UNIVERSITY OF HELSINKI

https://helda.helsinki.fi

Teleology behind the Prohibition of Recognition of Polygamous Marriages under the EU Family Reunification Directive – a Critique of Rule Effectiveness

Stybnarova, Nicole

2020-03
Routledge
http://hdl.handle.net/10138/334598
Stybnarova, N 2020, '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, vol. 40, no. 1, pp. 104-116. https://doi.org/10.1080/13602004.2020.1741168

Downloaded from Helda, University of Helsinki institutional repository. https://helda.helsinki.fi
This is an electronic reprint of the original article.
This reprint may differ from the original in pagination and typographic detail.
Please cite the original version.

Teleology Behind the Prohibition of Recognition of Polygamous Marriages Under the EU Family Reunification Directive: A Critique of Rule Effectiveness

NICOLE STYBNAROVA

Abstract

This article focuses on the recognition of foreign marriages and personal statuses as part of family reunification proceedings under EU Family Reunification Directive. The central focus of the article is the principle of not recognising polygamous marriages as grounds for the right to family reunification. The article briefly examines the historical negative approaches to recognising polygamous marriages in the Western Migration Law as well as Private International Law and accordingly, the interconnection between the present rule under EU Migration Law and the previous case-law of the European Court of Human Rights. The author then introduces the EU policy reasons for taking a stand against these marriages. The perspective of the policy aim is then critically evaluated. The critical part methodologically employs a critical feminist theory, focusing on the structure of the present rule and the power-relations it presupposes and re-creates in the relationships subject to it. The article concludes that, albeit it is claimed that the present European policy of non-recognition of polygamous marriages as grounds for family reunification is aimed at the protection of women's rights and equality between sexes, the consequences of the rule application support the paradigm of taking all the decisive power over the relationship away from women and granting it to men.

Keywords: Migration Law, Muslim marriages, polygamous marriages, Private International Law, feminist critique, rule teleology

Introduction

Recognition of a marriage, in the sense of admitting effects in the forum state[1] to relationships and personal statuses acquired abroad is a process developed within the field of Private International Law (PIL). Presently, the leading principle for recognition of marriages under European national PIL rules is the rule of the celebration of marriage (*lex loci celebrationis*),[2] which states that a marriage is valid if it is conducted in accordance with the form required by the law of the country where it was celebrated. Under current practice, the parties applying for recognition of marriage have to present documentation fulfilling international standards (i.e. including verification either with an apostille or legalisation) proving that their marriage has been concluded. After receiving the applicable documentation, the forum state assesses the formal and substantial requirements of the marriage. In the end, the forum state recognises and registers the marriage in its civil register. However, it also has

Nicole Stybnarova is a doctoral candidate at the Erik Castrén Institute of International Law and Human Rights at the University of Helsinki, Finland. She is a specialist in Private International Law and Migration Law. She combines legal analysis with critical social theory.

the right to refuse to recognise a foreign marriage, should the parties fail to present the formal documentation or should this marriage interfere with the public order of the state.[3]

The process of recognition of marriage can be applied either in a general context of cross-border relationships (loosely connected to migration) or as an immanent part of migratory proceedings in the strict sense. The first type of case concerns recognition of a foreign marriage for other than migratory purposes, or recognition occurring after obtaining a residence permit in the forum state as a consequence of previous migration to the forum state. Such framework covers situations when a wife living abroad claims the pension of a deceased husband living in the forum state, or when a married couple relocates together and both persons can claim their own legal grounds for relocation (e.g. both can apply for asylum protection), but they wish to be treated as a married couple in and after the migratory proceedings. These situations are regulated by the rules of Private International Law. The approaches of the national states to recognising marriages in this context remain unharmonized at the EU level.

The second type of case, which is central to this article, mainly concerns people applying for the right to reside in the forum state on the basis of their existent marriage; because existence of a marriage between them can establish a right to family reunification. However, before the right is granted to the applicant, the forum state needs to verify if a family relationship really exists between the applicant and the sponsor. In cases of claimed matrimonial relationships between applicants and sponsors, the existence of a marriage needs to be proved and recognised. Accordingly, in practice the claimed marriage and its form need to correspond or be relatable to the normative aspects of marriage according to the forum state's legal order, which is the reason why polygamous marriages are usually not recognised – or not recognised to their full extent. The provisions of Western forum states' substantive law only allow monogamous marriages and thus prohibit the recognition of polygamous marriage in their Migration Law. This legal prohibition serves to protect the public order in the forum state.[4] The claimed existence of a marriage thus presents an incidental question for granting the right to reunify with one's family. As recognition in this context is a part of the migratory process in the strict sense, the rules regulating it belong in the frame of Migration Law. The approach of EU states towards applicants from third countries applying for family reunification is harmonised on the EU level through the EU Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (Family Reunification Directive).[5]

