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Epilogue to the Family in EU Law

Is There a European Family Law?

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13.1 INTRODUCTION

This volume on 'The Family in EU Law' is an important and very timely contribution to an important debate. It follows up on Clare McGlynn's ground-breaking 'Families and the European Union'. Much has happened since McGlynn's 2006 book, but some things have not changed. The European Union (EU) still does not have legislative competence in the area of family law, and it probably never will. Nevertheless, the EU institutions and especially the Court of Justice of the European Union (CJEU) have increasingly had to deal with family matters, especially in the context of free movement of workers and cross-border cases more generally, as well as equality and non-discrimination. The EU Charter of Fundamental Rights has also begun to make an impact on families and family law, but is arguably still applied with too much trepidation.[1] In any event, the EU institutions and the CJEU have progressively utilised the competences that they do have, particularly to ensure the free movement of workers and non-discrimination in labour and social laws, with increasing impact on families and family law. Moreover, and as also will be addressed below, the 2019–2024 strategy and policy priority 'Promoting our European way of life' probably comprises significant family law aspects as well.[2]

* This contribution is partly based on the author's previous work: in particular, 'Marriage and the family' in L. Corrias and R. Tinnevelt (eds), *European Ways of Life: Legal and Philosophical Perspectives* (Edward Elgar Publishing, forthcoming), and 'Is there a 'European Family Law'?' (2023) 54 Victoria University of Wellington Law Review 317.

[1] On the latter, see, for example, Chapter 6 by Gunnar Thor Petursson, Xavier Groussot, and Alezini Loxa.

[2] European Commission, 'Promoting our European way of life: Protecting our citizens and our values' <https://commission.europa.eu/strategy-and-policy/priorities-2019–2024/promoting-our-european-way-life_en>.

The absence of a true and direct legislative competence on family law matters can explain that the family receives very little mention in the EU Treaties. Nevertheless, 'family' plays an important role in the above-mentioned contexts and is hugely relevant in many areas of EU law, as shown in many of the chapters in this book. This regularly necessitates a debate on what 'family' actually is, as well as what family-related terms like spouse, child, parent, and so on mean in the contexts in which they are used. It is fair to say that there is a significant divergence amongst Member States when it comes to understandings of 'family' and family law issues generally, making this an even more complicated and politicised area for the EU organs and institutions. Therefore, this book can make an important contribution to the development of this area of law.

This epilogue will first look at the 'dividing lines' in Europe, which have shifted significantly over the last decades. It then asks whether families are part of what (for better or worse) has been termed the 'European way of life', and if so, which families. Following this, this contribution then discusses whether despite the absence of a direct legislative competence, there are elements of a European or EU Family Law by looking at the notions of 'Institutional' and 'Organic' European/EU Family Law, concluding that while there is no universal definition of what is a 'family', there are elements of such definitions and indeed elements of a European Family Law and an EU Family Law.

13.2 FROM NORTH–SOUTH DIVIDE TO EAST–WEST DIVIDE

Historically, the dividing lines in family law used to be a reasonably clear divide between the 'progressive North' (leaving aside the Republic of Ireland and, to a certain extent, the jurisdictions of the UK) and the 'conservative South'. This can best be seen when examining the development of the law of divorce, where predominantly Protestant jurisdictions had a more liberal approach and introduced divorce (much) earlier compared to those that were/are predominantly Catholic. Even permitting divorce as such was controversial in the latter until relatively recently, with divorce only being possible in Italy since 1970, in Spain since 1981, and in the Republic of Ireland since 1996. Malta, the last European jurisdiction to introduce divorce, did so as late as 2011.[3] The development of divorce law in Europe has been described

[3] Thereby depriving private international law teachers of the last European example to easily create cases involving 'limping marriages'. While the Vatican, of course, still does not permit divorce, it is factually nearly impossible to construct good examples involving the Vatican for teaching purposes.

