeginsel, de bescherming van het gezinsleven en de interne en internationale beslissingsharmonie*, PhD thesis Law KU Leuven, 2003, 988.

⁴⁵ Algemeen Verdrag tussen het Koninkrijk België en het Koninkrijk Marokko betreffende de sociale zekerheid, BS 25 June 1971; Convention Générale de sécurité sociale entre le Gouvernement de la République française et le Gouvernement du Royaume du Maroc, *JORF* 9 July 1965.

⁴⁶ Z. TAHA, "Régimes arabes laïcs et politique du genre. La condition de la femme à travers le Code du statut personnel : le cas de la Syrie", *Cahiers de la Méditerranée* 2010, (305) 310.

⁴⁷ Art. 17 Syrian Law of Personal Status of 1953; S. KELLY and J. BRESLIN, "Women's Rights in the Middle East and North Africa: Progress Amid Resistance - Syria", *Freedom House* 2010, 9; Z. TAHA, "Régimes arabes laïcs et politique du genre. La condition de la femme à travers le Code du statut personnel : le cas de la Syrie", *Cahiers de la Méditerranée* 2010, (305) 314; S. D'HONDT, *Relatievorming en gezinshereniging getoetst aan het gelijkheidsbeginsel, de bescherming van het gezinsleven en de interne en internationale beslissingsharmonie*, PhD thesis Law KU Leuven, 2003, 989; J.N.D. ANDERSON, "The Syrian Law of Personal Status", *Bulletin of the School of Oriental and African Studies, University of London*, vol. 17, *JSTOR* 1955, 34-49, www.jstor.org.

2.2.3 Iraq

23. In Iraq the same condition applies as in the countries discussed above; polygamy is only possible as long as equal treatment between the women is guaranteed. Here, too, the judge rules and only gives permission if the husband has legitimate grounds for the second marriage and proves that he has sufficient means to support several wives at the same time. The judge has a sovereign power of appreciation for his decision.⁴⁸

The restrictive conditions can however be set aside when the second wife is a widow or when the man starts divorce proceedings for the first marriage, then enters into a second marriage and subsequently reconciles with the first wife.⁴⁹ A polygamous marriage is however not possible when the man and the current wife already have a child. This suggests that in Iraq, too, there is the option of entering into a second marriage to compensate for the fertility problem of the first marriage, but this is not very clear.⁵⁰ Polygamy remains the exception in Iraq and the few cases of possible polygamy require a restrictive interpretation.⁵¹

2.2.4 Afghanistan

24. Currently, the largest migration inflow into European states comes from Afghanistan (*supra*). Since the Afghan Civil Code does not clearly address polygamy, the rules concerning polygamy as described in the Koran apply here as well. However, the number of polygamous marriages in Afghanistan remains very low, due to the poor economic situation; few have the capacity to finance a second marriage.⁵²

⁴⁸ Art. 3, section 5 Law of Personal Status, Alwaqai Aliraqiya of 30 December 1959; K. BOELE-WOELKI, I. CURRY-SUMMER and W. SCHRAMA, *De juridische status van polygame huwelijken in rechtsvergelijkend perspectief*, Den Haag, Boom Juridische uitgevers, 2010, 47; H. AHMED, S. KELLY and J. BRESLIN, "Women's Rights in the Middle East and North Africa: Progress Amid Resistance - Iraq," *Freedom House* 2010, 12; Y. LINANT DE BELLEFONDS, "Le code du statut personnel irakien du 30 décembre 1959", *Brill* 1960, (79) 87.

⁴⁹ S. KELLY and J. BRESLIN, "Women's Rights in the Middle East and North Africa: Progress Amid Resistance - Iraq," *Freedom House* 2010, 12.

⁵⁰ S. D'HONDT, *Relatievorming en gezinshereniging getoetst aan het gelijkheidsbeginsel, de bescherming van het gezinsleven en de interne en internationale beslissingsharmonie*, PhD thesis Law KU Leuven, 2003, 989.

⁵¹ *Ibid.*

⁵² H. MURADI and N.A. YOUSEFI, "The Wisdom of Polygamy in Islam: The Law and Customary Practice in Afghanistan" in *Islamic Heritage leads the transformation of the Ummah*, 2015, (114) 123.

2.2.5 Algeria

25. Although Algeria does not figure in the list of the most incoming nationalities of origin in Europe today, France does have a very large Algerian community given the colonial past.⁵³ It is therefore important to mention the Algerian legislation on polygamous marriages as well, since polygamy still occurs regularly in Algeria, as it does in Morocco.⁵⁴

26. The Algerian man who wishes to enter into a second marriage must inform both his first wife and his future second wife of his polygamous intentions. He must also obtain permission from the president of the competent court⁵⁵. This permission will only be granted if the man can prove that all parties involved have agreed to the future polygamous situation, that the reason given by the man for the second marriage justifies it and that he can guarantee an equal treatment between the women. For the latter criterion, the man must also prove that his financial situation can support a second marriage.⁵⁶ The women have a right of claim against the husband in case of deceit by the husband, or a right to divorce in case of lack of consent.⁵⁷

By concluding treaties with other countries, it has now become much easier for European states to deal with polygamous situations. For instance, besides the General Agreement with Morocco on social security, the Republic of France also concluded a bilateral agreement with Algeria in 1980.^{58 59}

⁵³ P. DEWITTE, *Deux siècles d'immigration en France*, La documentation française, 2003, 128 p.

⁵⁴ Questions and Answers Belgian Chamber, Q. nr. 0343, 14 May 2018 (J.-J. FLAHAUX); CICADE, *Droit de la famille des femmes françaises & maghrébines, Le mariage polygamique*, 2016, www.cicade.org.

⁵⁵ This is the court of the place of the marital home.

⁵⁶ Art. 8 Algerian Family Code of 27 February 2005; CICADE, *Droit de la famille des femmes françaises & maghrébines, Le mariage polygamique*, 2016, www.cicade.org; J. MARY, "L'accueil en Belgique du mariage polygamique ou quand la Cour du travail de Bruxelles s'empoigne avec les juges de cassation: Retour sur la controverse quant aux effets sociaux du mariage polygamique", *Rev.dr.étr.* 2014, 558; K. BOELE-WOELKI, I. CURRY-SUMMER and W. SCHRAMA, *De juridische status van polygame huwelijken in rechtsvergelijkend perspectief*, Den Haag, Boom Juridische uitgevers, 2010, 5.

⁵⁷ Art. 8 Algerian Family Code of 27 February 2005.

⁵⁸ Convention Générale entre le Gouvernement de la République française et le Gouvernement de la République algérienne démocratique et populaire sur la Sécurité sociale, *JORF* 1 octobre 1980.

⁵⁹ For Belgium: Algemeen Verdrag betreffende de sociale zekerheid tussen het Koninkrijk België en de Democratische Volksrepubliek Algerije, *BS* 25 oktober 1969.

3. Polygamy in Europe

27. What happens when a man, who has legally married two or more wives in his country of origin, immigrates to Europe with one or more of his wives? Or when a man has a right of residence in a European country, marries a European citizen in the European state and then engages into a second marriage in his country of birth, in accordance with the rules applicable there? In those cases, the question arises whether a foreign polygamous marriage can be valid in the European state.

28. The ban on polygamy in Europe is a rule that applies both territorially and extraterritorially. In other words, a European national cannot enter into a second marriage, neither on the national territory nor abroad, even if polygamy is allowed in the foreign country.⁶⁰

Polygamy allows for conflicts of personal status when one party, who is monogamous, marries someone whose personal status is polygamous. The nationality of the parties is therefore important in deciding whether the marriage is compatible with the state's public order.⁶¹

29. When both spouses have the nationality of a European country, there is no ground for doubt. This union is monogamous according to the national law of European states. A possible second marriage is immediately null and void and has no effect in the state's legal system. This form of polygamy rarely occurs and, when it does, it is immediately rectified.⁶² This is often the result of the ignorance of the involved parties. For example, the new couple assumed that the first marriage of one of the spouses had already been dissolved before the divorce decree became final.⁶³

⁶⁰ Questions and Answers European Commission, Q. nr. E-4761/05, 15 December 2005 (A. MÖLZER), www.europarl.europa.eu.

⁶¹ Labour Court Bergen 25 June 2009, *Rev.trim.dr.fam.* 2010, afl. 2, 528; Tribunal of first instance Antwerpen 14 September 1998, *Tijdschrift@ipr.be* 1998, 1393; Labour Tribunal Hasselt 9 June 1998, *Soc.Kron.* 1998, 375; Tribunal of first instance Brussels 20 November 1990, *Rev.dr.étr.* 1990, 351; Commission Nationale Consultative des Droits de l'Homme, Etude et propositions: la polygamie en France, www.cncdh.fr/rapportpolygamie.pdf; K. BOELE-WOELKI, I. CURRY-SUMMER and W. SCHRAMA, *De juridische status van polygame huwelijken in rechtsvergelijkend perspectief*, Den Haag, Boom Juridische uitgevers, 2010, 19; E. ALOFS and D. CUYPER, "De doorwerking van polygamie in de Belgische rechtsorde, in het bijzonder in de Belgische sociale zekerheid: een status quaestionis na de arresten van het grondwettelijk hof van 4 mei 2005 en 4 juni 2009", *TSR-RDS* 2009, 542.

⁶² Interview with JORIS PASGANG, Belgian FPS Home Affairs - General Direction Institutions and Population.