It is crucial to distinguish between these two frameworks under which recognition of foreign marriage is applied: not only because both of the regulatory areas have different reasons for existence and the doctrinal roots of the instruments they employ are not entirely shared, but also because, in practical terms of law application and adjudication in the forum state, they are independent of each other (court decisions in Migration Law context might not present *res iudicata* in the PIL context, etc.). Each field might even employ a different regulation of normative requirements for marriage.[6]

Applicants relocating to Western European states from countries governed by Islamic Law can thus encounter various obstacles to recognition of their marriages for family reunification purposes. Even the first step as described above is often problematic, as getting hold of the right documentation might be impossible for subjects freshly arrived in the forum state (for example in the cases of refugees from unstable countries).[7] Additionally, in many European countries, some forms of marriages associated with customary application of traditional

Islamic Law, e.g. polygamous marriages, allegedly represent a threat to the national public order, which is why most of these countries hesitate to recognise their validity and tend to activate the public order reservation. The EU Family Reunification Directive correspondingly provides a rule that disqualifies recognition of polygamous marriage in its full extent for the purpose of family reunification.

Further in this article, the author will introduce the teleology behind the EU legislative approach to recognition of polygamous marriages under the Family Reunification Directive. The history of this approach will be accordingly outlined through the sources of the intellectual origins of the idea that foreign marriages can have effect in a forum state as well as through examples of historical migration law-making. The article will then describe the major shift in the relevant values legitimising the non-recognition of polygamy for family reunification purpose, from Christian values to human rights values. Eventually, the article will pay central attention to the human rights values that justify this approach under the current law. In the end the values acting as objectives of the present EU reunification policy will be critically evaluated with a focus on the normative disposition and the structure of the rule; and the corresponding paradigm that the current rule is based on.

History of Recognising Polygamous Marriages under the Common European Framework

European national states have not historically encountered polygamous marriages on a massive scale but rather occasionally. Accordingly, polygamous marriages do not present a frequently practiced form of matrimonial union in the countries governed under Islamic Law nowadays.[8] The negative responses of national courts to polygamous marriages in the first half of the 20th century corresponded with typically superior colonial approaches to the colonialised countries' cultures to the extent that they did not comply with Christian values.[9] In that period, regulation of polygamous marriages in countries without a stronger colonial outreach, e.g. in the Austro-Hungarian Empire, was accordingly restrictive for the reason of superiority of Christian morality[10] but also potentially as a legacy of historically conflicting relation to the Ottoman empire.[11]

The general idea that foreign marriage can have effectivity admitted in the forum state doctrinally originates from the field of Private International Law. The roots of this idea and one of the oldest documented terms under which this effectivity in the forum state was admitted go back to the Early Middle Ages.[12] Notably, in its modern history, the Western doctrine of recognition of marriages under the field of PIL was marked by its negative approach to recognising polygamous marriages, precisely for its 'immorality' based on its non-compliance with Christian values.[13] The same approach was adopted in the late 19th century regulatory framework for family reunification under the then emerging field of Migration Law, where the protected family unity was married and monogamous.[14] At the turn of the 20th century, participation on a polygamous marriage even served as a criterion disqualifying a person from migrating into the United States in general.[15]

This part does not aim to exhaustively map the doctrinal history of marriage recognition under PIL or under Migration Law, but merely serves to outline the possible historical attitudes

at the grassroots of the present migratory rules on non-recognition of polygamous marriages under the EU Directive. The pinpoints from doctrinal history of PIL or Migration Law show that the approach of Western lawmakers and some scholars towards recognising polygamous marriages has traditionally been negative.

The institution of family reunification and the European understanding of the protection of family ties in a migratory context was dynamically developed in the period after the Second World War. The emergence of the modern system of international human rights addressed the phenomenon of international migration by granting fundamental rights on the international level to everyone without distinction on the basis of nationality, thus also to migrants.[16] The protection of the family was enacted as a fundamental right by various international and European treaties – the right to protection of the family under Art. 16 of Universal Declaration of Human Rights (1948) or the right to respect for private and family life under Art. 8 of European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR or the Convention). The fact that even non-nationals affected by the Convention party states could claim the protection of their family began a long and ongoing process of interpretation of the notion of family and its different cultural connotations under the case law of the European Court of Human Rights (ECtHR or the Court). The scope of lawful interference with the right under conditions of Art. 8(2) of the Convention[17] also immediately became subject to evolving interpretations.

