

## Polygamy and Human Rights

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### Abstract

In non-Muslim societies polygamy is prohibited and cannot be celebrated even if the involved parties are Muslims. Such a prohibition generates in fact a situation of denying lots of human rights. That's a kind of discrimination towards the polygamous household which must be encountered because human rights are indivisible and all people deserve the enjoyment of all of them.

**Keywords:** polygamy, denial of human rights, legalization of polygamy.

### ملخص

يمنع تعدد الزوجات في المجتمعات غير المسلمة ولا يمكن إعلانه حتى ولو كان أطرافه مسلمين. تترتب عن هذا المنع في الواقع حالة من إنكار لكثير من حقوق الإنسان. ما يعتبر نوعاً من التمييز تجاه الأسرة متعددة الزوجات والذي يجب مواجهته لأن حقوق الإنسان غير قابلة للتجزئة وكل الأفراد يستحقون التمتع بها جميعها.

### Introduction

A married man may fall in love with another woman. However, he cannot marry her because most of the current legislations in the world forbid the second marriage if the first isn't cancelled. It's the case of France to which I devote this study. Such a forbiddance is a violation of human rights. Thus, polygamy must be a public liberty to consolidate not only the rights of men but to strengthen the rights of women as well.



## A - Non recognition of polygamy is a violation of human rights

The French civil code in its section 147 doesn't permit a second marriage without dissolving the previous one. Transgressing the rule is a crime. And both of the spouses and the public officer involved in the contract are punished with criminal sanctions according to the criminal code. So, polygamy is contrary to public order in France<sup>(1)</sup>. But jurisprudence makes the public order supple and admits acquiring rights in France when polygamous marriage is celebrated without fraud abroad in accordance with the local law<sup>(2)</sup>. Despite this recognition, right of cohabitation and insurance rights remain denied.

### 1 – Denial of right of cohabitation

The French jurisdictions had exempted the first wife of the obligation of cohabitation with the husband, because in the contrary case, she would be exposed to the risk of being obliged to cohabit equally with the second wife<sup>(3)</sup>. Thus, the tribunal of Versailles, within its judgment on 31<sup>st</sup> March 1965, decided that “the husband cannot impose to his first wife the presence of a second wife in conjugal domicile”<sup>(4)</sup>.

(1) Veronica Federico, Europe facing polygamy: Italy, France and the UK accept the challenge of immigration. Workshop 6 “The constitutional challenges of immigration” IACL IX World Congress, Oslo 16-20 June 2014, p 8. Retrieved from <https://www.jus.uio.no/english/research/news-and-events/events/conferences/2014/wccl-cmdc/wccl/papers/ws6/w6-federico.pdf>

(2) See Béatrice Bourdelois, commentaires, in Journal du droit international, N° 3/2007, p 933. The rights which may be acquired by the second wife and her children are: food allowance; a portion in conjugal community; inheritance rights; indemnity in case of husband accidental death claimed to the responsible of the accident. See Gérard Légier, « Les rapports familiaux et l'ordre public au sens du droit international privé », in Revue de Recherche Juridique, N° 2/1999, pp 305-306.

(3) See André Decocq, De la polygamie en France, in Le monde du droit, Ecrits rédigés en l'honneur de Jacques Foyer, Economica, Paris, 2008, p 279.

(4) See Gérard Légier, opcit, p 306.



However, if the different parties concerned implement with willingness the obligations dictated by the polygamous marriage, the public order hasn't to intervene<sup>(1)</sup>. Indeed, the Council of State, within its arrêt Montcho of 11<sup>th</sup> July 1980, has nullified a decision of the préfet who refused the stay against the second wife of a beninian citizen and her children<sup>(2)</sup>. Therefore, the right to family regrouping was established and each party of the polygamous relationship could claim it<sup>(3)</sup>.

Unfortunately for the parties, the law N° 93-1027 of 24<sup>th</sup> August 1993 about immigration<sup>(4)</sup> denies completely the right to family regrouping for polygamous family<sup>(5)</sup>. Thus, article 9 of this law adds article 15 bis to ordinance N° 45-2658 of 2<sup>nd</sup> November 1945 dealing with conditions of entrance and stay of foreigners in France, which states: "resident certificate cannot be delivered neither for a foreigner citizen living in state of polygamy nor for the spouses of such citizen. A resident certificate delivered without taking these provisions into account must be withdrawn"<sup>(6)</sup>. And the second wife of the polygamous foreigner resident in France with the first spouse cannot claim consequently the advantage of family reunification<sup>(7)</sup>.

Nevertheless, the enforcement of these provisions may lead to complex situations. It's the case of a foreigner second wife of a compatriot, who is mother of a French child. In this circumstance such

(1) Ibid, p 307.

(2) See André Decocq, op. cit. p 275.

(3) Veronica Federico, op. cit. p 9.