expertly by Masha Antokolskaia[4] and thus need not be repeated here. Unsurprisingly, although today there still is no uniformity as to the bases of divorce/divorce grounds, there are clear trends towards an understanding of marriage and the divorce process that gives the spouses greater autonomy to regulate their own affairs, including divorce. What also unites all European jurisdictions today is the move beyond allowing divorce exclusively based on fault.[5] Moreover, the trend towards greater autonomy of the spouses not only extends to the substantive divorce laws but also to the divorce process as such. In many jurisdictions in Europe, divorces no longer need to be pronounced by a court but are dealt with by administrative bodies or lawyers/notaries, thus dejuridifying the divorce process and removing it even further from state influence.[6] It is also interesting to note that the arguably most 'liberal' (i.e. permissive) divorce laws that allow divorce on the mere basis that one of the spouses requests this can be found in the North (e.g. Sweden and Finland), South (e.g. Spain), East (e.g. Russia), and West (e.g. England and Wales) of Europe. The development of the law of divorce thus exemplifies not only the withdrawal of the state from trying to control marriage by setting moralistic divorce requirements, but also the end of the 'classic' North–South divide in family law in Europe.

Arguably, this divide has now been replaced with an East–West divide as regards the institution of marriage and what often has been termed (wrongly, as these relationships have always existed) as 'new' family forms, especially same-sex relationships with or without children. The development of the recognition of same-sex relationships has been described elsewhere in greater depth.[7] For present purposes, it is sufficient to point out that this official recognition began with the emphatic statement of the Swedish *lagutskottet*

[4] M. Antokolskaia, 'Divorce in a European perspective' in J. M. Scherpe (ed), *European Family Law Vol. III – Family Law in a European Perspective* (Edward Elgar Publishing 2016); M. Antokolskaia, *Harmonisation of Family Law in Europe: A Historical Perspective* (Intersentia 2006); M. Antokolskaia, 'The search for a common core of divorce law: State intervention v. spouses' autonomy' in M. Martín-Casals and J. Ribot (eds), *The Role of Self-determination in the Modernisation of Family Law in Europe* (Documenta Universitaria 2006); M. Antokolskaia, 'Convergence and divergence of divorce laws in Europe' (2006) 18 Child and Family Law Quarterly 307.

[5] D. Martiny, 'Divorce and maintenance between former spouses – Initial results of the Commission in European Family Law' in K. Boele-Woelki (ed), *Perspectives for the Unification and Harmonisation of Family Law in Europe* (Intersentia 2003) 534.

[6] On this, see the national reports in A. Dutta and others (eds), *Scheidung ohne Gericht?* (Gieseking 2017).

[7] On this, see, for example, K. Boele-Woelki and A. Fuchs, *Same-Sex Relationships and Beyond* (Intersentia 2017); S. Cretney, *Same Sex Relationships from 'Odious Crime' to 'Gay* Marriage' (Oxford University Press 2006). For brief overviews, see, for example, J. M. Scherpe, 'Gleichgeschlechtliche Lebensgemeinschaften' in J. Basedow, K.-J. Hopt, and R. Zimmermann (eds), *Handwörterbuch des Europäischen Privatrechts* (Mohr Siebeck 2009);

(committee on legal affairs) in 1973 that 'from society's point of view, two persons of the same sex living together as a couple is a perfectly acceptable form of family life'.[8] The process continued with the introduction of registered partnerships in Denmark in 1989,[9] and culminated with the opening up of marriage to same sex couples twenty-eight years later with the Netherlands being the first jurisdiction to do so. Unlike in many non-European jurisdictions such as Canada,[10] the United States,[11] South Africa,[12] and Taiwan,[13] in Europe, this change was usually brought about through political and parliamentary initiatives[14] and not by court challenges,[15] although the motivation was the same: to end the discrimination against same-sex relationships.

J. M. Scherpe, 'Same-sex relationships' in J. Basedow, K.-J. Hopt, and R. Zimmermann (eds), *Max Planck Encyclopedia of European Private Law* (Oxford University Press 2012); J. M. Scherpe, 'From 'odious crime' to family life – same-sex couples and the ECHR' in A. Verbeke and others (eds), *Confronting the Frontiers of Family and Succession Law – Liber amicorum Walter Pintens* (Intersentia 2012); J. M. Scherpe, 'The legal recognition of same-sex couples in Europe and the role of the European Court of Human Rights' (2013) 10 The Equal Rights Review 83. See also the contributions in J. M. Scherpe and A. Hayward (eds), *The Future of Registered Partnerships – Family Recognition beyond Marriage?* (Intersentia 2017).