⁶³ Court of First Instance Den Haag 24 February 2006, *NIPR* 2006, 272; Court of First Instance Amsterdam 13 April 1993, *NJ* 1995, 52, *NIPR* 1995, 211; G. VERSCHOLDEN, "Cassatie redt bigaam huwelijk", *Juristenkrant*

In the event that, at the time of the first marriage, the woman is a European citizen, and her husband legally enters into a second marriage in his country of origin, this second marriage will still be null and void. It is assumed that, in view of the European States' position on polygamy, the woman could legitimately expect her marriage to be monogamous, in other words, that she would engage for an exclusive union with her husband.⁶⁴

However, the story is different when a judge is confronted with a situation of polygamy where the personal status of the first wife tolerates polygamy, in other words, when the wife has the nationality of a country which allows the practice of polygamy. In this case, the judge decides whether the recognition of the consequences of the second marriage conflicts with the international public order. If it is not contrary, recognition of the marriage is possible.

The most uncertain situation, a source of divergent opinions in the national courts of European states, arises in cases of polygamous unions where the first wife has acquired the nationality of the European state after the second marriage. In that case, the judge examines *in concreto* the degree of attachment of the foreign marriage to the European state and the compatibility with the public order.⁶⁵

30. Although the European states forbid to enter into a second marriage as long as the first one has not been annulled, they do in some cases accept a certain degree of spill-over into their legal system of a legally contracted polygamous marriage in a foreign country, and thus also the legal consequences which flow from this.⁶⁶ It is important to make a distinction between

2001, 9; G.R. DE GROOT and S. RUTTEN, "Polygamie, Naturalisatie, Bigamie?", in S. RUTTEN, *Recht van Islam*, Maastricht, RIMO, 1996, 19-60.

⁶⁴ J. MARY, "L'accueil en Belgique du mariage polygamique ou quand la Cour du travail de Bruxelles s'empaigne avec les juges de cassation: Retour sur la controverse quant aux effets sociaux du mariage polygamique", *Rev.dr.étr.* 2014,558-559; K. BOELE-WOELKI, I. CURRY-SUMMER and W. SCHRAMA, *De juridische status van polygame huwelijken in rechtsvergelijkend perspectief*, Den Haag, Boom Juridische uitgevers, 2010, 23.

⁶⁵ Belgian Labour Court. Brussels 8 January 2014, *Rev.dr.étr.* 2014, 299; Belgian Labour Court Brussels 17 February 2011, *JT* 2011, 383 ; J. MARY, "L'accueil en Belgique du mariage polygamique ou quand la Cour du travail de Bruxelles s'empaigne avec les juges de cassation: Retour sur la controverse quant aux effets sociaux du mariage polygamique", *Rev.dr.étr.* 2014,558-559; K. BOELE-WOELKI, I. CURRY-SUMMER and W. SCHRAMA, *De juridische status van polygame huwelijken in rechtsvergelijkend perspectief*, Den Haag, Boom Juridische uitgevers, 2010, 23.

⁶⁶ Questions and Answers European Commission, Q. nr. E-003221-18, 13 June 2018 (D. MARTIN), www.europarl.europa.eu; Questions and Answers European Commission, Q. nr. E-4761/05, 15 December 2005 (A. MÖLZER), www.europarl.europa.eu; German Bundesverwaltungsgericht 29 May 2018, BVerwG 1 C 15.17; French Council of State 16 April 2010, nr. 318726; Belgian Cassation 18 March 2013, *RW* 2014, 1; Belgian Cassation 14 February 2011, AR S.10.0031.F, *Rev.dr.étr.* 2011, afl. 164, 459; Belgian Cassation 3 December 2007, *T.Not.* 2011, 535; Labour Court Bergen 25 June 2009, *Rev.trim.dr.fam.* 2010, afl. 2, 526; A. GILLARD, "Polygamie et ordre public belge" (note under Brussels 2 May 2013), *Act.dr.fam.* 2015, 65; J. MARY, "L'accueil

the recognition of the polygamous marriage as such (“3.1 International public order test”) and the recognition of the legal consequences which arise from that marriage (“3.2 Family reunification”).

31. With regard to international treaty provisions concerning the effect of polygamy, the Convention on Celebration and Recognition of the Validity of Marriages, also known as the Hague Marriage Convention of 1978, provides that if one of the spouses was already married at the time of the marriage, the recognition of the second marriage can be refused.⁶⁷ Article 5 of the Convention, however, puts a nuance on this statement: “*The application of a foreign law declared applicable by this Chapter may be refused only if such application is manifestly incompatible with the public policy ("ordre public") of the State of celebration.*”⁶⁸ The recognition of the consequences of a polygamous marriage is therefore still unclear, so that it has to be examined on a case-by-case basis whether or not these consequences are compatible with public policy. It can thus be deduced from the latter Convention that the consequences of a polygamous marriage can be recognized if they are not contrary to the public order of the Member State.⁶⁹ ⁷⁰ However, not all EU Member States have signed this Convention and are therefore not bound by it.⁷¹

en Belgique du mariage polygamique ou quand la Cour du travail de Bruxelles s’empaigne avec les juges de cassation: Retour sur la controverse quant aux effets sociaux du mariage polygamique”, *Rev.dr.étr.* 2014, (557) 557; S. FRANCO and J. MARY, “Les effets sociaux du mariage polygamique: pour une appréciation en contexte”, *RTDF* 2013, (861) 869; B. SONGA, *Het recht op gezinshereniging in het licht van artikel 8 EVRM: polygamie en buitenechtelijke kinderen van vreemde nationaliteit*, master’s thesis Law KU Leuven, 2012, 53; K. BOELE-WOELKI, I. CURRY-SUMMER and W. SCHRAMA, *De juridische status van polygame huwelijken in rechtsvergelijkend perspectief*, Den Haag, Boom Juridische uitgevers, 2010, 3; E. ALOFS and D. CUYPERS, “De doorwerking van polygamie in de Belgische rechtsorde, in het bijzonder in de Belgische sociale zekerheid: een status quaestionis na de arresten van het grondwettelijk hof van 4 mei 2005 en 4 juni 2009”, *TSR-RDS* 2009, 534-567; EMN Synthesis Report, *Family Reunification*, European Migration Network, 2008, 18; J. CARLIER, “La polygamie devant la Cour d’arbitrage”, *Journ.Jur.* 2005, 1.

⁶⁷ Art. 11 Convention on Celebration and Recognition of the Validity of Marriages of 14 March 1978, Hague Conference on Private International Law, UNTS No. I-32391.

⁶⁸ Art. 5 Convention on Celebration and Recognition of the Validity of Marriages of 14 March 1978, Hague Conference on Private International Law, UNTS No. I-32391; J. MARY, “L’accueil en Belgique du mariage polygamique ou quand la Cour du travail de Bruxelles s’empaigne avec les juges de cassation: Retour sur la controverse quant aux effets sociaux du mariage polygamique”, *Rev.dr.étr.* 2014, (557) 559; B. SONGA, *Het recht op gezinshereniging in het licht van artikel 8 EVRM: polygamie en buitenechtelijke kinderen van vreemde nationaliteit*, master’s thesis Law KU Leuven, 2012, 13; S. D’HONDT, *Relatievorming en gezinshereniging getoetst aan het gelijkheidsbeginsel, de bescherming van het gezinsleven en de interne en internationale beslissingsharmonie*, PhD thesis Law KU Leuven, 2003, 991-992.

⁶⁹ *Ibid.*

⁷⁰ For the further qualification of the term ‘public policy’ see “3.1 International public order test”.

⁷¹ Convention on Celebration and Recognition of the Validity of Marriages of 14 March 1978, Hague Conference on Private International Law, UNTS No. I-32391.

32. Once a foreign polygamous marriage is recognized in a European state, it automatically generates consequences, just as an “ordinary” marriage would. Consequently, a polygamous marriage validly concluded abroad will be able to produce legal effects on a national and European level, even though this form of marriage in itself is prohibited in the domestic legal system.

A study of the legal implications arising from a polygamous marriage is essential in order to secure the rights and obligations of the parties. Polygamy has an impact on social security law, non-contractual liability law, family law and tax law of a state. However, the aforementioned is a matter of domestic law and is, therefore, outside of the scope of this thesis, which is centralized around the European disturbance of polygamy. Another legal effect of polygamy, more on a European level, is the problematic of family reunification. Thus, this topic will be dealt with in more detail (*infra*).

3.1 International public order test

33. The private international law of each state decides to what extent foreign law will or will not continue to apply in that state.⁷² The international public policy exception is used either to set aside an impediment under the applicable foreign law or to prohibit the celebration of a marriage, even though this would be permissible under the personal law of the spouses or the law of the place of celebration.⁷³ An example of the first hypothesis is that an impediment criterion such as origin or religion abroad may not in any event be an obstacle to the celebration of a marriage in a Member State. Polygamy, however, falls within the scope of the second hypothesis. As polygamy is prohibited in democratic societies, tension arises between the state’s public order and freedom of religion. Thus, a foreigner cannot invoke his national law to contract a second marriage on the territory of a Member State before the dissolution of his first marriage. It is in fact contrary to the Member State’s international public order.⁷⁴

⁷² P. MERCIER, *Conflits de civilisations et droit international privé. Polygamie et répudiation*, Genève, Librairie Droz, 1972, 23.

⁷³ S. FRANCO and J. MARY, “Les effets sociaux du mariage polygamique: pour une appréciation en contexte”, *RTDF* 2013, (861) 861; C. HENRICOT, “Les effets du mariage polygamique sur l’octroi de droits sociaux” (note under Cass. 3 December 2007), *Rev.trim.dr.fam.* 2008, (825) 831; F. RIGAUX and M. FALLON, *Droit International Privé, II, Droit Positif Belge*, Brussels, Maison Larcier, 1993, 318.

