Polygamous Marriages and Reunification of Families on the Move Under EU Law: An Overview

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I. Introduction

Families on the move, to be understood as groups of more than one person travelling from the outside to the inside the EU, pose a number of challenges to our legal framework. One of these challenges is represented by the fact that, in particular contexts, the family partnership might involve more than one spouse or partner. This second (or third) partner might follow the family nucleus in the first place or might, once the first family members have already settled, attempt to exercise family reunification at a later stage. This situation is common in the case of polygamous marriages. As known, so far, there has been very little room for the recognition of polygamous marriages in Europe.[1] The reason is that polygamous marriages are considered to be at odds with the principle of equal treatment between men and women, a fundamental cornerstone of the EU as well as of the national legal orders in Europe. Polygamous marriages in Europe are also, according to a Pew Research Centre analysis, quite rare and are usually involving one male partner and a plurality of female ones (polygyny), while the contrary, a plurality of male partners and one female partner (polyandry) is even more rare.[2] Several countries where polygamy used to be the practice and the majority of the population is Muslim have also adopted a restrictive interpretation of the concept of polygamy (Morocco and

[1] M. Jänterä-Jareborg, Populism and Comparative Law as Tools not to Recognise Foreign Marriages, Journal of International and Comparative Law, 2019, 347, at pp. 355, 359.

[2] S. Kramer, Polygamy is rare around the world and mostly confined to a few regions (7 December 2020), available at https://www.pewresearch.org/short-reads/2020/12/07/polygamy-is-rare-around-the-world-and-mostly-confined-to-a-few-regions/.

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S. Arnold, B. Heiderhoff (eds.), *Children in Migration and International Family Law*, https://doi.org/10.1007/978-3-031-71598-3_20

Indonesia) and others exclude completely the possibility to make use of it.[3] Thus, it can be said that the situation of polygamous marriages represents a niche into the broader picture of private international law as well as in the rights of EU migrant families.[4]

II. Polygamous Marriages and Family Reunification in Certain EU Member States: The Examples of France, Italy and Spain

It is difficult to find a consistent approach to the plurality of issues raised by polygamous marriages in Europe, perhaps in light of the changing value that the institute of marriage itself interprets in the member states.[5] France, Italy and Spain are examples of these competing trends at national level and currently there seems to be a considerable degree of uncertainty for marriages that involve more than two partners. It is true that polygamous marriages are — per se — unlawful in all the EU members states.[6] However, as it will be seen, the situation becomes more complex when the marriage has been contracted abroad and the partner(s) attempt(s) to exercise the civil and social rights attached to status of spouse (as pension rights and family reunification).

In France, for instance, an important judgment of the French *Cour de Cassation* of 17 November 2021 questioned the well-known automatic non-recognition of a foreign polygamous marriage.[7] The *Cour de Cassation*, in a judgment assessing the validity of a previous decision of the Court of Appeal of Orleans, maintained that a bigamous marriage is not automatically void under French law and that the lower court judging the case is required to designate the applicable law to the marriage in order to correctly assess its validity.[8] This case is interesting because it does not

[3] A. Trigiyatno/D. Rahmawati/P. Utomo/Mujadid, Comparative Analysis of the Polygamy Regulations in Indonesia and Morocco, Diktum: Jurnal Syariah dan Hukum, 2023(1), 34, at p. 35.

[4] On the contextualisation of polygamy and other Islamic legal institutions in European and private international law see D. Zannoni, Cultural Diversity as a Test Bench for the Future of Private International Law: What Legal Treatment for Islamic Institutions in Europe?, Anuario Espanol Derecho Int'l Priv. 2023 (23), at p. 255.

[5] R. Probert/A. Barlow, Displacing Marriage - Diversification and Harmonisation within Europe, Child & Fam L Q 2000(2), 153, at pp. 155 f.

[6] At the following link a summary of the legislation regulating polygamy in the EU member states is available (although updated only up to 2016): https://www.refworld.org/reference/themreport/euemn/2016/en/115576.

[7] Cour de Cassation 17 November 2021, case n. 20-19.420, ECLI:FR:CCASS:2021:C100708, available at https://www.legifrance.gouv.fr/juri/id/JURITEXT000044352185?isSuggest=true.