[8] 'Utskottet vill dock betona alt en samlevnad mellan två parter av samma kön är från samhällets synpunkt en fullt acceptabel samlevnads-form.': *Lagutskottets betänkande* (LU) 1973:20 <www.riksdagen.se/sv/dokument-och-lagar/dokument/betankande/lagutskottets-betankande-i-anledning-av-kungl_FW01LU20/html>, 116.

[9] On this, see I. Lund-Andersen, 'Registered partnerships in Denmark' in Scherpe and Hayward (eds) (n 7); J. M. Scherpe, 'Zehn Jahre registrierte Partnerschaft in Dänemark - Zur Novellierung des Gesetzes von 1989' (2000) Deutsches und Europäisches FamilienRecht 32; J. M. Scherpe, 'Erfahrungen mit dem Rechtsinstitut der registrierten Lebenspartnerschaft in Dänemark' (2001) Familie Partnerschaft Recht 439; P. Dopffel and J. M. Scherpe, 'Gleichgeschlechtliche Lebensgemeinschaften im Recht der nordischen Länder' in J. Basedow, K. J. Hopt, H. Kötz, and P. Dopffel (eds.), *Die Rechtsstellung gleichgeschlechtlicher Lebensgemeinschaften* (Mohr Siebeck 2000).

[10] *Halpern v Canada* (AG), [2003] O.J. No. 2268 (10 June 2003), followed by *Reference Re Same-Sex Marriage* [2004] 3 S.C.R 698 which led to the Civil Marriage Act being passed in 2005.

[11] *Obergefell v Hodges* (576 U.S._ (2015)).

[12] *Minister of Home Affairs and Another v Fourie and Another; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* [2005] ZACC 19.

[13] Judicial Yuan Interpretation No. 748 of 24 May 2017.

[14] In the case of the Republic of Ireland, after a referendum on 22 May 2015, leading to the Marriage Act 2015.

[15] Slovenia being a notable exception, where same-sex marriage came into being after a Supreme Court decision in 2022. See also Latvia's introduction of a functional equivalent to marriage after a Supreme Court decision in December 2021. The subsequent failure of Parliament to pass a civil union Bill means that such unions can now be registered by the administrative courts and have the same legal effect as marriages. On this, see, for example, 'Saeima's Legal Affairs Committee throws away initiative for legal protection of all families' (*BNN*, 6 December 2022) <https://bnn-news.com/saeimas-legal-affairs-committee-throws-away-initiative-for-legal-protection-of-all-families-240703>.

Interestingly, the introduction of same-sex marriage defied the traditional North–South divide, with, for example, Spain introducing it in 2005, and thus before Norway (2008), Sweden (2009), and Denmark (2012). However, a new divide was also created. The recognition of same-sex marriages is largely restricted to Western European jurisdictions, with the notable exception of Slovenia and Estonia, with the latter opening up marriage to same-sex couples by an Act of Parliament in June 2023 (while this chapter was originally written!), with the law coming into effect in 2024.[16] Several Eastern European jurisdictions have even gone so far as to amend their constitutions to define marriage as a union between a man and a woman only to prevent legislation that may allow same-sex marriages without a further constitutional amendment.[17] By contrast, the Republic of Ireland went in the opposite direction and amended the Constitution to *allow* same-sex marriages after a public referendum. Regrettably, in some Eastern European countries the discussion on the recognition of same-sex relationships is 'weaponised' to further other political means and ostensibly a 'national identity'.[18] As a result, Europe and the EU Members States are at least as divided on the issue of same-sex marriage (and indeed same-sex parenting) as they were in the past on divorce except that the dividing line is now between the East and the West. These widely divergent views obviously make it even more difficult to establish what 'family' means in EU Law.

13.3 DO FAMILIES HAVE A PLACE IN THE 'EUROPEAN WAY OF LIFE'? AND IF SO, WHICH FAMILIES?

How then do the European Institutions and EU law deal with the conflicting understandings of 'family' between Eastern and Western European jurisdictions?