⁷⁴ F. RIGAUX and M. FALLON, *Droit International Privé, II, Droit Positif Belge*, Brussels, Maison Larcier, 1993, 319.

34. However, the principle of international public order does not preclude the recognition of the consequences of a legal situation created abroad, despite the fact that this right is not tolerated in the Member State itself, such as in cases of polygamous marriages. The judge decides on a case-by-case basis and, for each decision, must consider the extent to which there is a connection with the national legal system and the importance of the legal consequences that would result from the application of the foreign law. If both parties have the State's nationality, the connection with the State is stronger than when only one of the parties or even neither of the parties is a citizen and only has a right of residence in the State. The lighter the connection, the lesser the applicability of the national law and the lesser the public order exception (*'effet atténué de l'ordre public'*).⁷⁵ In other words, the domestic legal sphere is more limited when none of the parties has the State's nationality. The nationality of the parties therefore plays a role in this assessment. In principle, the State's public policy does not prevent polygamous marriages contracted abroad from having an effect when the parties are legally married in their country of origin and then immigrate to this country.⁷⁶ In this case, several factors have to be taken into account, such as nationality, place of residence, place of the marriage ceremony (*lex loci celebrationis*), the monogamous or polygamous status of the different parties and the provisions set out in the marriage contract.^{77 78}

⁷⁵ French Cassation 17 April 1953 (arrêt Rivière); Belgian Cassation 18 March 2013, AR S.11.0068.F, RW 2014, 1; Belgian Cassation 3 December 2007, AR S.06.0088.F, *T.Not.* 2011, 535; Commission Nationale Consultative des Droits de l'Homme, Etude et propositions: la polygamie en France, www.cncdh.fr/rapportpolygamie.pdf; S. RUTTEN and J. VERHELLEN, "Inleiding tot het Internationaal Privaatrecht, met specifieke aandacht voor polygamie en verstoting" in S. RUTTEN, E. RAMAKERS and M. LENAERTS, *Recht in een multiculturele samenleving*, Antwerp, Intersentia, 2018, 254; H. ENGLERT and J. VERHELLEN, "L'application du droit marocain de la famille en Belgique 2004-2015", in M.-C. FOBLETS (ed.), *Le code marocain de la famille en europe. Bilan comparé de dix ans d'application*, Brugge, Die Keure, 2017, 279; M. FALLON, S. FRANCO and J. MARY, "La reconnaissance des mariages carrousels, pluriels et virtuels devant la Cour de cassation" (note under Cass. 11 January 2016), *RCJB* 2017, (247) 287-288; J. MARY, "L'accueil en Belgique du mariage polygamique ou quand la Cour du travail de Bruxelles s'empoque avec les juges de cassation: Retour sur la controverse quant aux effets sociaux du mariage polygamique", *Rev.dr.étr.* 2014, (557) 559-560; C. HENRICOT, "L'impact de la polygamie et de la répudiation sur les droits sociaux. Aperçu de la jurisprudence des juridictions du travail", *Soc.Kron.* 2012, 61; P. WAUTELET, "Quelques réflexions sur le statut des enfants issus d'une union polygamique" (note under Tribunal of first instance Charleroi 11 December 2008), *Rev.dr.étr.* 2009, (730) 733; C. HENRICOT, "Les effets du mariage polygamique sur l'octroi de droits sociaux" (note under Cass. 3 December 2007), *Rev.trim.dr.fam.* 2008, (825) 826; V. DE BACKER and H. JACOBS, "Het erfrecht in het Wetboek Internationaal Privaatrecht", *Not.Fisc.M.* 2006, afl. 2, (37) 51; K. JANSENGERS and J. ERAUW, *Het huwelijk*, TPR 2006, afl. 3, (1416) 1421; F. RIGAUX and M. FALLON, *Droit International Privé*, II, *Droit Positif Belge*, Brussels, Maison Larcier, 1993, 322.

⁷⁶ F. RIGAUX and M. FALLON, *Droit International Privé*, II, *Droit Positif Belge*, Brussels, Maison Larcier, 1993, 318.

⁷⁷ Provisions on repudiation, for example, may suggest that the parties have chosen for a marriage system allowing polygamy.

⁷⁸ M. FALLON, S. FRANCO and J. MARY, "La reconnaissance des mariages carrousels, pluriels et virtuels devant la Cour de cassation" (note under Cass. 11 January 2016), *RCJB* 2017, (247) 288; S. D'HONDT, *Relatievorming en gezinshereniging getoetst aan het gelijkheidsbeginsel, de bescherming van het gezinsleven en de interne en internationale beslissingsharmonie*, PhD thesis Law KU Leuven, 2003, 1071-1072.

35. At last, different jurisdictions appear to give different interpretations to the notion of 'public order' in order to give effect or not to a polygamous marriage.⁷⁹ The reflection that must be made here is that the concept of 'public order' must be interpreted according to consistent criteria so that the power of the judge, who rules on the matter, is limited and the risk of arbitrariness is reduced.

3.2 Family reunification

36. Family reunification or reunion is “*the process of bringing together family members, particularly children, spouses and elderly dependents.*”⁸⁰ A person who has a right of residence in Europe can reunite with his/her family member, *i.e.* the spouse and (if applicable) children, when they are separated, but only if the foreign marriage is recognized in the European country.⁸¹

For European nationals, Title 4 of the Treaty on the Functioning of the European Union advocates the free movement of persons.⁸² A European citizen who wishes to reunite with his partner who is a national of a state within the European Union can do so without too much difficulty. This is why the concept of family reunification is aimed at persons residing in third (non-EU) countries, as it was originally more difficult for them to reunite with their spouse in a European Member State.⁸³

⁷⁹ E.g.: The Belgian Labour Court has been giving a broader interpretation to ‘public order’ resulting in a stricter response to polygamous marriages in comparison to the Belgian Cassation Court (Cass. 15 December 2014, *JTT* 2015, 219; Cass. 18 March 2013, *RW* 2014, 1; Cass. 3 December 2007, *T.Not.* 2011, 535 versus Labour Court Brussels 8 January 2014, *Rev.dr.étr.* 2014, 299; Labour Court Brussels 17 February 2011, *JT* 2011, 383; Labour Court Brussels 27 May 2010, *JTT* 2011, 92).

⁸⁰ The Hague Process on Refugees and Migration, *People on the Move: Handbook of selected terms and concepts*, UNESCODOC, 2008, 63 p.

⁸¹ Art. 4 Council Directive nr. 2003/86/EC, 22 September 2003 on the right to family reunification, *Pb.L.* 3 October 2003; C. BOCCADUTRI, *Italy: Family Reunification and Family Cohesion*, Boccadutri International Law Firm, 2020, www.mondaq.com/italy; A. JANSSENS, *Polygamie en de gevolgen voor rust- en overlevingspensioen*, master’s thesis Law UGent, 2015, 57; S. DAWOUD, “Gezinshereniging in België: kan men het bos nog door de bomen zien?”, *T.Vreemd.* 2014, afl. 3, (286) 289; S. D’HONDT, *Relatievorming en gezinshereniging getoetst aan het gelijkheidsbeginsel, de bescherming van het gezinsleven en de interne en internationale beslissingsharmonie*, PhD thesis Law KU Leuven, 2003, 1083.

⁸² Treaty on the Functioning of the European Union, *Pb.C.* 26 October 2012.

⁸³ Art. 1 Council Directive nr. 2003/86/EC, 22 September 2003 on the right to family reunification, *Pb.L.* 3 October 2003; B. SONGA, *Het recht op gezinshereniging in het licht van artikel 8 EVRM: polygamie en buitenechtelijke kinderen van vreemde nationaliteit*, master’s thesis Law KU Leuven, 2012, 28.

Family reunification was born at a time when Europe needed foreign workers. By giving them the opportunity to be joined by their spouses, the European states wanted to keep the foreign workers in their country. Today, however, the wheel has turned and the preservation of the nation's own employment is central. The immigration of foreign workers, and the family reunification that goes with it, is now more tolerated than encouraged.⁸⁴

37. The story is even more complicated with regard to polygamous households. For a polygamous man, it is not possible to bring his wife, who resides abroad, to Europe if he already has a spouse residing on European territory.⁸⁵ It does not matter whether the woman residing in the Member State is the first wife of the man or the second or third.⁸⁶ If she does join her husband in the Member State on the basis of family reunification, she will have to leave the territory again, back to the country of origin, the country where the marriage was conducted.

38. However, the situation may arise that both spouses came to the Member State at the same time in a legal manner. As long as one of them has an autonomous residence permit, no real problems arise, as not both spouses base their residence on marriage. Even when they both come to the European state on the basis of family reunification, but one of them has obtained an independent residence permit in the meantime, the right of residence is not jeopardized in principle.^{87 88}

The fear of expulsion arises when both spouses base their stay in the Member State on family reunification and neither has an independent residence permit. According to D'HONDT, expulsion is only possible if afterwards, when assessing polygamous marriages by the national

⁸⁴ Centraal Bureau voor de Statistiek, *Work and family reunification main reasons for immigration*, 2020, www.cbs.nl; B. SONGA, *Het recht op gezinshereniging in het licht van artikel 8 EVRM: polygamie en buitenechtelijke kinderen van vreemde nationaliteit*, master's thesis Law KU Leuven, 2012, 28-29.