Some of the subjects in polygamous marriages felt that their second wives or their children from the second marriage should have received the right to reunify with them as family members in the forum state and that the state violated their rights under Art. 8 of ECHR in denying reunification of these family members. As a result, the recognition of polygamous marriage as a pre-requisite for family reunification was addressed by the European Court of Human Rights in three cases during the 1980s and 1990s: of E.A. and A.A. v. the Netherlands (No. 14501/89)[18], M. and O.M. v. the Netherlands (No. 12139/86)[19] and Bibi v. the United Kingdom (No. 19628/92)[20]. In the following paragraphs, the article shall briefly introduce these cases.

In the case of E.A. and A.A. v. the Netherlands the applicants were a father, who moved to the Netherlands from Morocco, and his elder son, who grew up in Morocco. The father re-married in the Netherlands with a Moroccan woman who had permanent residence there and he was authorized to stay in the Netherlands on the basis of this marriage, i.e. on the grounds of family reunification with this new wife. Later he was granted a permanent residence permit. He kept on visiting his first marriage family in Morocco regularly and provided for their maintenance. The parents agreed that their elder son (at the age of 13) would move to the Netherlands to stay there with his father. The Dutch authorities repeatedly rejected the father's applications for a residence permit for his son based on family reunification grounds because of the Dutch policy regarding family reunification of bigamous aliens allowing authorisation of reunification only for one spouse of the husband and the children born of their relationship.

According to the decision of the Deputy Minister of Justice in an appeal submitted by the applicant, polygamy was considered contrary to the Dutch public order. All national administrative and judicial instances deciding in the case, confirmed this decision as a justified interference with the applicant's right under Art. 8 ECHR. Consequently, the applicant turned to the Court claiming that his rights under Art. 8 ECHR were violated without meeting the

criteria under Art. 8(2) ECHR. The decision on the admissibility of this case to the Court was made by a former body of this Court – The Commission of Human Rights (the Commission). The Commission based its decision on the inadmissibility of the claim on the doctrine of margin of appreciation and emphasised the close connection between the control over immigration and consideration of public order. The legitimate interest pursued by the Netherlands in this case was the measure of immigration control.

The second case of M. and O.M. v. the Netherlands was built on similar factual circumstances. The applicant from Morocco moved to the Netherlands where he concluded a second marriage. His son, the second applicant, came to the Netherlands to join him at the age of 19. Following the relocation of the son, the father divorced his first wife (still living in Morocco) and was granted legal custody over the son. The Head of Police in the Netherlands refused to grant the son a residence permit, because he was born of a second marriage of his father (other marriage than the marriage registered in the Netherlands). The applicant turned to the Court, claiming that his rights under Art. 8 and Art. 14 ECHR (prohibition of discrimination) had been violated without meeting the criteria under Art. 8(2) ECHR. The Commission found this claim inadmissible on the basis of Art. 8 ECHR because the son was too old to claim the right of reunification and there was no financial dependency between the two. It also found inadmissibility on the basis of Art. 14 in conjunction with Art. 8 ECHR because the government followed its legitimate interest in controlling the entry of immigrants while interfering with the applicant's rights under Art. 8 ECHR. The Commission concluded that when considering application for family reunification, the state cannot be required under the Convention to give full recognition to polygamous marriages as those are considered to be in conflict with its public order. The policy in the Netherlands regarding family reunification provided that the husband is only 'allowed to bring with him one of his wives, according to his own choice, and the children of that wife'[21].

The last case of Bibi v. United Kingdom concerned an application of a girl born in Bangladesh, whose father migrated to the UK from Bangladesh and became a UK citizen before she was born. He returned to Bangladesh and married the applicant's mother, after which the applicant was born. The father consequently married a second wife, also a Bangladeshi citizen, who joined him in the UK. The applicant (aged 9) and her sister were allowed to reunify with the father in the UK on the basis of DNA tests of paternity. The mother applied to enter the UK when the applicant was aged 10. Her application was refused as the UK law only allowed non-citizen wives and minor children, without the right of abode in the UK, to enter if the husband/father could accommodate them; at the same time, only one wife could be permitted. The British Immigration Act 1988 provided that a woman cannot be granted a residence permit on the basis of a polygamous marriage if another woman has already been admitted as the wife of the same husband.

According to the Commission's summary of the case, the aim of the British Parliament in enacting this law was to prevent the formation of polygamous households as the practice of polygamy was unacceptable to the vast majority of people in the UK. The applicant claimed that her right under Art. 8 ECHR had been breached and that her mother had been discriminated against on the basis of sex, as the law allows the husband to choose which wife will join him in the UK. The Commission stated that the interference with the applicant's rights was in accordance with the law. The aim of the law was according to the Commission's reading to

'preserve the Christianity-based monogamous culture dominant in the UK'. This objective, under the assessment of the Commission, fell into the scope of Art. 8(2) ECHR and was found necessary in a democratic society. The Commission stated that the alleged discriminatory nature of the British law flowed essentially from the nature of the practice of polygamy. The application was found inadmissible.

