1

Introduction

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1.1 THE 'FAMILY' AND THE LAW

The strong personal and societal relevance of 'The Family' has led to an iconic status in popular and 'official' discourses'.[1] On an individual plane, for most people, their family is the most important aspect of their life.[2] The questions that the interaction of law and the family give rise to are, thus, of enormous importance to the society as well as to the individual.[3] Considering two or more persons as constituting a family opens for them the door to a host of significant rights and privileges. Those groups of persons that have been denied the status of a family are not only refused the same rights and privileges but often face an additional stigma that is attached to relationships which have not received the stamp of approval of a 'familial relationship'.

Yet, despite its importance, there is no official or universal definition for the concept of 'family' in either its social or legal dimensions. In both contexts, variability and indeterminacy are its main characteristics.[4] The lack of an overarching definition reflecting a 'readily available and identifiable social construction of "family" to underpin' the law's understanding of this term has had crucial repercussions for the development of family law.[5] As noted by Herring, 'family' is presently a term that is 'of limited legal significance',[6] as it

[1] A. Diduck, *Law's Families* (Cambridge University Press 2003) 1.
[2] J. Bernardes, *Family Studies: An Introduction* (Routledge 1997) 1.
[3] J. Herring, *Family Law* (Pearson 2021) 1.
[4] J. Herring, R. Probert, and S. Gilmore, *Great Debates in Family Law* (Macmillan 2015), ch 1.
[5] A. Brown, *What Is the Family of Law? The Influence of the Nuclear Family* (Hart Publishing 2019) 21.
[6] Herring (n 3) 3.

is rarely used in national and international legal instruments.[7] In most instances, legal texts employ terms that denote a familial relationship (e.g. 'marriage', 'parent', 'child', 'descendant'), to determine whether individuals can derive rights or entitlements as a result of the relationship they maintain with another person. The courts are, therefore, more concerned with the interpretation of these terms than with determining the meaning of the notion of 'family'. Nonetheless, this does not detract from the continuing importance of the notion of 'family', which still determines the circle of the bearers of various rights: to this day, in many instances persons acquire and maintain certain rights only through their status as a family member of someone else.

Due to the fact that the social and legal understandings of the 'family' are directly influenced by the moral, religious, social, and political factors prevailing in a specific society, and given that these factors vary among different societies, there is great diversity in the family law systems around the world. This diversity is prevalent even within continents and regions which are considered rather homogeneous in political and social terms.[8] In fact, it is, exactly, because of this 'native character' that is imbued in the notion of the 'family' and – by extension – family law, that the latter has been considered an unsuitable subject for unification.[9]

Because the understanding of the 'family' is deeply influenced by the moral, religious, social, and political factors prevailing in each society, family law needs to keep abreast of the changes that take place with regard to these factors. Societal changes and medical advances affect the characteristics of today's families as well as put existing family law structures under considerable pressure. As noted by Scherpe:

> [t]oday we live in a world where marriages often end in divorce, where an increasing number of children grow up in families that do not conform to the 'traditional' view of what a family is; where categories of gender are not as fixed as they used to be; where persons legally classified as men can give birth to

[7] An exception to this is Article 8 of the European Convention on Human Rights (ECHR) which grants to individuals, inter alia, the right to respect for family life. In cases where this aspect of Article 8 ECHR is relied on, the European Court of Human Rights (ECtHR) is required to determine whether two or more persons enjoy 'family life' which means, essentially, whether they constitute a family, to be able to be covered by the protection offered by this provision.

[8] An obvious example that springs to mind here is the comparison in their approach towards same-sex marriage between Canada and the United States as well as the different approaches to this matter that could be observed within the United States, prior to the ruling in *Obergefell v Hodges* (576 U.S. _ (2015)).