⁸⁵ EMN Synthesis Report, *Family Reunification*, European Migration Network, 2008, 18; Belgian Constitutional Court 26 June 2008, *Rev.trim.dr.fam.* 2008, 1158, note M. FALLON; A. JANSSENS, *Polygamie en de gevolgen voor rust- en overlevingspensioen*, master's thesis Law KU Leuven, 2015, 59; S. DAWOUD, "Gezinshereniging in België: kan men het bos nog door de bomen zien?", *T.Vreemd.* 2014, afl. 3, (286) 289; M. FALLON, "L'effet de l'union polygamique sur le droit à la pension de survie au regard du principe constitutionnel de non-discrimination", *Rev.trim.dr.fam.* 2010, (107) 110; L. WALLEYN, "Gezinshereniging na de grote hervorming", *T.Vreemd.* 2008, alf. 4, (247) 249; S. D'HONDT, *Relatievorming en gezinshereniging getoetst aan het gelijkheidsbeginsel, de bescherming van het gezinsleven en de interne en internationale beslissingsharmonie*, PhD thesis Law KU Leuven, 2003, 1087.

⁸⁶ *Ibid.*

⁸⁷ EMN Synthesis Report, *Family Reunification*, European Migration Network, 2008, 18-19.

⁸⁸ The right of residence is also maintained in case of a putative marriage. The annulment of the marriage does not generally prevent the acquired right of residence. The mere suspicion that the marriage is likely to be annulled is no ground for refusing the right of residence.

judge, the second marriage is not recognized because it is contrary to public order. In that case, the residence permit of the second spouse might lapse.⁸⁹ The residence permit does not lapse with regard to the children of the man and the second spouse together, but the woman's own children will probably have to follow her to the country of origin if they have not yet acquired the state's nationality in the meantime.⁹⁰ Children from the second marriage who were born in the Member State and have lived there for a certain amount of years acquire the State's nationality, after which a right to residence does arise by operation of law.⁹¹ Admittedly, this is a very complex issue because of the conceivable risk of discrimination between the children within the second marriage (*infra*).

The question also arises in relation to the right of continued residence of the first spouse whose right of residence is based on family reunification following repudiation, divorce or annulment of the marriage. The prohibition on being joined by more than one wife could have the effect that the husband is tempted to disown the first wife in order to be reunited with the second wife. Since European states do not recognize the concept of repudiation⁹², the man is forced to go through the member state's national divorce procedure before the second wife can join him. Once the divorce is finalized, the first wife's right of residence, who does not have an independent residence permit, lapses and she has to leave the territory. However, the latter should be nuanced. When the divorce is not recognized in the country of origin and there is a chance that the woman will be executed in the country of birth if she is sent back, the continued residence in the Member State is accepted because of the humanitarian necessity to do so. One may think of the impossible granting of a divorce which the woman has contested without the cooperation of the man in conservative, Islamic legal orders.⁹³

39. Although it is not possible for a polygamous man to bring a second wife from abroad to the Member State for the purpose of family reunification if a spouse already resides in the

⁸⁹ S. D'HONDT, *Relatievorming en gezinshereniging getoetst aan het gelijkheidsbeginsel, de bescherming van het gezinsleven en de interne en internationale beslissingsharmonie*, PhD thesis Law KU Leuven, 2003, 1088-1090.

⁹⁰ S. D'HONDT, *Relatievorming en gezinshereniging getoetst aan het gelijkheidsbeginsel, de bescherming van het gezinsleven en de interne en internationale beslissingsharmonie*, PhD thesis Law KU Leuven, 2003, 1091.

⁹¹ *E.g.*: Belgium: after 5 years (art. 11 Wetboek Belgische Nationaliteit).

⁹² The reason is that the rights of defence of the repudiated wife are violated in this foreign form of divorce, as the unilateral declaration by the husband is sufficient to end the marriage.

⁹³ French State Council 11 July 1980 (arrêt Montcho); S. D'HONDT, *Relatievorming en gezinshereniging getoetst aan het gelijkheidsbeginsel, de bescherming van het gezinsleven en de interne en internationale beslissingsharmonie*, PhD thesis Law KU Leuven, 2003, 1092; GISTI, "Étrangère et femme une double discrimination", *La revue du Gisti, Plein droit* 1990, nr. 11, www.gisti.org.

territory, it is different with regard to the children.⁹⁴ There are different views on reunification with children in a polygamous family. In some countries, such as Poland, this is completely excluded.⁹⁵ Sometimes family reunification is allowed, subject to a number of restrictions. This is the case in Belgium, the Netherlands and France.⁹⁶ Before 2008, it was impossible for minor children from polygamous families to come to Belgium for family reunification if another spouse, other than the child's parent, was already in Belgium.⁹⁷ The prohibition for a foreign spouse to reunify with her husband if another spouse was already in Belgium was thus extended to her children. However, the Constitutional Court annulled this provision of the Aliens Act in its judgement of 26 June 2008, as it was of the opinion that this implied unequal treatment between the children of a polygamous father residing abroad and those of a monogamous father. Every child has the right to be reunited with her/his father and cannot be the victim of the marital situation of the parents.⁹⁸ Today, the right to reunification of the child with the polygamous father can only be refused on the basis of civil rights. Thus, a spouse, who does not agree and has the right to contest the family reunification, can try to block this procedure.⁹⁹ In Sweden, the unification of a child with his parent prevails, making that there are no limitations to the obtainment of a residence permit for children of a polygamous marriage.¹⁰⁰

⁹⁴ Art. 4(4) Council Directive nr. 2003/86/EC, 22 September 2003 on the right to family reunification, *Pb.L.* 3 October 2003; Belgian Council for Alien Law Litigation 10 November 2017, *T.Vreemd.* 2018, (259) 260; S. D'HONDT, *Relatievorming en gezinshereniging getoetst aan het gelijkheidsbeginsel, de bescherming van het gezinsleven en de interne en internationale beslissingsharmonie*, PhD thesis Law KU Leuven, 2003, 1050; F. RIGAUX and M. FALLON, *Droit International Privé, II, Droit Positif Belge*, Brussels, Maison Larcier, 1993, 319; www.hg.org/polygamous-marriage-and-family-visa-in-italy.

⁹⁵ B. SONGA, *Het recht op gezinshereniging in het licht van artikel 8 EVRM: polygamie en buitenechtelijke kinderen van vreemde nationaliteit*, master's thesis Law KU Leuven, 2012, 84.

⁹⁶ EMN Synthesis Report, *Family Reunification*, European Migration Network, 2008, 18; B. SONGA, *Het recht op gezinshereniging in het licht van artikel 8 EVRM: polygamie en buitenechtelijke kinderen van vreemde nationaliteit*, master's thesis Law KU Leuven, 2012, 84.

⁹⁷ Advice Belgian Council of State, nr. 39.718, *Parl.St.* Kamer 2005-06, nr. 51-2478, 42; A. JANSSENS, *Polygamie en de gevolgen voor rust- en overlevingspensioenen*, master's thesis Law UGent, 2015, 60; B. SONGA, *Het recht op gezinshereniging in het licht van artikel 8 EVRM: polygamie en buitenechtelijke kinderen van vreemde nationaliteit*, master's thesis Law KU Leuven, 2012, 56-57; L. WALLEYN, "Gezinshereniging na de grote hervorming", *T.Vreemd.* 2008, alf. 4, (247) 252.

⁹⁸ Questions and Answers Chamber, Q. nr. 0482, 30 May 2013 (P. LOGGHE); Constitutional Court 26 June 2008, nr. 95/2008, B.20.4; S. RUTTEN, "Familie en culturele praktijken" in S. RUTTEN, E. RAMAKERS en M. LENAERTS, *Recht in een multiculturele samenleving*, Antwerpen, Intersentia, 2018, 297; B. SONGA, *Het recht op gezinshereniging in het licht van artikel 8 EVRM: polygamie en buitenechtelijke kinderen van vreemde nationaliteit*, master's thesis Law KU Leuven, 2012, 61; P. WAUTELET, "Quelques réflexions sur le statut des enfants issus d'une union polygamique" (note under Tribunal Charleroi 11 December 2008), *Rev.dr.étr.* 2009, (730) 730.

⁹⁹ Y. PASCOU and H. LABAYLE, Toegangsvoorwaarden voor gezinshereniging ter discussie. Een vergelijkende studie in negen lidstaten van Europa, Brussel, Koning Boudewijnstichting, 2011, 53; B. SONGA, *Het recht op gezinshereniging in het licht van artikel 8 EVRM: polygamie en buitenechtelijke kinderen van vreemde nationaliteit*, master's thesis Law KU Leuven, 2012, 57.

¹⁰⁰ EMN Synthesis Report, *Family Reunification*, European Migration Network, 2008, 18.

An important question is to what extent Article 8 ECHR, which commands respect for private and family life, covers the right to family reunification. Article 8 ECHR does not offer absolute protection of family life, so it is not certain whether the right to live with one's family and the right to family reunification automatically fall within the scope of Article 8 ECHR. It is therefore better to speak of a right *of* family reunification, that indicates more of a favour from the government, than of a right *to* family reunification, which is a subjective right that can be invoked in all cases by the person concerned.¹⁰¹

4. Polygamy and freedom of religion

40. As laid down in Chapter 2 of the thesis, “2. Polygamy overseas”, most cases of polygamy are in the context of the Sharia, where a Muslim man can marry up to four women. Thus, religion plays a major role when it comes to the concept of polygamy and it is therefore important to analyse this angle of the polygamous study as well.