(4) This law is available at <http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000530357>

(5) Veronica Federico, opcit, p 9.

(6) Author's translation. The provisions of article 15 bis have been renewed in article L. 314-5 of Ordonnance N° 2004-1248 du 24 novembre 2004 relative à la partie législative du code de l'entrée et du séjour des étrangers et du droit d'asile. See this text at [http://www.legifrance.gouv.fr/affichTexte.do;jsessionid=B00819ABC9235FE9211FA99218A9A893.tpdila18v\\_1?cidTexte=JORFTEXT000000624655&dateTexte=20041125&categorieLien=id#JORFTEXT000000624655](http://www.legifrance.gouv.fr/affichTexte.do;jsessionid=B00819ABC9235FE9211FA99218A9A893.tpdila18v_1?cidTexte=JORFTEXT000000624655&dateTexte=20041125&categorieLien=id#JORFTEXT000000624655)

(7) Article L.411-7 of Ordonnance N° 2004-1248 du 24 novembre 2004 relative à la la partie législative du code de l'entrée et du séjour des étrangers et du droit d'asile.



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a foreigner wife cannot be holder of a title to stay according to article 15 bis cited above. But on the other side the foreigner wife is protected from reconduction to frontier because article 25-5 of ordinance of 2<sup>nd</sup> November 1945 states: "May not be subjected to a proceeding of reconduction to frontier...the foreigner who is father or mother of a French child resident in France"<sup>(1)</sup>. These provisions will place foreigners in illegal situations<sup>(2)</sup>. That's a typical discrimination between a French mother and a foreigner mother based on considerations of origin which is forbidden by universal declaration of human rights within its article 2.

It seems that public order and republic values in France transcend the right of family reunification for polygamous family. In this way the European Commission of human rights has admitted that "a state party in the European convention of human rights may not be obliged to grant an entire recognition to polygamy which is in contradiction with its own legal order"<sup>(3)</sup>.

In this sense the council of the European Union stipulates that a further spouse, in case of polygamy marriage, cannot be authorized to join her husband living with a first spouse in a territory of a member state. The council extends this limitation to the minor children of such further spouse and they may not be reunited with their father<sup>(4)</sup>.

Apparently, the United Nations system doesn't converge with these provisions of international European law because the United Nations High Commissioner for Refugees recognizes polygamous marriage for the purpose of family reunification and doesn't admit to

(1) Author's translation.

(2) Véronique Fabre-Alibert, « Réflexion sur le nouveau régime juridique des étrangers en France », Revue Trimestrielle des Droits de l'Homme, 1994, p 530. Retrieved from <http://www.rtdh.eu/pdf/1994519.pdf>

(3) Author's translation. See Ibid, pp 529-530.

(4) Article 4(4) of COUNCIL DIRECTIVE 2003/86/EC of 22nd September 2003 on the right to family reunification available at [http://www.integrim.eu/wp-content/uploads/2012/12/Directive-2003\\_861.pdf](http://www.integrim.eu/wp-content/uploads/2012/12/Directive-2003_861.pdf)



split the family by offering residence to one spouse. It recommends that the reunification should be granted to the whole family<sup>(1)</sup>.

## 2 – Denial of insurance rights

In case of polygamous marriage, the survivor's pension cannot be shared between two spouses when the first is French. That's what the French Supreme Court judged on July 6th, 1988 within Baaziz case. In this matter, an Algerian citizen got married for a first time a French woman in France. Then, he contracted a second marriage with an Algerian woman in Algeria. After his death industrial accident, litigation was submitted to the judges whether the accident pension might be divided between the two spouses. The Supreme Court responded that the allowance should be allocated exclusively to the first spouse because public order, according to the court, "prevents polygamous marriage, contracted abroad by the one who is still the husband of a French citizen, to produce its effects toward this one"<sup>(2)</sup>. It's obvious that the application of the second spouse was rejected because the first wife was French<sup>(3)</sup>.

In return, when the two spouses are both Algerian, the survivor's pension will be shared between them. In this way, the court of appeal of Agen decided on January 10th, 2006 that "the survivor's pension, to which the two survivors spouses could pretend, should be shared in proportion to the period of common life"<sup>(4)</sup>. As the agricultural social mutual fund disagreed with such a decision, this case was submitted to the supreme court which approved the sentence of the court of appeal

(1) "Family reunification in the context of resettlement and integration", UNHCR-Annual tripartite consultations on resettlement, Geneva, 20-21 June 2001, para 19, p 6. Retrieved from <http://www.unhcr.org/3b30baa04.pdf>

(2) Author's translation.

(3) Cf. Gérard Légier, *opcit*, p 310. In order that the second Algerian spouse would be the survivor's spouse, according to the court of appeal of Limoges within its decision on September 15th, 2003, the first marriage with a French wife might have been dissolved by divorce (Cf. Alain Devers, "Le droit à réversion des veuves de l'assuré social polygame", *Revue du droit de la famille*, N°4-Avril 2007, p 56).