[9] W. Müller-Freienfels, 'The unification of family law' (1968) 16 The American Journal of Comparative Law 175.

children; where some persons are not legally classified as male or female; where children are not necessarily genetically related to (all) their legal parents and indeed may have three genetic parents, and even more social parents.[10]

Yet, as rightly explained by another commentator, '[t]he concepts of the law and the family do not seamlessly interact with one another',[11] as 'law is a clumsy tool for managing complex family problems'.[12] Accordingly, one of the greatest challenges for lawmakers is to recognise that family law needs to have moveable boundaries and that its goals should change over time to reflect and accommodate the lived realities of the families that it regulates. This creates significant tension by definition as it clashes with 'the law's desire for clarity and certainty'.[13]

Family law and the regulation of matters concerning families often have an impact on the human rights of individuals. While the legislator can and should take into account the moral, religious, social, and political factors prevailing in the society where a new piece of legislation affecting family relationships will apply, it must make sure that this will not result in a majority trumping the human rights of individuals who belong to vulnerable groups such as the members – or persons associated with members – of sexual or other minorities. In particular, as the European Court of Human Rights (ECtHR) has recently pointed out in a ruling concerning the legal recognition of same-sex relationships, '[t]he Court has consistently declined to endorse policies and decisions which embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority'.[14] This demonstrates that the signatories to the European Convention on Human Rights (ECHR), which include all European Union (EU) Member States, are no longer bound by a mere negative obligation to refrain from interfering in the family lives of their citizens without justification. They are also bound by a positive obligation to respect and protect the family rights of individuals even if to do so requires them to ignore ingrained prejudice and stereotypical thinking on the part of the majority population.[15] Hence, the rights of individuals

[10] J. M. Scherpe, 'Breaking the existing paradigms of parent–child relationships' in G. Douglas, M. Murch, and V. Stephens (eds), *International and National Perspectives on Child and Family Law: Essays in Honour of Nigel Lowe* (Intersentia 2018) 344.

[11] Brown (n 5) 3.

[12] F. Kaganas and S. Day Sclater, 'Contact disputes: Narrative constructions of "good" parents' (2004) 12 Feminist Legal Studies 1, 6.

[13] Brown (n 5) 5.

[14] *Maymulakhin and Markiv v Ukraine*, Application no 75135/14, para 62.

[15] For an analysis of the positive obligations that the ECHR imposes on its signatory States with regard to, inter alia, the family rights that sexual minorities enjoy, see A. Tryfonidou, 'Positive state obligations under European law: A tool for achieving substantive equality for sexual minorities in Europe' (2020) 13 Erasmus Law Review 98.

that belong to families that do not conform to what is perceived to be the 'traditional family' in a certain society can no longer be side-stepped or, worse, violated, merely because the majority of the population ignores or condemns such families.

Having made these preliminary points regarding the concept of 'family' and its position in the law, we shall now proceed to place this discussion in the particular legal context with which this volume is concerned, namely, the EU legal framework.

1.2 THE 'FAMILY' UNDER EU LAW

The individual has been subject to extensive regulation in EU law. Initially, the focus was on the individual as the migrant economic actor,[16] since 1993 on the individual as the Union citizen,[17] and, more recently, on the individual as simply the bearer and enforcer of rights stemming directly from EU law. Nonetheless, as Scherpe reminds us in the Epilogue in this volume, the EU still does not have legislative competence in the area of family law, and it probably never will. The absence of EU legislative competence in the substantive[18] family law field has resulted in the relegation of the regulation of family relationships to the national level; however, national family laws need to be interpreted and applied in line with EU law in situations that fall within the scope of the latter.[19] The EU has, therefore, only been concerned with regulating family relationships in situations that come within the scope of EU

[16] See, for instance, the essays in F. G. Jacobs (ed), *European Law and the Individual* (North Holland 1976).

[17] There is a very long list of books and articles focusing on the status of a Union citizen. See, inter alia, S. O'Leary, *The Evolving Concept of Community Citizenship: From the Free Movement of Persons to Union Citizenship* (Kluwer 1996); the essays in D. Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017); F. Goudappel, *The Effects of EU Citizenship* (T. M. C. Asser Press 2010); E. Guild, C. J. Gortázar Rotaeche, and D. Kostakopoulou (eds), *The Reconceptualization of European Union Citizenship* (Brill Nijhoff 2014); J. Shaw, *The Transformation of Citizenship in the European Union* (Cambridge University Press 2007); H. Van Eijken, *EU Citizenship and the Constitutionalisation of the European Union* (Europa Law Publishing 2015).