In the first instance, arguably by avoiding it, or at least not addressing it directly. In her manifesto 'A union that strives for more – My agenda for Europe', the candidate, now-President of the European Commission Ursula

[16] For the situation in Latvia, see n 17.

[17] See, for example, Article 46 of the Constitution of Bulgaria; Article 28 of the Constitution of Lithuania; Article 18 of the Constitution of Poland; Article 110 of the Constitution of the Republic of Latvia; Article 62 of the Constitution of Serbia; Article L of the Constitution of Hungary; Article 62(2) of the Constitution of Croatia; Article 41 of the Constitution of Slovakia.

[18] See, for example, Chapter 12 by Nausica Palazzo; V. Todorova, 'Gender wars in Bulgaria' in J. M. Scherpe and S. Gilmore (eds), *Family Matters – Essays in Honour of John Eekelaar* (Intersentia 2022); and L. Vaige, *Cross-Border Recognition of Formalized Same-Sex Relationships* (Intersentia 2022).

von der Leyen used the word 'family' only twice and in the contexts of work–life balance and health.[19] Given the central importance of families for the functioning of the Union and Member States, this was disappointing but perhaps can be explained by the fact that candidates for office tend to avoid topics of greater controversy to be more electable.

Moreover, neither the somewhat controversially named strategy and policy priority 'Promoting our European way of life'[20] nor the Commission President's Mission letter to Margaritis Schinas, the Vice-President for Promoting our European Way of Life, dated 1 December 2019, in which the latter is entrusted with his new role, contain direct mentions of family matters. With a little good will, one could read into the tasks that the Vice-President was given, namely 'Ensuring coherence of the external and *internal* dimensions of migration' (emphasis added) and 'Coordinating work on inclusion and building a genuine Union of equality and diversity', that the remit of the portfolio implicitly includes families generally, that is, also non-traditional families, and ensuring their unhindered right to free movement. Read that way, families must then be included in the 'European Way of Life' – but what families? How do families fit into the European way of life, what role do they play, and how are they composed? What is a 'European family', if there is such a thing? Are they different from other families, and if so, how? What would be the point of identifying a 'European family' – to treat them differently from non-European families? And is 'European' different from 'EU' in this context? Here is where the chapters of this book make an important contribution to explore this difficult, and controversial, area of law.

Remarkably, and to her credit, the Commission President later made it absolutely crystal-clear that she very much considers the recognition of all family forms as part of the *Mission in her State of the Union Address 2020*.[21] Towards the end of the address, she made this point with astonishing directness:

[19] European Commission, Directorate-General for Communication, U. von der Leyen, *A Union that Strives for More – My Agenda for Europe – Political Guidelines for the Next European Commission 2019–2024* (Publications Office 2019) <https://data.europa.eu/doi/10.2775/018127>.

[20] European Commission (n 2). For a debate on the supposed 'European way of life', see the contributions in L. Corrias and R. Tinnevelt (eds), *European Ways of Life: Legal and Philosophical Perspectives* (Edward Elgar Publishing, forthcoming).

[21] European Commission, U. von der Leyen, *State of the Union Address 2020 – Building the World We Want to Live In: A Union of Vitality in a World of Fragility* (Brussels, 16 September 2020) <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_1655>.

> Honourable Members,
>
> I will not rest when it comes to building a Union of equality.
>
> A Union where you can be who you are and love who you want – without fear of recrimination or discrimination.
>
> Because **being yourself is not your ideology.**
>
> **It's your identity.**
>
> **And no one can ever take it away.**
>
> So I want to be crystal clear – **LGBTQI-free zones are humanity free zones. And they have no place in our Union.**
>
> And to make sure that we support the whole community, the Commission will soon put forward a strategy to strengthen LGBTQI rights.
>
> As part of this, I will also push for mutual recognition of family relations in the EU. **If you are parent in one country, you are parent in every country**.[22]

That these are not just empty words could be seen in the subsequent initiative *Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood*.[23] However, given the resistance of many Eastern European Member States to the recognition of parenthood of same-sex couples, evidenced by the positions taken by the respective Member States in the decisions of *V.M.A.*[24] and *Rzecznik Praw Obywatelskich*,[25] it is unlikely that the required unanimity for the passing of the regulation will be achieved.[26] This means that, at best, an enhanced cooperation may be the outcome – which is far from what the Commission President said she would work for in her Address and also would not fulfil the express LGBTIQ Equality Strategy 2020–2025 of the EU.[27]

Objectively speaking, there is no general 'European Way of Life' when it comes to marriage, and the recognition of families and parent–child

[22] Ibid 22–23. Bold print in the original.