[8] M. Ho Dac, French Supreme Court Opens Door for Recognition of Foreign Bigamous Marriage, EAPIL Blog, (6 January 2022), available at https://eapil.org/2022/01/06/french-supreme-court-opens-door-for-recognition-of-foreign-bigamous-marriage/.

discuss only the validity of the polygamous union but it focuses on its effects. The facts of the appealed decision originated from the request of a woman to file a divorce against her husband whom she had married in Libya. However, since the French legal order does not recognise polygamous marriages, the Court of Appeal ruled that it was impossible to dissolve a non-existing marriage. On the contrary, with this decision, the *Cour de Cassation* confirmed that, under French law, polygamous marriages can produce effects in order to protect the rights acquired abroad.[9] This should allow the national court to select the legislation applicable to the case, despite the lack of an explicit conflict-of-laws rule in the French civil law.[10]

French scholars hoped that this position could have been partially reflected into the French draft reform codifying private international law in the national legal order.[11] However, Article 44 of the draft law excludes the possibility to enter into a polygamous marriage in France and Article 45 of the draft law extends the possibility to recognise the foreign double marriage contracted abroad only to couples where no one of the spouses is of French nationality, thus creating a potential discrimination between French and non-French couples. In France it is also not possible for family members of a polygamous family to obtain a residence permit relying on the Code on entry, residence and asylum, according to the amendments made by Article 25 of the law of 24 august 2021.[12]

The legal status of polygamous marriages in Italy is also complex, but more fragmented. The criminal legislation prohibits the marriage of a person with more than one other person,[13] and the civil law also considers the polygamous union to be void, thus excluding the possibility to recognise the polygamous union legitimately contracted abroad.[14] To this should be added that a strict interpretation of

[9] See C. Campiglio, Il diritto di famiglia islamico nella prassi italiana, Rivista di diritto internazionale privato e processuale, 2008, 43, at p. 50; V. Petralia, Ricongiungimento familiare e matrimonio poligamico. Il riconoscimento di valori giuridici stranieri e la tutela delle posizioni deboli, University of Catania - Online Working Paper, n. 49, 2013, available at http://www.cde.unict.it/quadernieuropei/giuridiche/49_2013.pdf.

[10] M. Ho Dac, EAPIL Blog (fn. 8): "the lower court should have verified, in accordance with the personal law of the spouses pursuant to article 202-1 of the Civil Code, whether the foreign bigamous marriage was valid (so that, in the affirmative, it could be dissolved). At that stage of the reasoning, the French prohibition of bigamy pursuant to article 147 of the Civil Code did not matter".

[11] F. Jault-Seseke, Recognition of Marriages Celebrated Abroad under the French Draft PIL Code, EAPIL Blog, (4 July 2022), available at https://eapil.org/2022/07/04/recognition-of-marriages-celebrated-abroad-under-the-french-draft-pil-code/.

[12] F. Jault-Seseke, La loi du 24 août 2021 confortant le respect des principes de la République: Aperçu des dispositions relatives au droit des étrangers et au droit international privé, Actualité Juridique Famille, 2021(9), 472, at p. 476.

[13] Article 556 of the codice penale (Italian Criminal Code). An OSCE/ODHIR sponsored database with the translation of the Italian Criminal Code can be found online at: https://legislationline.org/.

[14] Article 86 of the codice civile (Italian Civil Code). See N. Tonti, L'eterno ritorno dell'uguale? La poligamia nello spazio giuridico contemporaneo Tra identità religiosa e (nuove) istanze di legittimazione, CALUMET – intercultural law and humanities review, 2024(19), 1, at p. 13, available at https://calumet-review.com/index.php/2024/01/15/leterno-ritorno-delluguale-la-

Article 3,[15] read in combination with Article 29[16] of the Italian Constitution, prohibits a spousal relationship that is asymmetrical in nature, as the polygamous one.[17]

The exercise of the right to family reunification in Italy, on the other side, is characterised by a more complex approach. As it will be detailed in paragraph IV., since the entrance into force and the transposition of the Family Reunification Directive,[18] member states are free to establish obstacles to the right to family reunification of polygamous spouses. Notwithstanding that, as noted by Tonti, the position of scholarship on polygamy and family reunification before the entrance into force of Family Reunification Directive was more nuanced, with several advocating in favour of the non-discrimination between the spouses and of the unity of the family household.[19] The reader could then be allowed to think that, after the transposition within the Italian legislation of the rather express prohibition of family reunification in the directive, the problem was then resolved.[20] However, the Supreme Court of Cassation was forced to intervene in 2013 when the Court of Appeal of Venice was confirming the decision of the Court of First Instance to allow the family reunification of a spouse in a polygamous marriage filed not by the husband but by the son.[21] As noted by Petralia, a situation where the application

poligamia-nello-spazio-giuridico-contemporaneo-tra-identita-religiosa-e-nuove-istanze-di-legittimazione/.