[18] As opposed to the procedural law field. It is well established that the Union does not have competence in the (substantive) family law field. However, Article 81(3) of the Treaty on the Functioning of the EU gives to the EU the competence to adopt measures 'concerning family law with cross-border implications'. This provision has been used as a legal base for a long list of private international family law measures. See C. Honorati and M. C. Baruffi, *EU Private International Law in Family Matters: Legislation and CJEU Case Law* (Intersentia 2022).

[19] This has been reiterated by the Court of Justice of the EU (CJEU) in a number of its judgments. See, inter alia, Case C-267/12 *Hay* EU:C:2013:823, para 26; Case C-147/08 *Römer* EU:C:2011:286, para 38; and, most prominently, in Case C-673/16 *Coman and others*

law and where some other issue which falls within EU competence (e.g. in the areas of free movement, anti-discrimination, migration, and asylum) is predominant.

Thus, the notion of 'family' assumes relevance for EU law only as an auxiliary of the rights that Union citizens or – as explained by Öberg in Chapter 5 in this volume – third-country nationals (TCNs) derive from EU law. After all, there is no 'EU family law'.[20] Ultimately, it is the individual legal instruments adopted by the EU legislature in different policy areas (e.g. EU free movement law or anti-discrimination law) as well as the jurisprudence of the Court of Justice of the EU (CJEU) in those areas that demarcate the contours of the concept of 'family' (or, mainly, of related concepts) for the purposes of EU law. The legal understanding of 'family' has, thus, not been constructed in a systematic, structured, fashion. Rather, in EU law the notion 'family' has developed on an ad hoc basis determined by the main aims of the individual legislative instruments that (often implicitly) take this notion as a point of reference, and by the range of cases that have happened to reach the Court. As explained by Barbou des Places in this volume, there is, therefore, not a uniform category or definition of 'family' in EU legal norms but rather different conceptions of the 'family' for the purposes of different EU policy areas.

In recent years, increasing focus has been directed towards the way EU law addresses diverse family constellations in its laws and policies and how it manages the interaction of different national family law regimes in situations which fall within the EU's scope of application. In particular, there is significant uncertainty and controversy concerning the extent of the influence that EU law can – and should – have on the regulation of family-related matters, especially with respect to non-traditional family constellations that have often been ignored or condemned by the law. A plethora of complicated questions involving family-related matters have reached the CJEU concerning issues such as abortion, same-sex relationships, and surrogacy.[21] This has meant that the Court has been faced with the unenviable task of needing to carve out a

EU:C:2018:385, paras 37–38, and Case C-490/20 *V.M.A. v Stolichna obshtina, rayon 'Pancharevo'* EU:C:2021:1008, para 52.

[20] For a detailed consideration of the long-term prospects for the development of EU family law, see C. McGlynn, *Families and the European Union: Law, Politics and Pluralism* (Cambridge University Press 2006), ch 7.

[21] For an analysis, see, inter alia, N. Koffeman, *Morally Sensitive Issues and Cross-Border Movement in the EU: The Cases of Reproductive Matters and Legal Recognition of Same-Sex Relationships* (Intersentia 2015); F. Fabbrini, *Fundamental Rights in Europe: Challenges and Transformations in Comparative Perspectives* (Oxford University Press 2014), ch 5; A. Tryfonidou, 'Surrogacy in the ECHR and the European institutions' in K. Trimmings,

solution that can be equally welcomed – or, more accurately, tolerated – by all Member States. Although, as argued by Tryfonidou in this volume (see Chapter 2), EU law now recognises more family forms as 'family' than it did in the 1950s and 1960s, the influence of the nuclear family model[22] is still prevalent and thus, to this day, EU law does not sufficiently correspond to the individual and societal demands of contemporary family life as it continues to conceptualise all families through the prism of the nuclear family.[23]