(4) Author's translation.



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and concluded within its decision on May 2nd, 2007 that “the second marriage, contracted according to the personal statute of the people concerned, being valid and non open to nullification, permitted to recognize Madam Z. as survivor spouse in pursuance of article L.353-1 of social security code. [And accordingly] the court of appeal has legally justified its decision”<sup>(1)</sup>.

It's clear that French jurisdictions make a distinction between a French spouse and Algerian spouse. When a French woman is the first spouse, she gets entirely the survivor's pension and the second Algerian wife is deprived of the allocation. But if the polygamous marriage involves only Algerian wives, the allowance is split between them. At a first glance, somebody may say that's a discrimination settled on origin which is prohibited by the international instruments of human rights. This argumentation is far from the reality since the court of appeal of Bordeaux within a decision on June 12th, 2008 has also refused a survivor's pension for a French second wife of a French citizen<sup>(2)</sup>. And in both cases the second wives, Algerian and French respectively, were divested of “the right of everyone to social security, including social insurance”, set forth in article 9 of the International Covenant on Economic, Social and Cultural Rights of 1966, without justification since their marriages were not revoked.

Such a deprivation finds, obviously, its origin in French public order. But in a globalised world, human rights for all cannot be

(1) Author's translation. Cf. Alain Devers, “Le partage d'une pension de réversion entre les épouses survivantes de l'assuré polygame”, *Revue du droit de la famille*, N°9-Septembre 2007, p 37.

(2) The court has argued that “In the specific case, Madam C. whose good faith is not in question is the second spouse of M. B. who had contracted a first union non dissolved in 1957. So her marriage, according to aforementioned rules, has no effect in France. Consequently, she may not be the survivor spouse to perceive a survivor's pension regardless of the death of the first spouse since 1976”. Author's translation. Cf. Alain Devers, “L'exception de nullité du mariage en matière de réversion ”, *Revue du droit de la famille*, N°12-Décembre 2008, p 37.



sacrificed because of the public order variant which is changeable through the history of humanity.

In light of these obstacles faced by the polygamous household in the matters of the right to family reunification and the right to social protection, it's a duty for all to strive hardily to the recognition of polygamy by its legalization.

## **B – Legalization of polygamy to strengthen human rights**

Legalization of polygamy remains a necessity to facilitate the full enjoyment of human rights for the polygamous household either the members are citizens or foreigners. Such enjoyment is dictated by the need of acknowledgment of non western culture and the will of the polygamous parties.

### **1 – Acknowledgment of non western culture**

As it's explained by the European commission of human rights, denying the rights of the members of polygamous union is justified by "the preservation of the Christian based monogamous culture dominant in that country"<sup>(1)</sup>.

Evidently, this reasoning may establish a distinction between the culture which allows polygamy and the culture which asserts the supremacy of Christian culture. That's merely a discrimination based on culture banned by all human rights instruments.

Charles Taylor takes it out on such discrimination. He advocates that different cultures must be valued because they form the identity of their practitioners. He sustains that criminalizing polygamy constitutes a devaluation of polygamists. The societies which do so suppress the polygamists' religion. This is harmful to

(1) Samuel Chapman, Polygamy, bigamy and human rights law, Xlibris Corporation, USA, 2001, p 74, available at <http://www.protectmarriage.org.nz/wp-content/uploads/2012/06/Polygamy-Bigamy-and-Human-Rights.pdf>



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multiculturalism. All the citizens of different cultures must be entitled equality of value. If somebody's practice is criminalized, such a criminalization may be considered as an establishment of an inferior image of his culture. Thus, it's settled superior accepted cultures and less conventional ones. Hence, the western liberal societies are guilty. Therefore, Charles Taylor advises the societies to recognize the equal value of different cultures<sup>(1)</sup>.

Charles Taylor is right in his analysis because values of different cultures form the common fund of humanity. Each person of various communities has an entire right to explore the other cultures to choose which value is suitable for his tendency or his interests.

All the members of a community may transmit their values to other communities. This is a requirement of globalization. If they don't so, they may be considered as misers because the members of other communities can find their happiness in such values. The state makes a great mistake when forbiddance is made to thwart somebody's choice if he embraces a value of another culture. The public authority must help him to benefit from the advantages of such a value by taking regulations in the scope because the main aim of all legislations and rules is the realization of the welfare for all people.

Undeniably, love is an important part of the wellbeing of each one. When somebody contracts a second marriage, this new relationship expresses mutual feelings of love between a man and a woman. The state has a duty to respect their natural liberty. Criminalizing a celebration of the new wedding is to sentence someone because he loves. And this is outlaw interference in people's feelings. That's why it's necessary to take the will of individuals into account.