[23] COM(2022) 695 final.

[24] Case C-490/20 *V.M.A. v Stolichna obshtina, rayon 'Pancharevo'* EU:C:2021:1008.

[25] Case C-2/21 *Rzecznik Praw Obywatelskich* EU:C:2022:502.

[26] On this, see also Chapter 2 by Alina Tryfonidou, Chapter 9 by Geoffrey Willems, and Chapter 12 by Nausica Palazzo, as well as the references in n 18, and A. Tryfonidou, 'The ECJ recognises the right of rainbow families to move freely between EU Member States: The V.M.A. ruling' (2022) 47 European Law Review 534; D. Thienpont and G. Willems, 'Le droit à la libre circulation des familles homoparentales consacré par la Cour de justice de l'Union européenne' (2022) 132 Revue trimestrielle des droits de l'homme 925; L. Bracken, 'Recognition of LGBTQI+ parent families across European borders' (2022) 29 Maastricht Journal of European and Comparative Law 399.

[27] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Union of Equality: LGBTIQ Equality Strategy 2020–2025, COM(2020) 698 final.

relationships. On the contrary, these issues have deliberately been turned into a battleground by some politicians. The language used by the latter usually entails claims to 'protect our nation's values' and 'our way of life'.[28] Unsurprisingly, those who have embraced these new family forms likewise demand that *their* values and *their* way of life is accepted and recognised. Achieving political consensus is, therefore, unlikely if not impossible. However, in the past, the same was said about divorce and probably holds true for most 'controversial' family law topics at the time.[29] Future generations will likely shake their heads in disbelief that this has actually been seriously debated.

For the nearer future, the matter will likely continue to lie in the hands of the judiciary and the application of human rights law.[30] In light of the European human rights jurisprudence,[31] it seems fairly obvious that the denial of the existence (and refusal of recognition) of same-sex relationships and same-sex families cannot prevail. Moreover, the EU's LGBTIQ Equality Strategy 2020–2025 at its core aims to ensure that 'everybody in the European Union should be safe and free to be themselves' and thus in reality mandates the recognition of these families.[32] This inevitably creates huge tension within the EU and is a cause for great concern. As the author of this epilogue has written elsewhere:

[28] See the examples cited by Todorova (n 18) and Vaige (n 18).

[29] For a particularly readable and enjoyable account of this in England, see, S. Cretney, *Family Law in the Twentieth Century: A History* (Oxford University Press 2004), particularly the passages on the – then very controversial – Deceased Wife's Sister's Marriage Act 1907, which was followed by protracted debate of what ultimately became the Deceased Brother's Widow's Marriage Act 1921 (41–49).

[30] See, for example, Chapter 9 by Geoffrey Willems, Chapter 10 by Alice Margaria, and Chapter 12 by Nausica Palazzo.

[31] Space precluded an engagement with the ECtHR's case law and even referring the abundance of cases on what the Court calls 'sexual orientation issues'. An overview of the cases can be found on the Court's Factsheet: European Court of Human Rights, Press Unit, Factsheet – Sexual orientation issues (December 2023) <www.echr.coe.int/documents/d/echr/FS_Sexual_orientation_ENG>. Outside of Europe, the jurisprudence is developing along similar lines: see for the USA, *Obergefell v Hodges* (576 U.S. _ (2015)); for South Africa, *Minister of Home Affairs and Another v Fourie and Another; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* [2005] ZACC 19; for Canada, *Reference re Same-Sex Marriage* [2004] 3 S.C.R. 698, 2004 SCC 79; for Taiwan, the *Constitutional Interpretation No. 748*, <https://tapcpr.org/english/statement/2017/11/30/no-748-same-sex-marriage-case>; and for Latin America the ruling by the Inter-American Court of Human Rights, Advisory Opinion (Opinión Consultativa) 24/17 of 24 November 2017 in a case concerning Costa Rica <https://corteidh.or.cr/docs/opiniones/seriea_24_eng.pdf>.