4.1 International documents and national constitutions in Europe

41. Article 9 of the European Convention on Human Rights (ECHR) is a regional human rights instrument devoted to the protection of religious freedom and the establishment of secular beliefs for all individuals in Europe.¹⁰² A similar provision can be found at an international level in Article 18 of the Universal Declaration of Human Rights (UDHR) and Article 18 of the International Covenant on Civil and Political Rights (ICCPR). “*Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.*”¹⁰³ Article 9, paragraph 2 ECHR assures the freedom to manifest one’s religion or beliefs without any limitations other than those “*prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the*

¹⁰¹ A. JANSSENS, *Polygamie en de gevolgen voor rust- en overlevingspensioen*, master’s thesis Law UGent, 2015, 57; B. SONGA, *Het recht op gezinshereniging in het licht van artikel 8 EVRM: polygamie en buitenechtelijke kinderen van vreemde nationaliteit*, master’s thesis Law KU Leuven, 2012, 29; Commission Nationale Consultative des Droits de l’Homme, *Etude et propositions: la polygamie en France*, www.cncdh.fr/rapportpolygamie.pdf.

¹⁰² Art. 9 European Convention on Human Rights, Rome, 4 November 1950.

¹⁰³ Art. 18 Universal Declaration of Human Rights, Paris, 10 December 1948.

protection of the rights and freedoms of others.”¹⁰⁴ When one reverts to polygamous marriages, the foregoing paragraph would mean that traditions of polygamy considered in relation to freedom of religion should be accepted. Only in certain mentioned circumstances a limitation on this right can be set.

Comparing the language of these international instruments, we see that these provisions are a manifestation of the human rights rationale, centred on secular and individualistic norms. By contrast, many non-European states endorse the religious rationale, which appeals to religious norms for the settlement of legal matters. Article 18 UDHR and article 18 ICCPR are meant to protect theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms “belief” and “religion” should be interpreted broadly. The application of Article 18 is not limited to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The same applies to Article 9 of the ECHR and most European constitutions.¹⁰⁵

42. The international and regional human rights documents ensure minimal standards of protection as regards freedom of religion. Each state, however, can choose the degree of additional protection of religious freedom within their jurisdiction.¹⁰⁶ This will vary depending on the state's position towards religion. For example, a number of post-communist constitutions expressly provide for a constitutional right not to hold a belief.^{107 108} Nonetheless, as MALCOLM EVANS pointed out, secular beliefs are more likely to be protected by Strasbourg institutions if they fall within a well-established or better-known school of thought.¹⁰⁹ Thus the acceptance of religious practices, like for instance polygamy, runs counter to the liberal doctrine approached, which can result in a hampered throughput of polygamous cases.

¹⁰⁴ Art. 9, §2 European Convention on Human Rights, Rome, 4 November 1950.

¹⁰⁵ *General Comment No. 22*: “The right to freedom of thought, conscience and religion” (Article 18), 30/07/93. CCPR/C/21/Rev.1/Add. (1993).

¹⁰⁶ F. RAZA, “Limitations to the Right to Religious Freedom: Rethinking Key Approaches”, *Oxford Journal of Law and Religion* 2020, 9, (435) 436.

¹⁰⁷ See, for example, Azerbaijani Constitution, Article 48.2, Belarus Constitution, Article 31, Bulgarian Constitution, Article 37.1, Czech Constitution, Article 15.1, Slovak Constitution, Article 24.1 and Ukrainian Constitution, Article 35.1.

¹⁰⁸ When a constitution provides expressly for the protection of religious convictions without mentioning secular beliefs, a constitutional court may still expand the scope of constitutional protection to the latter, as evidenced by the jurisprudence of the Italian Constitutional Court (Article 19 of the Italian Constitution and Italian Court, judgment 149/1995, 4 May 1995, ECLI:IT:COST:1995:149).

¹⁰⁹ M.D. EVANS, *Religious liberty and international law in Europe*, Cambridge, 1997, 291; F. RAZA, “Limitations to the Right to Religious Freedom: Rethinking Key Approaches”, *Oxford Journal of Law and Religion* 2020, 9, (435) 441.

A distinguishment has to be made between the freedom to hold, choose and change beliefs, as protected in international instruments and national constitutions, and the freedom to manifest thereof. Religious freedom and the tight connection between church and state have formed a complex relation between freedom of religion as an individual right and as a right exercised in community with others.¹¹⁰ Therefore, it is important to find a right balance between secularism, which is a protected value in many European countries, and the freedom to exercise one's religion and customs, such as polygamy, even if this is not the most adopted practice in the state.

4.2. Secularity, tolerance and religious discrimination

43. Freedom of religion cannot be restricted to the concept itself, but also embraces aspects of liberty, individual autonomy or human dignity, that need to be taken into account. The constitutional protection of religious freedom, therefore, needs to be understood in the context of a plural, democratic society.¹¹¹

When analysing European state–church relations, it is surprising that even European countries that do not have a state church or state religion, know an intensive interaction between state and church, whether this relationship is termed as co-ordination, co-operation or interdependence. In other words, there is not an uncompromising separation of church and state, so a close connection remains.¹¹² Interestingly, most post-communist constitutions avoid the word “separation” due to its negative connotations, but in reality, this phenomenon can be better explained by the influence of the dominant church and its political allies. In practice, constitutional provisions stipulating the separation of church and state usually do not prevent European governments from reaching concordats or cooperation agreements with religious organizations.¹¹³ The question, however, is whether there remains place for religions other than Christianity, such as the Islam, in this narrow Church-State relationship.

¹¹⁰ R. UITZ, *Freedom of religion in European constitutional and international case law*, Strasbourg, Council of Europe Publishing, 2007, 12.

¹¹¹ F. RAZA, “Limitations to the Right to Religious Freedom: Rethinking Key Approaches”, *Oxford Journal of Law and Religion* 2020, 9, (435) 440; R. UITZ, *Freedom of religion in European constitutional and international case law*, Strasbourg, Council of Europe Publishing, 2007, 15.

¹¹² For example, the preamble of the Albanian Constitution invokes the spirit of religious coexistence and tolerance, while Article 3 names religious co-existence as a basis of the state (R. UITZ, *Freedom of religion in European constitutional and international case law*, Strasbourg, Council of Europe Publishing, 2007, 15-16).

¹¹³ R. UITZ, *Freedom of religion in European constitutional and international case law*, Strasbourg, Council of Europe Publishing, 2007, 16.

44. The more state and church are separated, the more religious liberty arises. Religious liberty can also be reached within systems where there is no strict separation, but a context of cooperation or accommodation of the church. MALCOLM EVANS states that “*there is no need for a rigid separation of church and state provided that the state also facilitates participation of other belief communities within the broader legal and political community in a fashion which enables them to enjoy the freedom of religion.*”¹¹⁴ The latest would include the customs of other religions, such as the Islam, and therefore, practices such as polygamy. It is the obligation of the state to create a social order where one is free and comfortable to develop his own religious personality. Only then there is really an environment of freedom of religion.¹¹⁵

45. European states are guided by concepts of neutrality, secularity or *laïcité* in matters of faith and when they approach religious communities.¹¹⁶ These terms might refer to state–church relations, but they are deeply imbedded in national constitutional traditions, creating numerous conflicting interpretations, they eventually allow for such divergent practices that they are rarely consequent.

For instance, Article 1 of the French Constitution declares that “France shall be an indivisible, secular (*laïque*), democratic and social Republic.” With this constitutional provision the principle of *laïcité* is set, as acknowledged by the French Constitutional Council and Council of State.¹¹⁷ Today this highly secular state is confronted with numerous cases of polygamy, struggling with the internal order disturbance that is caused by the irregular practise of polygamous marriages.¹¹⁸

As regards the notion of *laïcité*, MICHEL TROPER notes that it is a highly ambiguous term, which, *in se*, alludes to the separation of church and state.¹¹⁹ However, *laïcité* should not be

¹¹⁴ M.D. EVANS, “Believing in Communities, European Style” in N. Ghanea (ed.), *The Challenge of Religious Discrimination at the Dawn of the New Millenium*, Martinus Nijhoff, 2004, 133-155.

¹¹⁵ D.P. KOMMERS, *Constitutional Jurisprudence in the Federal Republic of Germany*, Duke, 1997, 461.

¹¹⁶ F. RAZA, “Limitations to the Right to Religious Freedom: Rethinking Key Approaches”, *Oxford Journal of Law and Religion* 2020, 9, (435) 444.

¹¹⁷ F. RAZA, “Limitations to the Right to Religious Freedom: Rethinking Key Approaches”, *Oxford Journal of Law and Religion* 2020, 9, (435) 445.

¹¹⁸ French Cassation 17 April 1953 (arrêt Rivière); French State Council 16 April 2010, nr. 318726; French State Council, ass, 11 July 1980 (arrêt Montcho).

¹¹⁹ M. TROPER, “French Secularism, or Laïcité”, *Cardozo Law Review* 2000, 1267.

approached from a church–state relationship point of view, but as a type of state policy where the state is also allowed to endorse religious values.

The separation of church and state is also incorporated in the Spanish constitution of 1978, a true constitutional innovation in Spain. Four principles (*principios informadores*) rule the Spanish church-state relations, *i.e.* religious freedom, equality, neutrality, and co-operation. “Neutrality means that when the State acts with respect to diverse religions, it may take into account only the social effects of the religious activity, including the cases in which those effects conflict with values that the legal order considers necessary.”¹²⁰

GERHARD ROBBERS highlights that Germany is a religiously neutral state, whereas secularism or secularity in German has negative connotations.¹²¹ State neutrality, according to the German Constitutional Court, is compatible with the recognition of Christianity as a formative historical and cultural experience.