The Court through these three cases contributed to defining the human rights limits of the rule of non-recognition of polygamous marriages for family reunification. The Court in the aforementioned cases approved the rule that an alien in a polygamous marriage can only bring one of his spouses to the forum state on the basis of family reunification, while the claims of additional spouses will be denied. This legal paradigm, which potentially interferes with individual rights under Art. 8 ECHR, was justified by the doctrine of margin of appreciation (one of the interpretative mechanisms of the Court) and the principle of state sovereignty in immigration matters. The Court also articulated that the legal interest in the 'preservation of Christian based monogamous culture' presents a legitimate aim justifying interference with the applicants' rights under Art. 8 ECHR.[22] Through the cases the Court noted that there is no right to enter or reside in a particular country guaranteed under the Convention.[23]

When the EU Council adopted the Family Reunification Directive, it paid due respect to the interpretation of the notion of family life under ECtHR case-law.[24] Even though the ECtHR was hesitant to establish a right to residence in a particular state on the basis of family ties, the Family Reunification Directive in its Art. 1 operates with the term *right* to family reunification, i.e. it suggests that the right to residence in a particular state might exist if a close (enumerated) relative is residing there. It also states that this right is to be exercised in compliance with values recognised in the member states which justifies a possible negative approach to family reunification of polygamous households.[25] In its Chapter II, Art. 4(4), the Directive substantially mimics the provisions of Dutch and British immigration laws previously approved by the ECtHR and stipulates that 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. Accordingly, member states may limit the family reunification of minor children of a further spouse and the sponsor.

Teleology of Non-Recognition of Polygamous Marriages as a Ground for Family Reunification

As documented earlier in the text, the historical reasons for not recognising the effectivity of polygamous marriages in the forum state were based on the conviction that Christian ideals are morally superior to those of other religions, which was especially explicit, but not limited, in relation to cultures under colonial control. It is interesting to observe that monogamy has maintained its unwavering stability protected by law or even under the scope of public order, when the prevalence of the Christian ideal of marriage has to a large extent already been overcome by easing the regulations for divorce or by the Western European trend of legalising homosexual marriages. As apparent from the argumentation of the ECtHR in the three cases of recognition of polygamous marriages, the notion of state sovereignty and the right of the state to select the people admitted to reside in its territory as well as the protection of Christian

values present legitimate interests falling into the scope of the public order, preventing states from recognising these marriages and admitting their effect in Migration Law.

The argumentation of the ECtHR in favour of the rejection of recognition of polygamous marriages is thus reflecting the general Western trend of the 20th century, where the importance of Christian values has been tempered by the rise of the importance of secular and humanistic values. Accordingly, the Commission through the cases articulated several reasons supporting the non-recognition of polygamous marriages where the mix of these reasons combines explicitly Christian references with general sovereignty- or cohesive society-based reasons. The legislative and policy discourse before and after the adoption of the Family Reunification Directive fully allies with the trend of the softening of explicit considerations for Christian values, as the argumentation for adopting a restrictive approach towards polygamous marriages as grounds for family reunification has been largely based on the aim of protection of human rights, in particular protection of women and respect for gender equality.

It appears that member states were against admitting family reunification effects to polygamous marriages on the basis of protection of domestic public order and on the basis of general refusal of the concept of polygamous unions in the host society.[26] The Directive however offers a general rule to reject application for family reunification on the grounds of public order in its Article 6(1) and (2), which demonstrates that rejection of polygamous marriages presents a special reason of public order as it is specifically articulated as its own ground for rejection. In the succeeding guidelines on the application of the Directive, the European Commission proclaimed that the public order reasons of the member states for non-recognising polygamous marriages insisted in the effort to prevent forced marriages.[27] In accordance with the preparatory and implementing guiding documents, the preamble of the Directive states that: 'The right to family reunification should be exercised in proper compliance […] with respect to the rights of women and of children; such compliance justifies the possible taking of restrictive measures against applications for family reunification of polygamous households'.[28] Based on these sources, it is thus reasonable to imply that together with general public order reasons, the aims of states to combat forced marriages and enhance protection of women have been important reasons for disqualifying polygamous marriages from family reunifications. Correspondingly, it demonstrates that state and EU policymakers believe that firm stance against polygamous marriages will help them achieve these goals.