It is of course true that challenges to the Court's upholding of the traditional nuclear family ideal have emerged in recent years with the adoption of the EU Charter of Fundamental Rights (EUCFR or 'the Charter')[24] and the case law of the CJEU. More specifically, recent rulings of the latter, such as *Coman* (2018)[25] and *V.M.A.* (2021)[26] – which are extensively analysed in this volume by Willems (Chapter 9) and Bogdan (Chapter 7) – confirm the path towards a more liberal view of the 'family' in the EU. However, the steps on this path have been taken rather diffidently. For instance, although the CJEU recognised in *Coman* that the term 'spouse' includes, for the purposes of Directive 2004/38,[27] the same-sex spouse of a Union citizen who has exercised free movement rights, it has emphasised throughout the judgment

S. Shakargy, and C. Achmad (eds), *Research Handbook on Surrogacy and the Law* (Edward Elgar Publishing 2024).

[22] For an analysis of the historical and philosophical underpinnings of the nuclear family model, see Brown (n 5), ch 2.

[23] For similar arguments, see Brown (n 5) 41–43; McGlynn (n 20); C. McGlynn, 'The Europeanisation of family law' (2001) 13 Child and Family Law Quarterly 35, 47; L. Woods, 'Family rights in the EU – Disadvantaging the disadvantaged?' (1999) 11 Child and Family Law Quarterly 17.

[24] Charter of Fundamental Rights of the European Union [2012] OJ C 326/291.

[25] See n 19. For an analysis, see, inter alia, J. J. Rijpma, 'You gotta let love move: ECJ 5 June 2018, Case C-673/16, *Coman, Hamilton, Accept v. Inspectoratul General pentru Imigrări*' (2019) 15 European Constitutional Law Review 324; 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; 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.

[26] See n 19. For an analysis, see, inter alia, 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] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77.

that the cross-border recognition of (same-sex) marriages is required by EU law *only* for the purpose of granting EU family reunification rights to Union citizens who move. This means that once a married same-sex couple has established residency in the receiving Member State, EU law currently leaves them at the mercy of national law. Similarly, in *V.M.A.*, the CJEU held that the Member States are required to recognise the parenthood of the children of same-sex couples as established in another EU Member State, but this obligation is only imposed for the purpose of enabling Union citizens to exercise their free movement rights.

As noted by Petursson, Groussot, and Loxa in their chapter in this volume, CJEU case law, such as *Ruiz Zambrano*[28] and *Carpenter*,[29] provides evidence of the Court's 'timid use' of the provisions of the EUCFR to advance the protection of family life[30] in situations falling within the scope of EU law. The Court prefers to conclude that there is a violation of provisions within one of the 'core' policy areas of EU law (such as free movement, Union citizenship, or anti-discrimination law), rather than to establish a violation of fundamental human rights stemming from the Charter. If at all,[31] the Charter is usually only examined as a side issue forming part of the justification assessment at the end of the judgment. Yet, there is a silver lining in that. As argued by Albors-Llorens in her chapter in this volume, the principle of effective judicial protection laid down in Article 47 of the Charter has been effectively used by the CJEU in its case law involving the enforcement of the guarantees offered by EU law to Union citizens thereby achieving a higher standard of protection.

The above paragraphs demonstrate that when the CJEU has chosen to depart from the traditional nuclear family model, it has been anxious to emphasise the lack of EU competence – and the deference it shows to Member States – in the family law field. Being wary of possible accusations of exceeding the limits to its jurisdiction and of imposing its own views in relation to an area that is considered so close to the heart of the Member States and in which the latter zealously guard their policy autonomy, the CJEU has ensured that in situations which do not fall within the scope of EU law, Member States remain free to determine what types of relationship qualify as

[28] Case C-34/09 *Ruiz Zambrano* EU:C:2011:124.

[29] Case C-60/00 *Carpenter* EU:C:2002:434.

[30] For an analysis of the approach to the interpretation of the right to family life under EU law, see the essays in M. González Pascual and A. Torres Pérez (eds), *The Right to Family Life in the European Union* (Routledge 2018).