[32] See n 27.

> In the absence of a common 'European way of life' on these issues, sadly the very best one currently can hope for – and even that seems doubtful – is the acceptance or tolerance of other jurisdictions' 'ways of life'. The Gordian knot of course is that both sides of the debate claim this acceptance. As it stands, the sword that is most likely to cut the knot is wielded by the human rights obligations of the European nations, but the danger is that it might cut too deeply for the Union to prevail.[33]

13.4 IS THERE A EUROPEAN FAMILY LAW? OR AN EU FAMILY LAW?

It has been and still is being doubted whether, in the absence of a body with legislative competence in family law (be it a European or EU one), there can actually be such a thing as European or EU family law. Yet this view laboured under the assumption that this family law would have to be embodied in a 'European Family Law Code',[34] that is, comprehensive legislation, to be recognised as such. But why would such a code be required? After all, nobody disputes the existence of European Consumer Law, even though there is no European Consumer Code. Neither does the absence of a specific legislative power for European/EU family law, and consequently family statutes, necessarily preclude the existence of a European Family Law or EU Family Law. Instead, there are bits and pieces of family law on a European level, which either have grown organically (so-called 'Organic European Family Law') as a result of similar national legal developments, or have been created by institutions such as the CJEU and the European Court of Human Rights (ECtHR) (so-called 'Institutional European Family Law').

Organic European/EU Family Law consists of elements of a common family law that have 'grown', that is, developed similarly in the European jurisdictions (if speaking of European Family Law) and/or EU Member States (if speaking of EU Family Law).[35] That, as outlined above, the law of marriage is hugely divergent between jurisdictions does not rule out the existence of other

[33] J. M. Scherpe, 'Marriage and the family', in L. Corrias and R. Tinnevelt (eds), *European Ways of Life: Legal and Philosophical Perspectives* (Edward Elgar Publishing, forthcoming).

[34] Which to Sir Gerald Fitzmaurice, one of the dissenting judges in the ground-breaking decision *Marckx v Belgium* (1979–80) 2 EHRR 14, apparently was something of great concern, when he accused the majority of reading (or rather introducing) 'a whole code of family law into Article 8' of the European Convention on Human Rights. On this, see W. Pintens and J. M. Scherpe, 'The Marckx case: A "whole code of family law"?' in S. Gilmore, J. Herring, and R. Probert (eds), *Landmark Cases in Family Law* (Hart Publishing 2011).

[35] For a more detailed description of Institutional and Organic European Family Law, see J. M. Scherpe, *The Present and Future of European Family Law* (Edward Elgar Publishing 2016) ch 2 and 3.

elements of European Family Law. Moreover, even in the law of marriage, a core of joint elements can be identified (e.g. that a marriage is restricted to two persons; certain prohibited degrees; or that the spouses – at least nominally – are equals) that can be identified as European/EU Family Law.

For the purposes of this volume, and as shown expertly by the preceding chapters, what can be termed 'Institutional European Family Law' and specifically 'Institutional EU Family Law' are of greater relevance. This 'Institutional' Family Law is created through binding family law rules by multilateral agreements or treaties such as the EU Treaties or the European Convention on Human Rights or (as is more often the case) their interpretations by the CJEU or the ECtHR.

As the contributions in this volume have shown, there are undoubtedly growing areas of family law emanating indirectly from EU laws or from CJEU decisions. The driving force behind these is the free movement of persons, the principles of equality and non-discrimination, and the legal competences to regulate cross-border issues through private international law instruments. A typical example for this is the way Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation[36] was applied to same-sex couples. In *Maruko v Versorgungsanstalt der deutschen Bühnen*,[37] the surviving partner of a same-sex registered partnership had been denied a survivor's pension in Germany as the law only extended these benefits to spouses (marriage not being available to same-sex couples at the time). The Court held that this would amount to direct discrimination within the meaning of Council Directive 2000/78/EC, provided that the couples were in comparable situations.[38] Even though the Member States were free to legislate on adult relationships (and especially marriage) in principle, they were obliged to do so without discrimination.[39]

[36] OJ L303/16.