In addition to the EU law-making area, the rejection of recognition of polygamous relations due to human rights concerns of protection of women has been advocated by the Human Rights Council[29] and national governments' initiatives.[30] Further, the prohibition of recognition of polygamous marriages is on the level of international legal treaties accordingly often connected with human rights considerations, e.g. in the Convention on the Elimination of All Forms of Discrimination against Women, 1993 (CEDAW) and its Article 16.[31] Accordingly, the general recommendation of the Committee on the Elimination of Discrimination against Women on CEDAW encourages states to recognise such effects of polygamous marriage serving the economic interests of the women at stake.[32]

Researchers concerned with the phenomenon of accommodation of polygamous relations in Europe point out that the trend of refusing recognition to foreign polygamous marriages is reversing in some European states.[33] They present reports on developments in national case law and law amendments (German, Belgian, French and Italian), in which the restrictive

tendency seems to be replaced with a so-called accommodation approach.[34] The accommodation approach essentially means that the marriage as such is not considered valid, but some of its effects (namely those that serve the economic interests of the wives and children) are admitted. This reversal of the trend, however, usually appears in a context different from migratory in the strict sense (other cases than family-reunification cases), thus the recognition does not appear as an incident question in claiming the right to reside in the forum state. When concerns about this development have been addressed in the European Parliament, the body has urged member states to assure the illegality of polygamy in order to fight violence against women.[35]

National parliaments, perhaps in the light of the clear policy direction advocated by the EU bodies, but also because polygamous marriages have allegedly occurred in the member states more often in the recent years,[36] have taken legislative actions to assure a strict approach to the marriages by administrative and judicial bodies. Such is the case of the Swedish government, which has appointed an inquiry chair to investigate the possibility of making stricter legislation on recognition of foreign marriages after a survey by the Swedish Tax Authority discovered that 169 people in Sweden live in polygamous marriages.[37] This survey led the Swedish parliament to order the government to investigate possible legal changes to prevent the recognition of foreign polygamous marriages. In its proposal, the government also aims to investigate what legal consequences non-recognition can have and if such legislative changes would require constitutional amendments.[38]

As demonstrated, the approach to polygamous marriages among Western European states has remained strongly negative since the mid-1800s.[39] In the 19th century, legal scholars and courts openly condemned the practice of polygamy as immoral because it contradicted Christian values. The presumed supremacy of Western culture immanent to the colonial relationship between Western and 'Oriental'[40] culture allowed the judicial bodies and legal scholars to regard legal relationships under Islamic Law as inferior to those arranged under laws based on Christian values. The substance, as will be shown below, of the argumentation against polygamous relationships then in comparison with the present policy argumentation against these relationships, has changed. It follows the value re-orientation from Christian to secular values. However, the presumption that Western values (or Western interpretations of values) are morally superior and able to create fairer relations among the subjects of law still prevails.

From the law-making sources cited above, it appears that the lawmakers believe that restrictive and negative approach to recognition of polygamous marriages in family reunification claims has the potential to foster equality between men and women and help prevent violence against women. The ideal behind the European family reunification policy on polygamous relations has thus moved from believing in the superiority of Christian values to believing in the superiority of Western interpretation of human rights values. The legitimacy of the aim to enhance rights-based value of protection of women while limiting rights and freedoms of spouses in polygamous marriages has been questioned by studies on cultural bias behind the concept of human rights[41] or even more specifically, cultural bias behind the approach of Western courts to polygamy.[42] In spite of the change in the substantial argumentation against recognition of these marriages, the rejection of recognition of polygamy

has always been and is still now underlined by the idea that Western values are superior to Islamic values.[43]

Not Recognising for the Sake of Equality

The rules on recognition of polygamous marriages in family reunification framework arising from the various aforementioned EU and national sources of Migration Law[44] stipulate that an alien can only bring one spouse to the forum state and other consequent marriages will be not recognised. The absolute majority of cases of polygamous marriages brought to European countries are composed of one man and two (or more) women, cases of so-called polygyny. Therefore, in the aforementioned, legislatively predicted situation, it is in reality the man who is married to multiple spouses and must or is allowed to choose one of them to bring along. In examining how much the present European rules improve the position of women in polygamous marriages (as is the proclaimed objective of these rules), the preliminary question to pose is: where does the idea that women in polygamous marriages are in particular need to have their positions improved come from, and what are its premises? Under postcolonial feminist critical approach, this issue was addressed e.g. by Zainab Naqvi.[45]

However, for the purposes of this article, the author would like to accept the premises of the EU Reunification Directive rule on non-recognition of polygamy. Therefore, the author will disregard whether this policy aim is legitimate and meaningful or prejudiced and culturally biased and rather investigate whether the disposition of the rule can establish effective promotion of its goal. The legal norm under the EU Reunification Directive says that in the event of a polygamous marriage, where the sponsor already has a spouse living with him in the territory of a Member State, the Member State concerned shall not authorise the family reunification of a further spouse.[46]