46. When analysing constitutional provisions and jurisprudence on religious freedom, one has to keep in mind that freedom of religion came late to many European democracies. By this way, many national constitutions had to make historic compromises, taking into account history, traditions and religion in order to form national identities within European policies.¹²²

The conceptions of *laïcité*, secularity or state neutrality are understood to safeguard and promote tolerance and pluralism in modern European democracies. Proclaiming that tolerance is “*the sound foundation of any civil society and of peace*,” the United Nations General Assembly defines tolerance as “*the recognition and appreciation of others, the ability to live together with and to listen to others*.”¹²³

47. Discrimination and intolerance are sometimes used interchangeably. NATAN LERNER, however, warns that these terms should not be treated as synonyms because, in the legal sense,

¹²⁰ R. UITZ, *Freedom of religion in European constitutional and international case law*, Strasbourg, Council of Europe Publishing, 2007, 18; J. MARTINEZ-TORRON, “Freedom of Religion in the Case Law of the Spanish Constitutional Court”, *Brigham Young University Law Review* 2001, 719-720.

¹²¹ G. ROBBERS, “Country Report: Federal Republic of Germany on School-Religion Relations”, available at <http://www.strasbourgconference.org/papers/OnSchoolReligionRelations.pdf>, p. 2.; R. UITZ, *Freedom of religion in European constitutional and international case law*, Strasbourg, Council of Europe Publishing, 2007, 18.

¹²² R. UITZ, *Freedom of religion in European constitutional and international case law*, Strasbourg, Council of Europe Publishing, 2007, 20.

¹²³ A/RES/48/126, 14 February 1994.

discrimination does not include the full scope of intolerance.¹²⁴ European democracies implement pluralistic, multi-religious policies regardless of whether they retain official religions or churches. Tensions and conflicts in such policies are inevitable.

With regard to tensions between democratic states and religious, more precisely Islamic communities, the European Court of Human Rights recognized a premise understanding in the *Serif v. Greece* case, that the role of the government is not to eliminate pluralism, but “*to ensure that the competing groups tolerate each other.*”¹²⁵ The European states see themselves bound by this reasoning, and its logical consequences in the context of polygamy, being an expression of religion in most cases. In fact, all European countries apply a no-tolerance policy when it comes to polygamy, but on the basis of Article 9 ECHR, it appears that some spill-over into the European legal systems must be possible, based on the freedom of religion. Thus, Article 9 imposes a degree of flexibility on the States regarding polygamous cases. However, most of the cases go more towards other legal norms and principles, showing that some private life or family law regulations are maybe closer to polygamy than article 9 ECHR.¹²⁶

How far can one go when one invokes his right of freedom of religion according to article 9 ECHR? Can this fundamental right be a reason to expand the Islamic rights in Europe and demand the right to marry more than one person on religious bases? Can the fight against discrimination be a justification for restricting the freedom of religion and, therefore, can limits be set on polygamy? Can the freedom of religion have an application without any limits, even if there is a discrimination between the different wives of the polygamous man (e.g., regarding the pension distribution), or between the children of his first and later marriage (e.g., regarding family reunification)? These questions are central to this study and will be further addressed below.

¹²⁴ N. LERNER, “Religious Human Rights under the United Nations”, pp. 79-134, in J. VAN DER VYVER and J. Witte (eds.), *Religious Human Rights in Global Perspective: Legal Perspectives*, Martinus Nijhoff, 1996, pp. 116-117.

¹²⁵ *Serif v. Greece* 14 December 1999, nr. 38178/97, paragraph 53.

¹²⁶ *Pretty v. the United Kingdom* 29 April 2002, nr. 2346/02, paragraph 82; *Johnston v. Ireland*, 18 December 1986, nr. 9697/82,

4.3 Freedom of religion as a subjective right

48. Although many international instruments protect freedom of religion, conscience and belief, and this freedom appears in the constitutions of almost all modern democracies, it appears that a real definition of these concepts has still not been established. In cases involving claims based on the free exercise of religious freedom, courts are reluctant to define what amounts to a religion.¹²⁷ The lack of a definition creates a vacuum, a grey area, in which it is not clear what is considered as part of a religion, and therefore, demands a particular protection under the freedom of religion, resulting in varying approaches across jurisdictions.¹²⁸ Should polygamy be considered as a fundamental right in the context of the practice of Islam? Can it be considered as a subjective, individual right, that can be invoked by all, in order to set up a positive obligation to tolerate the traditions that come with the Islam?

49. Polygamy can be seen as a custom of Islam, and could therefore be linked to religion, and thus, subject to freedom of religion. However, courts are often hesitant to declare whether a presented case falls under religion since it is not appropriate for official governmental bodies, such as courts of law, to make judgements on matters of faith in a modern secular democratic state. In addition to religious convictions, secular convictions are also protected under international conventions and constitutions. Atheists, humanists, and pacifists frequently claim constitutional protection for non-religious convictions throughout Europe. Yet there are certain cases where the court cannot remain silent any longer and must rule on certain issues of religion or secular belief, contributing in this way to a definition of religion or conscience as such.¹²⁹

50. All individuals determine the content of their religion. The lack of clarity and guidance from the Court of Human Rights in Strasbourg regarding what amounts to religion, custom and belief in the context of Article 9 ECHR can be disappointing.¹³⁰ For a court to rule that particular beliefs are not religious, can lead to arbitrary judgements. For the scope of Article 9 ECHR, the European Commission of Human Rights stated that “*while the applicant’s desired*

¹²⁷ R. UITZ, *Freedom of religion in European constitutional and international case law*, Strasbourg, Council of Europe Publishing, 2007, 23.

¹²⁸ F. RAZA, “Limitations to the Right to Religious Freedom: Rethinking Key Approaches”, *Oxford Journal of Law and Religion* 2020, 9, (435) 436.

¹²⁹ R. UITZ, *Freedom of religion in European constitutional and international case law*, Strasbourg, Council of Europe Publishing, 2007, 24.

¹³⁰ R. UITZ, *Freedom of religion in European constitutional and international case law*, Strasbourg, Council of Europe Publishing, 2007, 28.

action has a strong personal motivation, nonetheless, it does not amount to a manifestation of any belief in the sense that some coherent view on fundamental problems can be seen as being expressed thereby.” In cases involving claims based on religious freedoms, national courts focus on the sincerity of the claimant's beliefs rather than the nature of the beliefs, using a proportionality test approach.¹³¹ Likewise, the European Court of Human Rights (ECtHR) is hesitant to adopt a standard for determining whether a set of customs qualifies as religion for the purposes of protecting human rights. Instead, if a belief reaches a particular level of cogency, seriousness, cohesiveness, and relevance," the ECtHR is satisfied. However, as permissive as this requirement may look, is not easy to achieve in practice.

51. Building on what has been said above, it is uncertain that polygamy automatically falls within the scope of Article 9. However, the principle of freedom of religion can be subject to limits in certain cases, such as discrimination.¹³² In her judgement of *Refah Partisi and Others v. Turkey*, the ECtHR has confirmed the right to set limits legitimately on the freedom of religion for states “*in order to preserve the secular liberal order*”.¹³³ Thus, it can be concluded that consequently limits can be set on polygamy, when based on the principle of freedom of religion. The latest will be further developed in “5.4 Discrimination excuses limitations on freedom of religion?”.

¹³¹ *Welsh v. U.S.* 15 June 1970, 398 US 333; *U.S. v. Seeger* 8 March 1965, 380 US 163; F. RAZA, “Limitations to the Right to Religious Freedom: Rethinking Key Approaches”, *Oxford Journal of Law and Religion* 2020, 9, (435) 439.

¹³² *Refah Partisi and Others v. Turkey* 13 February 2003, 37 EHRR 1.

¹³³ *Ibid.*

5. Polygamy and discrimination

5.1 Discrimination towards women

52. Although the aim is to ensure equal treatment between all spouses, in practice polygamy often results in an imbalance between the parties. This may be an inequality between the man and the woman, or between the wives mutually.¹³⁴ The ban on polygamy in Europe grew out of the idea of protecting a person from a second marriage of the husband, to counteract this possible inequality.¹³⁵

53. As mentioned before, among the two forms of polygamy, polyandry is nearly non-existent, so that in practice polygamy refers more to polygyny, *i.e.*, the system by which the man marries several women. The extinction of polyandry in comparison to polygyny means that much more often the woman holds the weaker position compared to the man's. Today's cases of polygyny stem from Islam, where the woman is considered inferior to the man, making polygamy an absolute reserved right of the man. It should also be noted that polygamy occurs in theocratic countries where same-sex marriage is strictly forbidden. Indeed, both polygyny and polyandry only involve an alliance with the opposite sex, *i.e.*, a man marrying several women or a woman marrying several men. In this way, the LGBT community is excluded and this constitutes additional discrimination.

54. In addition to the inequality between men and women in terms of the legal possibility of being polygamous or not, there is also conceivable discrimination between the different wives of the polygamous husband. Indeed, it is not always feasible to treat every wife objectively and equally. It is important to refer to Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and Article 5 of the Seventh Additional Protocol to the European Convention on Human Rights.¹³⁶ Both provisions

¹³⁴ OHCHR, The Human Rights Council Working Group on the issue of Discrimination against Women in law and in practice, 17 April 2015, www.ohchr.org; S. D'HONDT, *Relatievorming en gezinshereniging getoetst aan het gelijkheidsbeginsel, de bescherming van het gezinsleven en de interne en internationale beslissingsharmonie*, PhD thesis Law KU Leuven, 2003, 988.

¹³⁵ S.W.E. RUTTEN, "Ouderschap en ouderlijk gezag bij niet-erkende islamitische huwelijken", *Justitiële verkenningen* 2016, (45) 50.