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(1) See Jessica Freitas, "Practicing polygamy: multicultural right or liberal crime?", *Global Tides*, Volume 6, 2012, pp 11-13, available at <http://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1056&context=globaltides>





## 2 –The will of polygamous parties

As it's highlighted above, the will to marry a second wife derives from love between them and the previous wife who remains lover of her husband may consent the new relationship. She doesn't want to fall in divorce. Thus, an image of polygamous love maybe formed in the mind of three persons. Such feelings must be out of control of the state. And the realization of their choice on the ground is a duty of the administration.

In the same reasoning, let's give a view of a woman. It's Jillian Keenan, a writer in New York City. She said: "As women, we really can make our own choices. We just might choose things people don't like. If a woman...wants to marry a man with three other wives, that's her damn choice...Arguments about whether a woman's consensual sexual and romantic choices are "healthy" should have no bearing on the legal process...those women deserve our respect just as much as any others"<sup>(1)</sup>.

In fact, polygamous marriage is a matter of women. They have the full right to behave as they please. Other people, men and women, have the duty to forbear interfering in their lifestyle, otherwise liberty has no sense. It's true that a woman may encounter enormous problems in polygamous household, but let's her make a balance between such obstacles and her interests. Deciding in her place is a denegation of her personality.

Charles Taylor's outlook comes to strengthen the women's choices. He said: "there is a certain way of being human that is 'my' way. I am called upon to live my life in this way, and not in imitation of anyone else's life...if I am not, I miss the point of my life; I miss what being human is for me"<sup>(2)</sup>.

(1) Jillian Keenan, "Legalize Polygamy!", at [http://www.slate.com/articles/double\\_x/doublex/2013/04/legalize\\_polygamy\\_marriage\\_equality\\_for\\_all.html](http://www.slate.com/articles/double_x/doublex/2013/04/legalize_polygamy_marriage_equality_for_all.html)

(2) Cited by Jessica Freitas, opcit, p 12.



Therefore, the provisions of international law of human rights don't necessarily serve the will of women. For instance, the general comment 28 of the Human Rights Committee stated that "It should also be noted that equality of treatment with regard to the right to marry implies that polygamy is incompatible with this principle. Polygamy violates the dignity of women. It is an inadmissible discrimination against women. Consequently, it should be definitely abolished wherever it continues to exist"<sup>(1)</sup>.

Such provisions go in with the view saying that women in polygamous unions are victims who live in an unhealthy environment<sup>(2)</sup>. This opinion despises those women because of their choice. Peter Lawler replies that "We should regard their choice as different and not inferior"<sup>(3)</sup> even if people in polygamy are a minority. As a matter of fact, freedom is not valuable if it is not extended to the smallest groups<sup>(4)</sup>. Neglecting women's choices is a neglect of themselves as a group with a different believe. That's a discrimination based on opinion.

If the general will of the women's groups heads for acceptance of polygamy, neither the women's dignity nor equality of treatment will be encroached. Peter Lawler comes to adhere to my point of view. He added that women's choice "is not a violation of anyone's right...Legalized polygamy won't be any big deal, and it won't weaken anyone else's marriage"<sup>(5)</sup>.

(1) Human Rights Committee, General Comment 28, Equality of rights between men and women (article 3), U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000), at : <http://www1.umn.edu/humanrts/gencomm/hrcom28.htm>

(2) Jillian Keenan, opcit, pp 3-4.

(3) Peter Lawler, The right to polygamy? p 2, at <http://bigthink.com/rightly-understood/the-right-to-polygamy>

(4) Jillian Keenan, opcit, p 4.

(5) Peter Lawler, opcit, p 2.



## Conclusion

As the choice of polygamy expresses the general will of women's groups, it must be legalized wherever it exists de facto. If we don't so the difficulties which can be generated in de facto polygamous households may not be resolved because such unions occur out of the regulation of the state. Hence, the human rights of women and children will be infringed.

In fact, since polygamy is forbidden, a married man may have a concubine. It's de facto polygamy. The man and woman are involved in an adultery relationship and there are no duties between them in the issues of respect, fidelity and assistance. In addition, they don't inherit each other<sup>(1)</sup>.

Also, we have seen earlier, under the aegis of French legislation, how the right to family reunification and the right to insurance were thwarted for wives whose polygamous marriage was celebrated abroad.

Consequently, many women all over the world are deprived of enjoying all their human rights due to curtailing them certain of these rights because of their situation of polygamy. Human rights are an indivisible whole. Let's fight to conquer all the rights for all women regardless of their situations.

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(1) The French Supreme Court within its decision on October 17th, 2000, decided that as no legal provision has regulated the common life expenses between the partners of concubinage, each of them must bear his own expenses. See André Decocq, opcit, p 282.