As mentioned above, the majority of cases appearing before European administrative and judicial bodies are cases of polygyny, thus the following critique will be performed with regard to the effects of the norm as applied to cases of polygyny. The first point of critique is that the norm in its disposition enforces the paradigm that the man has the decisive power over the relationship. Since the EU policy presumes that women in polygamous marriages need help to improve their position, it is relevant to ask how much regard does the law is pay to the position of the remaining wife; whether she was consulted by the man on the decision to move, and how much she approved of it. As this decision is very complex and has serious consequences for one of the wives, it is possible that this move is not a matter of consensus among all the parties concerned. It is also apparent from the ECtHR decision in Bibi v. United Kingdom that the wife who remained in the country of origin was also interested in relocating to the UK but due to the decision of her husband she could not, at least on family reunification grounds – as her (one per marriage) spot in the family reunification was occupied by the wife accompanying the man. We may imagine that none of the wives are interested in staying in their country of origin when their partner moves to another place, as much as it would be fair to presume this in a monogamous spousal relationship. The disposition of the norm thus, in its outlet, grants the power of choice solely to the man, in spite of the possible (even probable) disapproval of the second wife over the decision of her husband to move away with the second wife.

By analysing the structure of the norm, it is possible to imply that it in fact supports the reality that the man has all the power over the multi-party relationship and thus partially the power over the options for relocation of his wives. The second point of critique following the 'man decides' paradigm, is that the present system does not investigate the situation of the wife not chosen by the man to reunify with him, nor her position towards the reunification of the other wife, i.e. towards losing the opportunity to reunify. Along with losing the opportunity to reunify, the wife faces a turn into partial ineffectiveness of the marriage (in the eyes of the forum state). As neither she, nor the children of her and her husband, can in principle use the marriage as grounds for relocating (exceptions are possible for the children), she is left in a limbo between divorce and ineffective marriage from the perspective of its usability in the forum state. Therefore, she cannot enjoy the potential benefits of divorce, nor all the benefits of an effective marriage. Additionally, the present rule on family reunification in cases of polygamy does not give the wife in the state of origin any procedural opportunity to challenge the decision of the husband or the state of affairs after the reunification with another wife has been approved. This paradigm, prescribed by the EU Family Reunification Directive, is also approved by the ECtHR in terms of compliance with human rights requirements.

In the cases of recognition of polygamous marriages for the purpose of family reunification, one of the parties (whose ability to use the marriage and gain advantage from it will be greatly decreased by the recognition of another, simultaneous, marriage) lacks the right to be heard or to challenge the decision of her husband and its migratory status consequences for her in the forum state. Admittedly, the forum administrative body or court might not know that the incoming applicant asking for recognition of one of his marriages might have another simultaneous marriage which he fails to mention. However, the third critical point is that the present legislative paradigm allows the given administrative body / court to not consider the second wife, even if it is aware of the existence of the simultaneous marriage. As the rule explicitly gives the power of choice to the husband, his will would be the main point of reference for the decision-making body.

Without underestimating the agency and opportunities of the wife left in the country of origin and her options for relocating on other grounds, the above analysis aims to demonstrate what consequences does the current rule disqualifying polygamous marriages from family reunification in the EU and its member states have for wives in polygamous marriages. While this rule is allegedly standing against the practice of polygamy in order to improve the position of women, its effects on the power-dynamics in polygamous marriages; and the wives not chosen by their men to reunify are rather undermining. As a result of the above analysis, the author finds that the present legal approach to recognition of polygamous marriages for the purpose of family reunification fails to serve the alleged aim of the legal provisions effectively; and is not competent to achieve the proclaimed aim of the policy. In fact, the paradigm that the given rule is built on, reproduces the imbalanced power structures allegedly existent in polygamous marriages instead of dealing with them.

Conclusion

The article aimed to introduce the teleological origins of the Migration Law rule of non-recognition of polygamous marriages for the purpose of family reunification stipulated in the regulatory framework of European Union and overtaken by majority of the EU member states. The rule states that an alien who is a part of a polygamous marriage can only bring with him one spouse to the forum state and further family reunification claims of any additional spouses will be dismissed. This rule is, according to the preamble of the Directive, constructed with respect to the European human rights requirements as interpreted by the ECtHR. Additionally, the preamble of the Directive as well as the guiding materials related to the Directive, claim that this rule should act as an instrument of combating forced marriages and protecting women.

The ECtHR has previously ruled that every state has a right to regulate the number of foreigners admitted to reside in the territory of the state as an expression of the state's sovereignty. Additionally, the Court has ruled that national Migration Law rules prohibiting the recognition of polygamy, while aimed at the preservation of Christian values, follow a legitimate aim with regard to the potential interference with individual human rights caused by the application of these rules. Preparatory works and other policy documents show that the reason why subjects in polygamous relations should not enjoy the right to have their relationship recognised as a whole in the reunification proceeding is that these relationships contradict the values of European human rights. Namely, the reasons for the restrictive and rejective policy towards recognising polygamous relationships as grounds for family reunification are to fight inequality of men and women and to prevent maltreatment of women.