[31] In *Ruiz Zambrano* (n 28), the question of compliance with fundamental human rights was not examined at all.

familial ones. In turn, this means that the Member States' family laws remain widely divergent, as the issues they touch upon reflect historically, culturally, and ethically distinctive understandings of family composition and family life. This can be problematic, especially when, as argued by Lamont in this volume (Chapter 11), these differences are ignored by the EU legislature when it takes action to respond to problems in the family law field which have emerged or have become exacerbated as a result of the process of EU integration. Although the finding of a common EU approach is certainly difficult, it is nonetheless imperative due to the close connection of family matters with a number of core EU policies.

The same deference that has been exercised by the EU institutions and judiciary has, indeed, been shown by other international or regional organisations and courts when faced with the need to define the notion of 'family'. The ECtHR, for example, has recognised in its case law that same-sex couples with or without children can enjoy 'family life' and, thus, constitute a family.[32] Although this court has confirmed in its recent case law that *all* signatory States to the ECHR have a positive obligation stemming from Article 8 ECHR to introduce a status through which same-sex relationships will be legally recognised, it has nonetheless refrained from touching the hot potato of same-sex marriage. Instead, the ECtHR has ruled that under the current circumstances, the ECHR does not impose an obligation on States to introduce same-sex marriage in their territory.[33] Similarly, as is seen in Chapter 10 by Margaria in this volume, the ECtHR has ruled that the ECHR signatory States are obliged, when certain conditions are satisfied, to recognise the parent–child relationship between surrogate-born children and their intended parents as legally established in another country. Yet the same court has completely refrained from ruling on whether States should, in the first place, allow surrogacy in their territory and, if yes, how they should regulate it, given that it is a very controversial and, thus, delicate issue that falls squarely within the domain of national family law.

Accordingly, as argued by Archard in this volume (Chapter 3), there appears to be a general acknowledgement that different societies define what counts as a family and its members in different ways, and this is, to a great extent, respected by international and supranational organisations, including the EU. Nonetheless, as Palazzo explains in Chapter 12, recent developments

[32] *Schalk and Kopf v Austria*, Application no 30141/04, para 94; and *Gas and Dubois v France*, Application no 25951/07, para 32.

[33] *Oliari and Others v Italy*, Application nos 18766/11 and 36030/11; *Fedotova and Others v Russia*, Application nos 40792/10, 30538/14, and 43439/14; *Maymulakhin and Markiv v Ukraine* (n 14).

allow us to be hopeful that the constitutional relevance of the family can be increased in the EU in ways that could hardly have been predicted in the past, specifically by starting to include non-traditional families within the controversial area of the EU's common values. Hence, it is important to remember that although the EU does not have the competence to promulgate legislation in the substantive family law field and thus to harmonise the substantive family laws of the Member States, it nonetheless plays an important role in influencing the family laws and policies of the Member States. This is due to the fact that the instances in which the Union, mostly through its judiciary, will be called to take a stance on politically charged and controversial questions regarding familial ties and relationships are bound to increase, along with the expansion of the scope of application of EU law.

1.3 OVERVIEW OF THE BOOK

This edited volume results partly from the workshop 'The Family in EU Law', held on 1 and 2 July 2021, which explored how a family – a traditionally private-law governed institution – functions in the EU's supranational context and interacts with different legal regimes. This topic was first systematically explored by Clare McGlynn in her groundbreaking book *Families and the European Union* which was published in 2006.[34] As explained by Scherpe in the Epilogue of this volume, 'Much has happened since McGlynn's 2006 book, but some things have not changed.' The aim of this volume, therefore, is to provide an updated and comprehensive account of the concept of 'family' in EU law and its role in regulating relationship and shaping policies in Europe from the perspective of various legal and non-legal disciplines – philosophy, EU law, private international law, migration law, constitutional law, human rights law, comparative family law, and social anthropology. The result is an exciting mix of doctrinal and theoretical approaches which uncover the multitude of preconditions and determinants for family life under EU law. It must be acknowledged that the book does not – and cannot – exhaustively consider the role of the family in the EU nor does it attempt to offer a conclusive answer to the question of what constitutes a family under EU law. Nonetheless, we hope that the book will help stimulate thinking around the definition and role of one of the most fascinating, dynamic, and multifaceted concepts in contemporary national, European, and international law.