[15] Article 3 of the Italian Constitution: "All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions. It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country". English translation courtesy of the Senato della Repubblica, available at https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf.

[16] Article 29 of the Italian Constitution: "The Republic recognises the rights of the family as a natural society founded on marriage. Marriage is based on the moral and legal equality of the spouses within the limits laid down by law to guarantee the unity of the family". English translation courtesy of the Senato della Repubblica.

[17] Ibid.

[18] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (Family Reunification Directive).

[19] N. Tonti, CALUMET – intercultural law and humanities review, 2024(19) (fn. 14) mentions at p. 16, the scholarship in J. Witte, A. Pin, Il rifiuto della poligamia in Occidente: gli argomenti, Diritto pubblico comparato ed europeo, 2020, 57, at. p. 58.

[20] Decreto legislativo n. 5, 8 January 2007 *Attuazione della direttiva 2003/86/CE relativa al diritto di ricongiungimento familiare*, subsequently modified by Decreto legislativo n. 160, 3 October 2008, *Modifiche ed integrazioni al decreto legislativo 8 gennaio 2007, n. 5, recante attuazione della direttiva 2003/86/CE relativa al diritto di ricongiungimento familiare*. This change was also reflected into the Italian immigration legislation, with the introduction of the prohibition of family reunification for more than one spouse in Article 29 para. 1-ter of the decreto legislativo n. 286 of 25 July 1998, *Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero*, as amended by Article 1 para. 22 lit. s of the legge 94 of 15 July 2009, *Disposizioni in materia di sicurezza pubblica*.

[21] Court of Appeal of Venice 27 July 2011, case n. 804/2010.

for family reunification is filed by a different person from the spouse does not give rise to a challenge to the public order per se.[22] There was also a precedent by the Court of Bologna where a minor, a Moroccan national, filed an application for a visa for family reunification that was rejected by the Italian embassy in Rabat.[23] The local Court of Bologna decided that the rejection of the visa was unlawful since the Italian legislation on migration that was prohibiting family reunification in the case of polygamy was only applicable if it was the spouse filing the application for family reunification.[24] A judgment of a different tone was however rendered by the Juvenile Court of Torino a couple of years earlier, where, under similar circumstances, the Court argued that, if the main interest of the minor was to live with his mother, then the family should have moved back to the country of residence of the mother.[25] This decision was however appealed and the Court of Appeal of Torino reversed the decree of the Juvenile Court, arguing in favour of the interest of the child to live with his mother.[26]

The Italian Supreme Court, with its order, rejected the precedents of the Court of Appeals by arguing in favour of the integrity of the legal order, recognising that, after the entrance into force of the provision of Article 29 of the Italian immigration code amended after the transposition of the Family Reunification Directive, it was not possible to distinguish between the application for family reunification filed by the child and the one filed by the spouse.[27]

Spain is another EU member state where polygamous marriages are prohibited by the national legislation, but where the social rights attached to the status of spouse might be, in certain conditions, recognised.[28] A polygamous marriage is not allowed by the Spanish legislation, but the husband (or, although more difficult, the wife) is allowed to choose freely the wife with whom he wants to reunite, thus not considering the chronological order of marriages.[29] The chronological order of marriages is however more important in the case of the social rights following the condition of wife, and in particular the situation of the survivor's pension. In this case, the Spanish case law produced a series of judgments that were first denying the right

[22] V. Petralia, University of Catania - Online Working Paper, n. 49, 2013 (fn. 9), at p. 10.

[23] Court of Bologna 12 March 2003, case n. 469/2003. This precedent is also mentioned by V. Petralia, University of Catania - Online Working Paper, n. 49, 2013 (fn. 9), at p. 13.

[24] V. Petralia, University of Catania - Online Working Paper, n. 49, 2013 (fn. 9), at p. 13.

[25] Juvenile Court of Torino 21 December 2000, see Diritto, Immigrazione e Cittadinanza, volume 2, 2001, at p. 172; also mentioned by V. Petralia University of Catania - Online Working Paper, n. 49, 2013 (fn. 9), at p. 13 and by N. Tonti, CALUMET – intercultural law and humanities review, 2024(19) (fn. 14), at p. 19.

[26] Court of Appeal of Torino (Juvenile section) 11 April 2001, see Diritto, Immigrazione e Cittadinanza, volume 2, 2001, at pp. 173 ff.