The article takes the opportunity to critically analyse how the application of this rule might actually affect women in the relationships in question. It employs a critical feminist approach in deconstructing the norm to examine the presumptions reflected in the structure of the norm. With three points of critique – the point of empowering the husband with decision making agency; the point of not allowing the second wife to procedurally challenge the decision of her husband and its consequences for her ability to relocate; and the point of the inability of the decision-making authority to review the position of the second wife towards the state of affairs, the article reaches the conclusion that the present widely spread rule does not improve the position of women in polygamous matrimonial relationships, which the policy presupposes as unequal to men, but contrarily supports the man-centred power relations, which the policy criticises. Therefore, it concludes that the present rule on non-recognition of polygamous marriages for the purpose of family reunification is not only incapable of contributing to the goal set forth by the lawmakers, but the structure of the norm and its application reproduce the disbalanced gender relations instead of tackling them.

NOTES

[1] A ‘forum state’ is the **state** where the lawsuit is brought. See,

https://www.law.cornell.edu/wex/minimum_contacts. Accessed in February, 2019.

[2] As stated in Article 2 of the Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages. Accordingly, this rule is incorporated in the Civil / PIL Codices of the majority of European countries: Michael Bogdan, *Private International Law as Component of the Law of the Forum: General Course*, The Hague: Hague Academy of International Law, 2012, p. 67.

[3] As stated in Articles 5 and Article 11 of the Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages.

[4] ECtHR: E.A, and A.A. v. the Netherlands (no. 14501/89).

[5] See, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:251:0012:0018:en:PDF. Accessed in February, 2019.

[6] Susanne Gossl, Jinske Verhellen, "Marriage and other Unions in Private International Law - Separate but Equal?", *International Journal of Law, Policy and the Family*, Vol.31, No. 2, 2017, pp.174-190.

[7] More about this issue in e.g. Jinske Verhellen, "Cross-Border Portability of Refugees' Personal Status", *Journal of Refugee Studies*, Vol. 31, No. 4, 2017.

[8] Analysis of incidence of polygamy and reasons for entering into polygamous marriages related to migration is provided by e.g. Kathrine Charsley; Anika, Liversage, "Transforming Polygamy: Migration, Transnationalism and Multiple Marriages among Muslim Minorities", *Global Networks: A Journal of Transnational Affairs*, Vol. 13, No. 1, 2013, p. 62.

[9] Zainab Naqvi, "A Contextualised Historical Account of Changing Judicial Attitudes to Polygamous Marriage in the English Courts", *International Journal of Law in Context*, Vol. 13, No. 3, 2017, p. 13.

[10] M. Mendel, B. Ostřanský, T. Rataj, I*slám v Srdci Evropy*, Prague: Accademia, 2008, pp. 69–70.

[11] Harald Christian Scheu, "Nový rakouský zákon o islámu jako vzor pro úpravu vztahů evropské sekulární společnosti a muslimských komunit?", *Jurisprudence*, Vol. 5, 2016, pp. 23.

[12] Torsten Gihl, *Den Internationella Privaträttens Historia och Allmänna Principer*, Stockholm: Norstedt, 1951, p. 50.

[13] Friedrich Carl von Savigny, *A Treatise on the Conflict of Laws, and the Limit of Their Operations in Place and Time*, London: T. and T. Clark Law Publishers, 1869, p. 36.

[14] Kerry Abrams, "Family Reunification and the Security State", *32 Constitutional Commentary*, 2017, p. 257.

[15] Immigration Act of 1891, Sess. II Chap. 551; 26 Stat. 1084. 51st Congress; March 3, 1891.

[16] Brian Opeskin, Richard Perruchoud and Jillyanne Redpath-Cross, *Foundations of International Migration Law*, Cambridge: Cambridge University Press, 2012, p. 2.

[17] See, https://ukhumanrightsblog.com/incorporated-rights/articles-index/article-8-of-the-echr/. Accessed in February, 2019.

[18] See, http://echr.ketse.com/doc/14501.89-en-19920106/. Accessed in February 2019

[19] See, http://echr.ketse.com/doc/12139.86-en-19871005/view/. Accessed in February 2019

[20] See, http://echr.ketse.com/doc/19628.92-en-19920629/. Accessed in February 2019

[21] M. and O.M. v. the Netherlands (No. 12139/86), The Law (2)

[22] ECtHR: Bibi v. the United Kingdom (No. 19628/92), The law: § 1.

[23] ECtHR: E.A. and A.A. v. the Netherlands (No. 14501/89), The law: § 2.

[24] EU Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification, Preamble (2).

[25] *Ibid.* Preamble (11).