[34] McGlynn (n 20).

The volume explores the family in EU law from four different angles. The first part of the book (Chapters 2–5) considers the philosophical and theoretical foundations of the family in law in general, and EU law in particular, including the definition of the family under EU law. The second part of the book (Chapters 6–8) provides an overview of the rights conferred upon the family by Union law and assesses whether these cater to the needs of all families (whether these are recognised as 'families' for the purposes of EU law or not). The third part of the book (Chapters 9 and 10) examines the EU family from the perspective of family diversity in comparison with the ECHR. Finally, the fourth part of the book (Chapters 11 and 12) offers insights into how EU law deals with some situations of crisis that are faced by families in the EU.

Part I of the volume opens with Chapter 2 by Alina Tryfonidou, which explores the questions of what is a 'family' in EU law and whether EU policies sufficiently address family diversity and its consequences. The chapter departs from the premise that the prevalence of the nuclear family model has traditionally meant that the only valid form of family in EU law was one consisting of an adult man and an adult woman who live together in a single-state context and produce their own biological children. This model is, also, based on the sexual division of labour: the man is the main breadwinner, whilst the woman is the homemaker. Nonetheless, in recent years, there is growing evidence of diversity in family forms. Moreover, there is an increasing departure from the traditional sexual division of labour. Although many EU Member States are already acknowledging this changing landscape of family life in their law and policy, the important question – for the purposes of this book – is whether the EU has been influenced by this: does EU law now sufficiently address family diversity and its consequences? This is the main question that is analysed in this chapter by examining the concept of 'family' employed across a spectrum of fields of substantive EU law.

Chapter 3 by David Archard explores, again, the notion of 'family', albeit from a philosophical perspective. Archard's point of departure is that EU family law recognises that there is such a thing as the family and that it does merit special legal protection. At the same time, there is an acknowledgment that different societies define what counts as a family, and its members, in different ways. He explains that the changes in family forms over the last hundred years have led some to argue 'the family' no longer exists, and, moreover, that it is not special. Archard, however, reviews and criticises those arguments, demonstrating that there can be a single concept of 'the family' and that the diversity of whatever falls under the concept does not of itself invalidate the continued usage of 'family' as a concept. The chapter argues

that giving a special legal status to the family requires being satisfactorily able to define what it is, and offers a defence of a 'functional' definition. Archard then considers ways in which the family – as defined – might be thought uniquely valuable, critically reviewing appeals to the goods it provides and emphasising the key public good of families in rearing children. Archard's conclusion is that the probable impossibility of unifying EU family law does not mean that it is inconsistent to argue that a single concept of family encompasses many different national forms and that the family, in its diversity, continues to merit a special legal status.

In Chapter 4, Ségolène Barbou des Places, too, focuses on an exploration of the definition of the notion of 'family' but from an EU law perspective. The chapter first acknowledges the variable geometry of the family, and the absence of a uniform category of 'family' in EU legal norms. The chapter then shows that, despite the fragmentation of sources and the modulation of family circles, the way in which the EU characterises a person as a 'family member' obeys a form of logic and expresses a certain rationality. Borrowing from the work of Morgan[35] and his notion of 'doing family', the chapter demonstrates that in addition to the de jure family members, other persons are counted as family members on the basis of them 'behaving' like family members. Barbou des Places concludes that 'family members' is a defined category of EU law: it designates the groups of people who are assumed to perform – or asked to prove that they do perform – different functions like education, care, protection, and socialisation. It is subsequently emphasised that these roles are central because they contribute to a broader ambition, namely, participating in the cohesion of the whole of European society.