[37] Case C-267/06 *Maruko* EU:C:2008:179. On this, see also G. De Baere and K. Gutman, 'The impact of the European Union and the European Court of Justice on European Family Law' in J. M. Scherpe (ed), *European Family Law Vol. I – The Impact of Institutions and Organisations on European Family Law* (Edward Elgar Publishing 2016) especially 39 ff. See also Chapter 6 by Gunnar Thor Petursson, Xavier Groussot, and Alezini Loxa.

[38] Which they were, according to Verwaltungsgericht München 1.6.2006 – M 2 K 05.1595.

[39] See also, European Network of Legal Experts in the non-discrimination field, C. O'Cinneide, *The Evolution and Impact of the Case-Law of the Court of Justice of the European Union on Directives 2000/43/EC and 2000/78/EC* (European Commission 2012) <www.equalitylaw.eu/downloads/1452-evolution-and-impact-en-final>; and European Network of Legal Experts in the non-discrimination field, K. Liu and C. O'Cinneide, *The Ongoing Evolution of the Case-Law of the Court of Justice of the European Union on Directives 2000/43/EC and 2000/78/EC* (European Commission 2019) <http://5009-the-ongoing-evolution-of-the-case-law-of-the-court-of-justice-of-the-european-union-on-directives-2000-43-ec-and-2000-78-ec-pdf-766-kb>.

In *Römer v Freie und Hansestadt Hamburg*,[40] the Court decided along similar veins holding that receiving a lower supplementary pension benefit because the applicant had been in a registered partnership rather than a marriage was directly discriminatory and, thus, a violation of the Directive. Although pensions and comparable benefits are not what is generally seen as the 'core' of family law, these decisions nevertheless accepted a family form other than marriage, at least for some purposes. Admittedly, this result was only reached because the relationship in question resembled that of a heteronormative marital relationship. While this generally seems to be the approach of EU Law,[41] it is highly questionable whether it still is the appropriate yardstick for family relationships. Nevertheless, this recognition of same-sex relationships can be seen as creating an element of Institutional EU Family Law just as, for example, the decision in *Coman*.[42] None of the decisions mentioned create a right to same-sex marriage nor the necessity for general recognition of such relationships in the EU. Given the legal and institutional constraints, this has never been a possible outcome. However, these decisions establish elements of an EU Family Law, a minimum standard under which the Member States must not fall, as well as a steppingstone towards full(er) recognition of more diverse family forms in general and same-sex relationships and families in particular.

In addition to the EU Institutions, the ECtHR is probably the most potent source for Institutional European Family Law, given that the EU and all Member States are Contracting States of the Convention. Although decisions based on the ECHR often concern the substantive family law of the Contracting State immediately involved, they nevertheless set a minimum standard for all others. The prime example, and arguably the starting point of European Family Law, is the *Marckx* decision of 1979 on the legal status of

[40] Case C-147/08 *Römer* EU:C:2011:286.

[41] On this, see, for example, Chapter 2 by Alina Tryfonidou, Chapter 4 by Ségolène Barbou des Places, Chapter 9 by Geoffrey Willems, Chapter 10 by Alice Margaria, and Chapter 12 by Nausica Palazzo.

[42] Case C-673/16 *Coman and others* EU:C:2018:385. On this case, see, for example, A. Tryfonidou, 'The ECJ recognises the right of same-sex spouses to move freely between EU Member States: The Coman ruling' (2019) European Law Review 663; and D. V. Kochenov and U. Belavusau, 'After the celebration: Marriage equality in EU Law post-Coman in eight questions and some further thoughts' (2020) 27 Maastricht Journal of European and Comparative Law 549 as well as Chapter 7 by Michael Bogdan and Chapter 9 by Geoffrey Willems.

children born out of wedlock.[43] As a result of the decision, which held that these children must be treated equally to those born in marriage, numerous European jurisdictions had to change their family laws.[44]

Another example is the decision of *Christine Goodwin v United Kingdom*, which similarly and powerfully established a minimum standard for all Contracting States, namely that there must be the possibility to change one's legal gender from the one allocated at birth and to marry under that gender.[45] This did not only lead to a string of further cases, each of which clarified the legal position of transgender persons,[46] but also meant that the Contracting States had to adapt their laws in this area.