¹³⁶ Art. 16 Convention on the Elimination of All Forms of Discrimination against Women, New York, 18 December 1979; art. 5 of the Seventh Additional Protocol to the European Convention on Human Rights, Strasbourg, 22 November 1984; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, New York, 6 October 1999.

guarantee equality between spouses. The lack of equality in marriage between a man and a woman violates article 3 of the International Covenant on Civil and Political Rights (ICCPR), which ensures the equal right of men and women.¹³⁷ A judge should therefore always take the aforementioned provisions into account when deciding whether or not to recognise a foreign polygamous marriage. Indeed, women's rights must always be protected in the patriarchal system of polygamy, read, polygyny. In addition, the addressed judge must examine whether or not the polygamous marriage in question is compatible with the state's public policy (*supra*).

55. In some situations, women are disadvantaged despite the husband's good financial care. The wife of a polygamist in fact exposes herself to the risk of an obligatory division of the available assets, as, for example, in the case of pension distribution.¹³⁸ The judge can decide that the first wife of a polygamous man must share her survivor's pension with the other wives.¹³⁹ By dividing the survivor's pension among the various wives, the first wife is allocated a smaller amount than in the case that there had been no additional marriages on the husband's behalf.

In addition, it is possible that some form of rivalry arises between the wives, based on the number of children gestated by each wife, knowing that polygamous families sometimes live together in one house. According to anthropologists, the number of maternal mortalities increases in polygamic contexts, girls are married at a very young age to a wealthy man, and "the women and children are often poorly educated, impoverished, and chronically dependent on welfare".¹⁴⁰ Sharing a house with all the individual wives and children can also create miserable living conditions when the large family lives in a house that is too small. Finally, because of the strong position of the man in polygamy, as explained above, some vigilance is required for the increased risk of sexual abuse of the wives by the polygamous man. The polygamous context rises the risk of HIV infections and other sexual transmissible diseases between the women, as well as domestic violence. The polygamous man could neglect his wife

¹³⁷ Art. 3 of the International Covenant on Civil and Political Rights, 16 December 1966.

¹³⁸ S. FRANCQ and J. MARY, "Les effets sociaux du mariage polygamique: pour une appréciation en contexte", *RTDF* 2013, (861) 864.

¹³⁹ This is an example of the issues that are covered by the conventions between the states. For Moroccan widows, for example, the equal division of the survivor's pension between the different wives of a polygamous man occurs automatically as soon as the polygamous situation has been recognized. (Art. 24, §2 Algemeen Verdrag tussen het Koninkrijk België en het Koninkrijk Marokko betreffende de sociale zekerheid).

¹⁴⁰ J. WITTE, "Why Monogamy is Natural", *On Faith* 2012, www.faithstreet.com/why-monogamy-is-natural.

as he still has 'spare ones'.¹⁴¹ It has been shown that women in a monogamous marriage live longer than women entangled in polygamous marital relations.¹⁴²

56. The legislation of certain countries where polygamy is allowed sometimes causes (in)direct discrimination against women. In Egypt, the woman used to have a right to divorce when the man wanted to enter into a second marriage, even when there was no clause of monogamy in the marriage certificate.¹⁴³ This rule was removed from the law in 1985 so the above limit on polygamy no longer applies today. The only ground for divorce for the first wife is to be able to prove that her situation has become morally or materially worse because of the second marriage, which is very difficult to prove. However, if the woman finally succeeds in getting the judge to accept the ground for divorce, she loses her children and house in favour of her husband.¹⁴⁴

As for the monogamy clause that some legal systems offer, the question is to what extent the woman can enforce it. In practice, we see that it often remains rather a ground for divorce. Since the marriage is no longer valid in the country of origin when such a claim is made, it cannot be recognized in the EU Member State either. Consequently, the divorce claim is also inadmissible in the Member State. The result is that the woman can neither ensure the existence and uniqueness of her marriage nor be entitled to a maintenance allowance.¹⁴⁵ This great financial risk often forces the woman to accept the polygamous situation imposed on her and this again shows that she is in a submissive position.

¹⁴¹ J. WITTE, "Why Monogamy is Natural", *On Faith* 2012, www.faithstreet.com/why-monogamy-is-natural; UN Women, *Polygamous marriages*, 2011, www.endvawnow.org; S.G. DRUMMOND, *Polygamy's Inscrutable Secular Mischief*, York, Osgoode Hall Law School of York University, 2009.

¹⁴² R. McDERMOTT, "Polygamy: More Common Than you Think," *The Wall Street Journal* 2011.

¹⁴³ S. D'HONDT, *Relatievorming en gezinshereniging getoetst aan het gelijkheidsbeginsel, de bescherming van het gezinsleven en de interne en internationale beslissingsharmonie*, PhD thesis Law KU Leuven, 2003, 985; G. ASCHA, "Polygamie in de moderne Arabische rechtsliteratuur", *Recht van de islam* 1994, 29.

¹⁴⁴ S. D'HONDT, *Relatievorming en gezinshereniging getoetst aan het gelijkheidsbeginsel, de bescherming van het gezinsleven en de interne en internationale beslissingsharmonie*, PhD thesis Law KU Leuven, 2003, 990.

¹⁴⁵ J. WITTE, "Why Monogamy is Natural", *On Faith* 2012, www.faithstreet.com/why-monogamy-is-natural; UN Women, *Polygamous marriages*, 2011, www.endvawnow.org; Commission Nationale Consultative des Droits de l'Homme, *Etude et propositions : la polygamie en France*, www.cncdh.fr/rapportpolygamie.pdf; S. D'HONDT, *Relatievorming en gezinshereniging getoetst aan het gelijkheidsbeginsel, de bescherming van het gezinsleven en de interne en internationale beslissingsharmonie*, PhD thesis Law KU Leuven, 2003, 1036.

5.2 Discrimination towards children

57. There is also a risk of discrimination concerning the children. When the second wife is sent back to her country of origin after family reunification in the EU Member State has been refused, this removal from the territory does not translate to the common children of the polygamous marriage. However, the woman's own children, who had moved with her, but who have not yet acquired the Member State's nationality, do not enjoy such protection.¹⁴⁶ They thus have to go through a physically and mentally eventful transition again. Discrimination is also possible between the children of the first marriage, who are European, and the children of the second marriage, who do not have the nationality of an EU Member State, because of the rights granted to the first-mentioned. Finally, also within the second marriage itself, certain children may be discriminated against. Children of the second marriage, who were born in the Member State and have lived there for several years, acquire the State's nationality after which a right of residence arises by operation of law.¹⁴⁷ This can lead to discrimination against the other children of the second marriage, who were not born in the Member State and, therefore, do not enjoy the aforementioned right of residence by operation of law.

5.3 Discrimination resulting in restriction

58. Due to the indisputable discrimination caused by polygamy, more and more international organisations are fighting for the rights and dignity of women, and this is slowly but surely bearing fruit.¹⁴⁸ Despite its legality, many countries where polygamy is permitted are trying to reduce its incidence by narrowing the concept, with a view to modernizing their societies.¹⁴⁹ For example, a number of formalities must be complied with before a second

¹⁴⁶ S. D'HONDT, *Relatievorming en gezinshereniging getoetst aan het gelijkheidsbeginsel, de bescherming van het gezinsleven en de interne en internationale beslissingsharmonie*, PhD thesis Law KU Leuven, 2003, 1091.

¹⁴⁷ S. D'HONDT, *Relatievorming en gezinshereniging getoetst aan het gelijkheidsbeginsel, de bescherming van het gezinsleven en de interne en internationale beslissingsharmonie*, PhD thesis Law KU Leuven, 2003, 1125.

¹⁴⁸ Para. 24 CCPR General Comment No. 28: Article 3 of the UN Human Rights Committee (HRC) on its Sixty-eighth Session (29 March 2000), UN Doc. CCPR/C/21/Rev.1/Add.10 (2000); Para. 14 General recommendation No. 21 of the Committee on The Elimination of Discrimination Against Women (CEDAW) on its Thirteenth Session, UN Doc. A/49/38 (1994).

¹⁴⁹ J. MARY, "L'accueil en Belgique du mariage polygamique ou quand la Cour du travail de Bruxelles s'empoque avec les juges de cassation: Retour sur la controverse quant aux effets sociaux du mariage polygamique", *Rev.dr.etr.* 2014, (557) 558; K. BOELE-WOELKI, I. CURRY-SUMMER and W. SCHRAMA, *De juridische status van polygame huwelijken in rechtsvergelijkend perspectief*, Den Haag, Boom Juridische uitgevers, 2010, 3-4; Z. TAHA, "Régimes arabes laïcs et politique du genre. La condition de la femme à travers le Code du statut personnel : le cas de la Syrie", *Cahiers de la Méditerranée* 2010, (305) 311; E. ALOFS and D. CUYPERS, "De doorwerking van polygamie in de Belgische rechtsorde, in het bijzonder in de Belgische sociale zekerheid: een status quaestionis na de arresten van het grondwettelijk hof van 4 mei 2005 en 4 juni 2009", *TSR-RDS* 2009, (534) 536;

marriage can be contracted.^{150 151} The social and economic situation has changed and the realization that the interests of both parties must not (no longer) be neglected has become established. For example, women's emancipation has led to women being allowed to work, which means that they are now much less dependent on their husbands. This, of course, has repercussions on the position of women within marriage. Also because of the threat of overpopulation in the countries where polygamy is allowed, attempts are now being made to abolish the concept of multiple marriages.¹⁵² Today, even in these countries, cases of polygamous marriages are only very sporadic.

59. The tightening of the concept of polygamy in the countries discussed today leads to a decrease in the number of polygamous marriages in these legal orders. Since polygamy in Europe is the direct result of migration from countries that permit polygamy, a gradual decrease in polygamous cases in Europe is thus expected.¹⁵³ A further tightening of polygamy might be appropriate in view of the explained danger of discrimination associated with the conclusion of multiple marriages by men. As ALOFS and CUYPERS rightly state, "it is not because the group of potentially discriminated persons is reduced that the (degree of) discrimination is also reduced."¹⁵⁴ The tightening should start in the country of origin in order to prevent such cases from occurring. However, if a second marriage does take place and does reach the EU Member State's legal order, this marriage should be recognized, as the refusal of the legally concluded foreign marriage leads to an unjustified denial of legal effects.