[26] Henri Labayle, Yves Pascouau, Directive 2003/86/EC On the Right to Family Reunification Synthesis Report, Academic Network for Legal Studies on Immigration and Asylum In Europe (2007), pp. 52; European Commission, Proposal for a Council Directive on the right to family reunification, COM/99/0638 final - CNS 99/0258

[27] Commission of the European Communities, Report from the Commission to the European Parliament and the Council on the Application of Directive 2003/86/EC On the Right to Family Reunification, COM (2008) 610 final, Brussels, 8 October 2008.

[28] EU Council Directive 2003/86/EC of 22 September 2003, Preamble (11)

[29] European Union External Action, "Women's rights are human rights - EU speaks up for women's rights at the Human Rights Council, 22 June 2018", https://eeas.europa.eu/headquarters/headquarters-homepage/47162/womens-rights-are-human-rights-eu-speaks-womens-rights-human-rights-council_en. Accessed in January 2019

[30] E.g. Dutch government; Minister voor Immigratie, Integratie en Asiel, Plan van aanpak preventie huwelijksdwang, July, 2012 (Dutch governmental proposal for law amendment advocating stricter criminalisation of polygamous marriages).

[31] Committee on the Elimination of Discrimination Against Women: General Recommendation on Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/GC/29, 26 February 2013.

[32] *Ibid*. pp. 6.

[33]Andrea Büchler, *Islamic Law in Europe?: Legal Pluralism and its Limits in European Family Laws*, London: Routledge, 2016, pp. 47; Sara Tonolo, "Religious Values and Conflict of Laws", *Liber amicorum Tito Ballarino*, 2016, p. 20; Directorate General for Internal Policies of the Union, Private International Law in a Context of Increasing International Mobility: Challenges and Potential, June 2017. http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583157/IPOL_STU(2017)583157_EN.pdf, p. 23. Accessed in January 2019

[34] Sara Tonolo, Religious Values and Conflict of Laws, op cit.; Spanish Supreme Court Decision 84/2018 of 24 January 2018.

[35] European Parliament Resolution on Women's Immigration: The Role and Place of Immigrant Women in the European Union (2006/2010(INI)), Official Journal 313 E, 20/12/2006 P. 0118 – 0125. Accessed in January 2019.

[36] Government Offices of Sweden, New Rules against Foreign Polygamous Marriages, 25 July 2018. Accessed in January 2019.https://www.government.se/press-releases/2018/07/new-rules-against-foreign-polygamous-marriages/, Accessed in January 2019.

[37] Skatteverk, Månggifte I folkbokföringsregistret, published 25 January 2018. Accessed in January 2019; https://www.skatteverket.se/download/18.4a4d586616058d860bc7b3a/1516808177859/M%C3%A5nggifte+i+folkbokf%C3%B6ringsregistret+204+402+092+-+17+113.pdf. Accessed in January 2019.

[38] Kommittédirektiv nr. 2018:68, Strängare regler om utländska månggiften, 19 July 2018. Accessed in January 2019, https://www.regeringen.se/4a0f71/contentassets/9a65d3c1223542c0b9458cbbaeb1c113/strangare-regler-om-utlandska-manggiften-dir.-2018-68.pdf. Accessed in January 2019.

[39] Savigny, *A Treatise on the Conflict of Laws*, op. cit.; Abrams, *Family Reunification and the Security State, op. cit.*

[40] I use the term Oriental, as it is used by scholars focusing on postcolonialism in law, e.g.: Elisa Giunchi, *Muslim Family Law in Western Courts*, London: Routledge, 2014, p. 1. This term gained its currency in the postcolonial discourse through Edward Said: *Orientalism*, New York: Pantheon Books, 1978.

[41] Further on this topic e.g. Sarah van Walsum, The Family and the Nation: Dutch Family Migration Policies in the Context of Changing Family Norms, Cambridge Scholars Publishing (2008), pp. 6; Garbi Schmidt, Troubled by Law: The Subjectivizing Effects of Danish Marriage Reunification Laws, International Migration (Vol. 52/2, 2014)

[42]Zainab Naqvi, "A Contextualised Historical Account of Changing Judicial Attitudes to Polygamous Marriage in the English Courts", *International Journal of Law in Context*, Vol. 13, No. 3, 2017, pp. 1-21.

[43] *Ibid.* p. 10.

[44] A comprehensive summary of legal provisions regarding the recognition of polygamous marriages in the EU states can be accessed in: European Migration Network, Ad-Hoc Query on Polygamous marriage, 2016, , https://www.refworld.org/pdfid/58ac4d2fd.pdf. Accessed in January 2019.

[45] Naqvi, "A Contextualised Historical Account", *op. cit.*

[46] EU Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification, Art. 4 (4).