[27] Italian Court of Cassation 28 February 2013, case n. 4984/2013.

[28] N. Tonti, CALUMET – intercultural law and humanities review, 2024(19) (fn. 14), at p. 21.

[29] Ley Orgánica n. 4/2000, sobre derechos y libertades de los extranjeros en España y su integración social. Mentioned by N. Tonti, CALUMET – intercultural law and humanities review, 2024(19) (fn. 14), at p. 22.

of the spouses following the first one to enjoy the survivor's pension, while, in 2018, a judgement of the Spanish Supreme Court allowed the second wife to see her application for the survivor's pension to be welcomed.[30] The case law on family reunification in Spain, on the contrary, gives rise to less ambiguity compared to the Italian one, as there is the possibility to obtain only one residence permit for family reunification with the spouse per family.[31]

In all these cases, as it will be further discussed in paragraph IV., it is possible that the codification of the prohibition of family reunification for polygamous marriages in the Family Reunification Directive, while protecting non-discrimination between men and women in the marital relationship, introduces a conflict with the right to family life of the minor.

III. Polygamous Marriages and Family Reunification: Instruments of Private International, EU and Human Rights Convention[32] Law

The 1978 Marriage Convention[33] states that "a marriage validly entered into under the law of the State of celebration or which subsequently becomes valid under that law shall be considered as such in all Contracting States".[34] The Convention, however, has been ratified only by a limited number of States.[35] Interestingly, however, out of three parties that have fully ratified the Convention, two of them are EU member states (Luxembourg and the Netherlands). The status of children born to the married couple might be protected under other private international law instruments, as the CRC[36] and the 1996 Child Protection Convention.[37] The Brussels IIbis Regulation[38] and its successor the Brussels IIter

[30] This case law is discussed into details by N. Tonti, CALUMET – intercultural law and humanities review, 2024(19) (fn. 14), at pp. 23 f.

[31] See also F. Di Pietro, La poligamia e i ricongiungimenti di famiglie poligamiche in Spagna e Italia, Cuadernos de Derecho Transnacional, 2015, 56, at pp. 63–65.

[32] Convention for the Protection of Human Rights and Fundamental Freedoms (Human Rights Convention).

[33] Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages (1978 Marriage Convention).

[34] Article 9 of the 1978 Marriage Convention.

[35] See the Status Table of the Convention, available at https://www.hcch.net/en/instruments/conventions/status-table/?cid=88.

[36] UN 1989 Convention on the Rights of the Child (CRC).

[37] Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (1996 Child Protection Convention).

[38] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.

Regulation[39] are also relevant to the situation of polygamous marriages, as they provide for the possibility to refuse the recognition of matrimonial decisions on the ground of public policy, eventually leading to the very likely refusal of any marriage decision coming from an EU member state that tolerates polygamy.[40]

The lack of recognition of polygamous marriages eventually impacts the recognition of the right to family reunification, under EU law and private international law. The right to respect for private and family life is also a fundamental right protected by both the EU Charter[41] as well as by the Human Rights Convention. The European Court of Human Rights (ECtHR) dealt with the issue of the recognition of polygamous marriages in at least three cases. The cases consider the refusal of national authorities to allow family reunification of family members from polygamous marriages. Interestingly, in the first case, E.A. and A.A. v. the Netherlands, the European Commission of Human Rights considered the question on the compliance of the refusal of recognition of polygamous marriages with the Human Rights Convention as inadmissible, considering the act of the local authority as a legitimate measure of immigration control.[42]

Two more applications, M. and O.M. v. the Netherlands[43] and R.B. v. the United Kingdom[44] were also found inadmissible by the European Commission of Human Rights, as the national authority was also pursuing the legitimate aim of controlling internal migration and the Court again declined to examine the cases.[45] In all these cases, the European Commission of Human Rights followed a similar approach: to reject the application as inadmissible, since the refusal of recognition was to be considered as an internal measure adopted to control migration. Such a justification is only partially satisfactory from a legal standpoint but allowed the European Commission of Human Rights to avoid a subject which might have been divisive for the parties of the convention at least for a while. One thus would wonder what could happen if a similar case would reach the ECtHR in the near future.

[39] Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction.

[40] Article 38 of the Brussels IIter Regulation. Polygamous marriages are unlawful in all the EU member states, so a decision in matrimonial matters about polygamy coming from EU member states is not realistic. However, since Luxembourg and the Netherlands have ratified the 1978 Marriage Convetion, although only hypothetical, this situation can happen if another State that recognises polygamy joins the 1978 Marriage Convention.