M. LADIER- FOULADI, *Population et politique en Iran. De la monarchie à la République islamique*, Paris, ined, 2003, 62; S. D'HONDT, *Relatievorming en gezinshereniging getoetst aan het gelijkheidsbeginsel, de bescherming van het gezinsleven en de interne en internationale beslissingsharmonie*, PhD thesis Law KU Leuven, 2003, 982; B. BOURDELOIS, *Mariage polygamique et droit positif français*, Paris, GLN Joly Editions, 1993, 59.

¹⁵⁰ *Ibid.*

¹⁵¹ As previously mentioned, the conditions for polygamy in Morocco have been tightened. Also in Algeria, certain restrictions have been introduced since 2005, namely that the first and future spouses must be informed of the man's wish to enter into a new marriage. (K. BOELE-WOELKI, I. CURRY- SUMMER and W. SCHRAMA, *De juridische status van polygame huwelijken in rechtsvergelijkend perspectief*, Den Haag, Boom Juridische uitgevers, 2010, 5). Here, however, assent is sufficient, whereas in Morocco consent is required. Whereas consent is a contractual requirement for the creation of an obligation, assent is merely a passive agreement. (B. VANOBBERGEN "Therapie voor een kind zonder toestemming van beide ouders?", *Kinderrechtencommissariaat* 2018, 6). In Iran, the woman has to fulfil nine requirements. Only in the event that she no longer fulfils one of these requirements can the man enter into an additional marriage, as long as he has the consent of his first wife. (M.-C. BOURDON, "IRAN: non à la polygamie", *Chatelaine (French edition)* 2008, 1).

¹⁵² S. D'HONDT, *Relatievorming en gezinshereniging getoetst aan het gelijkheidsbeginsel, de bescherming van het gezinsleven en de interne en internationale beslissingsharmonie*, PhD thesis Law KU Leuven, 2003, 984.

¹⁵³ Questions and Answers Belgian Chamber, Q. nr. 0142, 13 May 2016 (S. BECQ).

¹⁵⁴ E. ALOFS and D. CUYPERS, "De doorwerking van polygamie in de Belgische rechtsorde, in het bijzonder in de Belgische sociale zekerheid: een status quaestionis na de arresten van het grondwettelijk hof van 4 mei 2005 en 4 juni 2009", *TSR-RDS* 2009, (534) 565.

5.4 Discrimination excuses limitations on freedom of religion?

60. Although ‘freedom’ and ‘religion, custom or belief’ are two components of freedom of religion, it is difficult to make a true connection between ‘human rights’ and ‘religion’ given the two claims come from opposite angles.¹⁵⁵

The human rights rationale and the religious rationale continuously generate conflicts amongst each other, due to the clash of values in many different aspects, where both claims consider themselves as the ‘*ultima ratio*’ of laws.¹⁵⁶ An example is the international gender equality claim versus the submissive position of the woman in Islam, even more in the context of polygamy. A highly topical issue today is the extent to which freedom of religion is acceptable and when it becomes a matter of discrimination.

61. As developed in the previous chapter, states can set limitations on the freedom of religion in their legal order when this freedom disturbs the secular, liberal structure of the nation.¹⁵⁷ The question is whether polygamy can be considered as a disruptive element. One must return to the international public order test for this purpose. If it satisfies this test, there should be no reason to assume that the polygamous situation is contrary to the State's domestic order. In this case, there would be no grounds for limits and the polygamous marriages should be accepted by the European State. However, one must go beyond the international public order test, which, in my opinion, does not reach far enough. The deep-seated discrimination that polygamy entails, as previously developed, may not be a form of public order disruption for the state, but it does go against certain human rights and must therefore also be considered as a ground for placing limits on polygamy. Thus, in the case of discrimination, the state should not be allowed to give effect to the presented polygamous case.

¹⁵⁵ Bielefeldt, H., ‘Privileging the ‘Homo Religious’? Towards a clear conceptualization of freedom of religion or belief’ in: Malcolm D. Evans, Peter Petkoff and Julian Rivers (eds.), *The Changing Nature of Religious Rights under International Law*, Oxford: Oxford University Press, 2015, 11. (*hereafter*: Bielefeldt, H., 11).

¹⁵⁶ Binderup, L., *Religion, Secularism and Human Rights*, 2020, Slide 10; Foblets, M.-C., ‘The body as identity marker’ in Maarit Jänträ-Jareborg (ed.), *The child's interests in conflict*, Cambridge, Intersentia, 2016, 129.

¹⁵⁷ F. RAZA, ‘Limitations to the Right to Religious Freedom: Rethinking Key Approaches’, *Oxford Journal of Law and Religion* 2020, 9, (435) 442.

6. Conclusion

62. In this dissertation, the word polygamy is intended to refer to the narrower form of 'polygyny', in which a man has more than one wife, since polyandry - *i.e.* a woman having several husbands - is very rare and there are no cases of polyandry in Europe.

63. First of all, we examined what polygamy is. Polygamy is a culture-bound matter due to religious, economic and power-influencing motives, which comes to disturb the normal functioning of the European states' legal order due to its complexity. This is because in such cases there are two marriages by virtue of the same person, while this is prohibited for European citizens. The influence of migration on the problematic of polygamy in Europe and the legislation of states on the legality of polygamy in their domestic systems were therefore explained in chapter 2. Thus, the second sub-question was answered by analysing the laws of countries where polygamy is presently still allowed, and their relevance for European states due to today's internationalization flows.

64. The central research question of the present master's thesis is the effect of polygamy in Europe, with a deeper focus on the consequences that a foreign polygamous marriage engenders in European countries. The possibility to enter into a polygamous marriage stems from the personnel status of the persons concerned. In certain states, nationals have a polygamous status while other states impose a monogamous status. Each person is subject to the national law relating to marriage. It is therefore possible that in one marriage two different laws are applied if the parties have different nationalities. This means that in some cases, two different statutes on polygamy may be united, which can cause a lot of difficulties. The main aim was, therefore, to study the extent to which foreign polygamous marriages can be given effect in European legislations. Since this is a very complex matter, one can only try to answer this question by analysing all the different aspects and consequences that polygamous marriages originate, whether positive or negative, and define a line of when polygamy should be tolerated and when it can be considered as contrary to international human rights, and therefore, the polygamous marriage cannot be recognized in a European state. One possible way to evaluate the aforementioned, is to compare the concept of freedom of religion and the eventual degree of discrimination that a polygamous case may present. By doing so, a judge can assess if the presented polygamous case is conflicting with the international public order, and thus, cannot be grounded further recognition under the European state's legislation.

65. A foreign marriage can only have consequences in a European state if the foreign marriage certificate is recognised by the European state's authorities. The courts of several European nations have, in their judgements, followed up polygamous situations - despite the prohibition in their internal legal order - by applying the international public order test as laid down in the Private International Law Code. In some cases, the judge considered that the second marriage did not disturb the public order. Such a decision has huge repercussions as these polygamous marriages give rise to consequences like those of a European monogamous marriage. The acceptance of certain legal consequences of a polygamous marriage by the European judge leads to legal claims by several persons on one substance, where usually only one legal claim arises. An example is the division of the widow heritage between the multiple wives of the deceased husband or the procedure of family reunification with the wife and children of the second marriage, from the country of origin to the European state where the husband is a current resident. The judge's broad power of appreciation on the matter is limited by some bilateral agreements that EU Member States have with certain countries, such as Morocco and Algeria.

66. Polygamy is an occurrence of religion, more precisely the Islam, in most of the cases. In this way, the question arises of whether the freedom of religion can be called in to proceed to a second marriage even though this is prohibited in the European legal order. Can freedom of religion be invoked against the European state's legislation? In other words, can freedom of religion as a fundamental international human right counter the state's legislation? In a first instance, the right to religion itself was studied. Subsequently, we analysed whether freedom of religion is a subjective right that can be invoked in any situation, thus generating rights that any individual can invoke in any situation. The answer is that freedom of religion is not an absolute right that is automatically granted but is considered on a case-by-case basis. To judge whether the right to religious freedom can be called on, it is again important to do the international public order test.

67. Finally, the complexity of polygamy and the danger of discrimination was discussed. Polygamy has two facets. In some situations, it is an obligation, imposed on the woman by her family or by the man. But in other cases, polygamy is also a conscious choice and pursued in the hope of a better quality of life. Therefore, the background of the polygamous family and the motives for entering a second marriage must be considered. For example, there should be no discrimination between the polygamous man's marriage in a European State and the second

marriage in the country of origin. In this respect, there must be a certain tolerance for polygamy on the part of the European States. Yet polygamy remains a danger to the European states' international public order. The recognition of a foreign polygamous marriage leads to the implementation in the European state's legal order of a form of marriage that is prohibited in that state and that is incompatible with the values and standards of the state. The general conclusion is therefore that polygamy still needs to be framed within clearly defined boundaries, but that the judge decides on a case-by-case basis to what extent he can give effect to a polygamous marriage legally contracted abroad when the effects of that marriage do not (or barely) disturb the European Member States' international public order.

68. In conclusion polygamy should be tolerated in some cases, when no harm is done by the marriages, but it is important to stay vigilant and to evaluate all the risks first before accepting the situation. This is the best way to judge the extent to which foreign polygamous marriages can be given effect in European legislations.

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