Part I of the volume is rounded off by Chapter 5 by Marja-Liisa Öberg, which takes as its point of departure the EU's close cooperation with third countries, especially in the EU's neighbourhood, which has erased a number of perceived boundaries between the EU and non-Member States. Whereas within the EU, family members are largely considered as natural beneficiaries of the free movement of persons with ensuing residence and social rights, it is less clear whether the same undisputed status of a family also applies beyond the EU's borders. The EU has concluded a number of association agreements with countries in its neighbourhood which comprise, to varying degrees, access to the EU's internal market including the free movement of workers. The *Polydor* doctrine of the CJEU has, however, established that similarly worded provisions in the EU Treaties and cooperation agreements concluded with third countries do not guarantee identical interpretation. With a focus on

[35] D. H. J. Morgan, *Family Connections* (Polity Press 1996).

Turkey, the European Economic Area, and the United Kingdom, the chapter analyses the conception of family and related rights in the EU's cooperation instruments, with an aim to establish to what extent non-EU families can be considered 'EU families'.

Part II of the book comprises three chapters, which focus on the different rights that families enjoy under EU law and their enforcement.

Chapter 6 by Xavier Groussot, Gunnar Thor Petursson, and Alezini Loxa begins by explaining that family rights have been protected under EU law long before the adoption of the Charter. In particular, the chapter argues that the CJEU consolidated the protection of family life through a free movement rationale, guided by the need to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty. The chapter then focuses on investigating how family rights are protected under EU law *today*. The authors first analyse the horizontal provisions of the Charter and how they can affect both the extent of protection and the substance of family rights. Subsequently, they look at how family rights have appeared in the Court's case law. Finally, the authors consider the interaction of family rights with the EU citizenship provisions. Exploring the connection between fundamental rights, free movement, and EU citizenship, the chapter concludes by signalling the timid use of Charter provisions to advance the protection of family life.

Chapter 7 by Michael Bogdan offers an elaborate analysis of three recent cases by the CJEU in the context of EU free movement law. The cases deal with the questions of whether and to what extent the EU Member States are obliged to accept a family status created abroad even when it is incompatible with their own family law (such as same-sex marriage and same-sex parenthood) or is a status totally unknown in their legal system (such as the Islamic *kafala*). Bogdan's argument is that the main approach chosen by the CJEU regarding same-sex marriage and same-sex parenthood created abroad, obliging the Member States to recognise them *for the purpose of free movement only*, may give rise to practical problems.

In Chapter 8, Albertina Albors-Llorens looks at the enforcement of the rights of free movement and residence provided by the Citizens' Rights Directive (Directive 2004/38) to Union citizens and their family members. In particular, the chapter examines the enforcement of these rights by members of the 'family' of the EU citizen – both 'core' members and 'other' family members according to the distinction created by the Directive under Articles 2(2) and 3(2), respectively – and, in particular, at how the CJEU has extended the application of the principle of effective judicial protection to these situations. This principle has been present in EU law since the early case law of the CJEU and is now entrenched in primary EU legislation in

Article 47 of the Charter but, in most areas of EU law, it has been interpreted in relation to the enforcement of substantive EU rights by the primary holders of these rights, that is, Union citizens. Albors-Llorens explains that Directive 2004/38 adds a different dimension to this by regulating the conditions that apply to the substantive rights that their family members *derive* from EU citizens and correspondingly introducing the necessity of effective legal protection of these rights. In a collection that seeks to explore the role of the 'family' in EU Law, this chapter specifically seeks to contribute an examination of how the guarantee of effective legal protection has taken hold in the interpretation of the provisions of the Directive as applied to family members.

Part III of the book examines questions of family diversity in EU law and the ECHR.

It begins with Chapter 9 by Geoffrey Willems offering an elaborate analysis of the position of same-sex couples and homoparental families under the ECHR and EU law. Addressing issues such as marriage and partnerships, parenthood and parental responsibility, but also social benefits, family reunification, and the legal recognition of family ties established abroad, the chapter takes the view that the recognition and protection of family relationships can follow multiple paths and that the ECtHR case law and EU law are mutually reinforcing for the benefit of the rights of same-sex couples and their children. It also acknowledges that subsidiarity considerations lead European bodies to favour a compromise approach, refraining from forcing states to abandon their traditional conception of family law's fundamental institutions: marriage and parenthood. The chapter, nevertheless, suggests that, at some point in the future, the increased visibility and legitimacy of same-sex couples and homoparental families should ultimately lead to imposing a European and inclusive understanding of these institutions.