[41] Charter of Fundamental Rights of the European Union (EU Charter).

[42] ECtHR 6 January 1992, 14501/89, ECLI:CE:ECHR:1992:0106DEC001450189 (E.A. and A.A. against the Netherlands).

[43] ECtHR 5 October 1987, 12139/86, ECLI:CE:ECHR:1987:1005DEC001213986 (M. and O.M. against the Netherlands).

[44] ECtHR 29 June 1992, 19628/92, ECLI:CE:ECHR:1992:0629DEC001962892 (R.B. against the United Kingdom).

[45] Recitals 10 and 11 of the Family Reunification Directive.

The Family Reunification Directive, consistently with the Strasbourg case law mentioned above, recognises the possibility for EU member states not to authorise family reunification in case of polygamous marriage, referring to the need to respect the rights of women and children.[46] Article 4 para. 4 of the Family Reunification Directive states that "[i]n the event of a polygamous marriage, where the sponsor already has a spouse living with him in the territory of a Member State, the Member State concerned shall not authorise the family reunification of a further spouse".[47]

The lack of recognition observed by several EU member states and also found at the level of the EU legislation reflects the determination that polygamous marriages can undermine equal treatment between women and men and also foster violence against women.[48] Other scholars challenged this view by saying that it reflects a culturally biased and Western-centred interpretation of fundamental rights of women and that it conceals a sense of superiority from the Western legal culture towards other interpretations of fundamental rights.[49] Another counter-argument is that the lack of recognition of the second marriage might eventually leave too much power to the decision of the man as of the wife to reunite with and leave the other family members in a legal and societal limbo in the country of origin, thus eventually producing more inequality than the one that it is aspired to challenge. This, known also as the accommodation argument, attempts to preserve the rights of women involved in a polygamous marriage, instead of challenging its situation from a position of cultural superiority.

IV. The Prohibition of Family Reunification in Article 4 para. 4 of the Family Reunification Directive: In Search of a Balance Between Rights Protected by the EU Charter?

The analysis of the condition of polygamous marriages and the distinction between on the one side, the refusal to recognise a polygamous union and, on the other side, its effects on the social and free movement rights operated in the EU leads to the conviction that the introduction of an express prohibition of family reunification in Article 4 para. 4 of the Family Reunification Directive might have eventually contributed to foster the situation of discrimination already present in several polygamous unions.

[46] Article 4 para. 4 of the Family Reunification Directive.

[47] See J. Bornemann/C. Arevalo, In: Thym/Hailbronner (eds), EU Immigration and Asylum Law, 3rd ed. 2022, Article 4 of the Family Reunification Directive paras. 41–44.

[48] J. Witte, Diritto pubblico comparato ed europeo, 2020(1) (fn. 19), at pp. 75 f.

[49] N. Stybnarova, Teleology behind the prohibition of recognition of polygamous marriages under the EU family reunification directive: A critique of rule effectiveness. Journal of Muslim Minority Affairs, 2020(1), at pp. 104–116.

This is because, in a situation of existing difference of treatment (as the one between first and second or third wives) another difference of treatment will be added: the one between the child of the first spouse and the ones of the other spouse.

On the other side, the EU legal orders pursue the legitimate aim to protect and promote equal treatment between women and men, which is also protected in the EU Charter as well as by the national constitutions.

There is, accordingly, a potential balance to be struck between the best interests of the child read together with the right to family unity, connected to the right of family life, and the right of non-discrimination of women involved in a polygamous marriage.[50]

In the EU Charter, the best interests of the child principle is to be found under Article 24 para. 2, that cites: "In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration."[51]

The case law of the Court of Justice of the European Union (CJEU) on the best interests of the child as derived by the EU Charter is not extremely abundant and even more so when the situation of application of the EU Charter itself is referred to a third country national.[52] However, in the last five years, there has been an increase in the use of Article 24 para. 2 in front of the CJEU, although not directly related, again, to the case of third-country nationals. The EU Charter applies to the EU institutions and to the EU member states "only when they are implementing EU law".[53] Thus, it cannot be limited or restricted only to EU citizens, and it is also applicable to all the third country nationals that find themselves on the territory of the EU.