All of these are just examples, and one could list many more, including parenthood and especially surrogacy,[47] parental responsibility,[48] and the right to know one's origin,[49] of how elements of European Family Law have been created by the ECtHR.

[43] *Marckx v Belgium*, Application no 6833/74.

[44] See, for example, Law Commission of England and Wales, *Illegitimacy* (Law Com No 118, 1982); Scottish Law Commission, *Report on Illegitimacy* (Scot Law Com No 82, 1984); Law Commission, *Illegitimacy (Second Report)* (Law Com No 157, 1986); Hoge Raad case no 463, 181.1980, Nederlands Jurisprudentie 1980, 1460. See also F. Sturm, 'Das Straßburger Marckx-Urteil zum Recht des nichtehelichen Kindes und seine Folgen' (1982) FamRZ - Zeitschrift für das gesamte Familienrecht 1151; M. Salzberg, 'The Marckx case' (1983–1984) 13 Denver Journal for International Law and Policy 283; C. Forder, 'Legal protection under Article 8 ECHR: Marckx and beyond' (1990) 37 Netherlands International Law Review 162.

[45] Application no 28957/95. On this, see, for example, Scherpe (n 35) 11 ff, as well as the contributions in J. M. Scherpe, *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015).

[46] In *Goodwin*, the Court did not stipulate which legal requirements must be fulfilled by the individual for this, since that was not the issue in the case. The question had to, therefore, be dealt with by national legislation (for example, in the UK's case by the Gender Recognition Act 2004 (UK)) and subsequent litigation). See, for example, *L v Lithuania*, Application no 27527/03; *Schlumpf v Switzerland*, Application no 29002/06; *Hämäläinen v Finland*, Application no 37359/09; *YY v Turkey*, Application no 14793/08; *AP, Garçon and Nicot v France*, Application nos 79885/12, 52471/13 and 52596/13; *YT v Bulgaria*, Application no 41701/16; *X and Y v Romania*, Application no 2145/16 and 20607/16; and *AD and others v Georgia*, Application nos 57864/17, 79087/17 and 55353/19.

[47] In the field of surrogacy and parenthood, for example, see Chapter 10 by Alice Margaria. For a wider analysis of surrogacy laws, see, for example, J. M. Scherpe, C. Fenton-Glynn, and T. Kaan (eds), *Eastern and Western Perspectives on Surrogacy* (Intersentia 2019); N. Espejo-Yaksic, C. Fenton-Glynn, and J. M. Scherpe (eds), *Surrogacy in Latin America* (Intersentia 2023).

[48] For example, *Zaunegger v Germany*, Application no 22028/04 (2019) FamRZ - Zeitschrift für das gesamte Familienrecht 108, with notes by D. Henrich and J. M. Scherpe. See also the later decision in *Sporer v Austria*, Application no 35637/03.

[49] For example, *Odièvre v France*, Application no 42326/98, and *Godelli v Italy*, Application no 33783/09.

13.5 CONCLUSION: AN EU/EUROPEAN FAMILY LAW FOR EUROPEAN FAMILIES?

A fragmentary European and EU Family Law has begun to develop, creating elements and pockets of family law in very diverse and often unconnected areas. At the heart of these developments, especially in the EU context, there lies the central question which this volume addresses: What is a family?

'Family' means different things to different people, and is also likely to mean different things in different legal and social contexts. But that families, whatever form they take, are part of the basic European fabric cannot be denied. It is, therefore, not surprising that organic and institutional elements of European Family Law have begun and continue to grow. For now, most of them are separate little islands; but in the distant future they may grow together and form a more coherent and more recognisable body of European and EU Family Law.

Ultimately, it is to be hoped (to paraphrase the abovementioned statement by Commission President Ursula von der Leyen) that at least in Europe, if you are a family in one country, you are family in every country. Nobody's family is any less a family just because somebody else's family also is a family in the eyes of the law. Because love is love, and caring is caring.