In Chapter 10, Alice Margaria explores the approach of the European supranational courts towards one of the most controversial issues in the area of family law: surrogacy. The chapter focuses on the surrogacy case law of the CJEU and ECtHR to unravel the understanding of motherhood endorsed by the two judiciaries. It shows that legal motherhood continues to be tied to gestation and birth, thus placing intended mothers in a precarious legal position, especially compared to intended (genetic) fathers. As part of its effort to explain this gender imbalance, the chapter uses the experience of surrogacy as a window for a broader discussion on the gender of legal fictions governing the attribution of parenthood. Whilst the rule *mater semper certa est* remains one of the most immutable facts of European family laws, legal systems have generally demonstrated a certain flexibility and attention to context in determining legal fatherhood, at times departing from the marital presumption.

Margaria argues that this different attitude reflects a long-standing socio-legal fear of disaggregating motherhood, not only from gestation but also from care, in line with the gendered and higher expectations that legal systems have towards legal mothers if compared to legal fathers.

Part IV of the volume, which comprises two chapters, is devoted to a consideration of how EU law deals with situations of crisis faced by families.

In Chapter 11, Ruth Lamont explores the use by the Member States, of the EU private international family law rules designed to provide for the uniform assumption of jurisdiction over cross-border disputes, in the protection of children with links abroad from abuse or neglect by their family through the national child protection system. These measures include rules governing the assumption of jurisdiction over the parental responsibility of a child, including both private and public law measures. The chapter argues that the abused and neglected child was not a central focus when regulating the cross-border family and, as a consequence, legal borders between Member States' family law systems retain considerable significance for these children. Whilst each Member State has provision in place for public law child protection measures, the methods and approach adopted vary significantly between legal systems. The substantive outcomes for children in managing the risk posed by abuse may, thus, be significantly different, but the EU's private international family law rules are designed to obscure and ignore these differences and this has presented difficulties in supporting cross-national cooperation over the protection of a child. The political nature of these decisions has meant that the focus on the welfare of the child may consequently be lost in the management of public law proceedings between Member States.

Chapter 12 by Nausica Palazzo focuses on the role of the family in European culture wars. It analyses the ideological usage of the family by illiberal actors in Poland and Hungary and the EU's reaction to this kind of illiberal erosion. The chapter argues that recent developments seem to hold potential to increase the constitutional relevance of the family in the EU in ways that could hardly be predicted, by beginning to attract the (LGBTQ) family in the controversial area of the EU's common values. Palazzo claims that looking at the role of family in similar European culture wars and how it reflects on the constitutional relevance of the family in EU law is essential for understanding the contemporary movement.

The book concludes with an Epilogue (Chapter 13), written by Jens M. Scherpe. Using the changing legal bases for divorce, this chapter first canvasses how the traditional dividing lines between the so-called 'progressive North', consisting of predominantly protestant jurisdictions, and the 'conservative South' with predominantly catholic populations have faded away in

family law – only to be replaced by a new dividing line between Eastern and Western European jurisdictions regarding the recognition of same-sex relationships and same-sex families. It then discusses whether 'the family' is part of the 'European Way of Life', proclaimed by the European Commission – headed by President Ursula von der Leyen – as one of the policy and strategy aims the EU should promote. However, the understandings of what a 'family' is still differ greatly within Europe, especially with regard to same-sex families, creating significant tensions. These tensions manifest, in particular, when the CJEU or the ECtHR pass down decisions which mandate the recognition of family forms, at least on specific issues, creating elements of an institutional European Family Law. The chapter concludes by expressing the hope that in the long term the tensions between different conceptions of family can be resolved within the existing frameworks in Europe and that a family in one country will also be a family in all other European countries.