In a recent case, the CJEU, ruling on a European Arrest Warrant addressed against a Belgian woman with two young children, had an occasion to update its interpretation of Article 24 para. 2 of the EU Charter.[54] The Court, in particular, confirms that "Article 7 of the Charter enshrines the right of every person to respect for his or her private and family life, and second, Article 24(2) of the Charter provides that, in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration".[55]

[50] As noted by F. Di Pietro, Cuadernos de Derecho Transnacional (fn. 31), at p. 68.

[51] Here is the full text of Article 24 para. 2: "1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity. 2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration. 3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests."

[52] A search on the database available on curia.europa.eu based on Article 24 para. 2 gives 39 results.

[53] Article 51 of the EU Charter.

[54] CJEU 21 December 2023, case C-261/22, ECLI:EU:C:2023:1017 (Criminal proceedings against GN).

[55] CJEU 21 December 2023, case C-261/22, ECLI:EU:C:2023:1017 (Criminal proceedings against GN) para 40.

The fact that the Court reinforces the reference to Article 24 para. 2 of the EU Charter with a reference to Article 7 of the EU Charter (right to respect of private and family life) seems to suggest that an EU Charter-oriented interpretation of the legal acts of EU law should take into account the child's best interests not by itself but in the context of the family unity of the child.

Applying the reasoning of the CJEU in this recent case to the situation of a minor third-country national that files a request for family reunification with regard to his or her parent should then lead to the conclusion that this request is considered in light of Article 24 para. 2 of the EU Charter read together with Article 7. It should be then possible to strike a balance between the legitimate aim pursued by the EU member states while applying the prohibition in Article 4 para. 4 of the Family Reunification Directive — the promotion of equal treatment between women and men — and the best interests of the minor child who files an application for family reunification. Accordingly, it should be difficult, in a potential case in front of the CJEU about polygamy, to deny the possibility of applying the EU Charter.[56] The only real obstacle seems to be to know if such a situation falls within the concept of implementation of EU law according to the EU Charter. But the only way to know this for sure is to address a question for a preliminary ruling to the Court itself, and there is the scope also perhaps to target a similar issue with strategic litigation.

This call to action to the Court has been upheld also by scholars, making also reference to the seminal case law of the CJEU in Zambrano.[57] As I maintained above, one should avoid to not consider Zambrano and other case law of the CJEU that might be relevant to the solution of the case of family reunification of the child of a polygamous marriage simply because they are referred to EU citizens. Although we know that certain rights (as free movement) are exclusive to EU citizens, the EU Charter applies to everyone. Thus, it will be for the CJEU to decide, when it will be invested of the question, if the EU Charter (the combination of Article 24 para. 2 and Article 7) applies to the situation of the child of a polygamous marriage.

V. Conclusion

The prohibition of polygamous marriages in the law of the EU member states still stands, perhaps also in light of the complexity of its impact on society.[58] On the other side, however, the recognition of the civil and social rights of the partners

[56] At present, however, there is no case law of the CJEU on polygamy, as recognised by the Commission in its report on the application of the directive on family reunification.

[57] P. Rodrigues/M. Klaassen, The Best Interests of the Child in EU Family Reunification Law: A Plea for More Guidance on the Role of Article 24(2) Charter, European Journal of Migration and Law, 2017, at pp. 191–218.

[58] M. Husni/A. Pakarti et al, The Role of Family Law in Confronting Polygamy Practices in Contemporary Society, Syakhshiyyah Jurnal Hukum Keluarga Islam, 2023, 132, at p. 136, available at https://e-journal.metrouniv.ac.id/index.php/syakhsiyah/article/download/7614/3685.

legitimately involved, in the State of provenience, in a polygamous marriage should be considered more carefully. This is in order, surely, to protect the rights of the weaker parts of the relationship (the plurality of wives) and to avoid the creation of partners of first and second class, thus discriminating among persons in a similar situation and violating their fundamental rights as expressed in the EU Charter and in the national constitutions. Even more so when children are involved, and they (their guardians) are the subjects filing an application for family reunification. The best interests of the child, resulting, in the EU legal order, from the combined reading of the Articles 7 and 24 para. 2 of the EU Charter, should be carefully weighted with the competing legitimate aim of promoting equality between men and women and avoiding discrimination. At the same time, it is worth to be reflected upon the variety of solutions present at the level of the EU member states before the entrance into force of the prohibition in Article 4 para. 4 of the Family Reunification Directive, and favoured by the framework of private international law, that was much richer and more protective for the rights of the weaker categories. Going back to the previous framework seems indeed to be difficult, but perhaps an EU Charter-oriented reading of the instruments of private international law that have been embodied into the EU legal order can help in finding a middle ground between competing interests.