THE CONCEPT OF “FAMILY” IN COMMUNITY LAW AND POLICY

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Although neither the Treaty on European Union (“TEU”) nor the Treaty establishing the European Community (“ECT”) do not empower the European Union to develop a policy in relation to the “family”, Community law and policy touch upon family matters either via international conventions in the field of human rights and fundamental freedoms (section 2), or through the adoption of measures that affect the family or family members (section 3).

1 In Article 63(2) of the Treaty establishing the European Community (the “ECT”) reference is made to “family reunification” in the context of measures on immigration policy; in terms of Article 67(5) ECT, the Council can adopt, following the co-decision procedure, measures provided for in Article 65 (in the field of judicial cooperation in civil matters having cross-border implications), with the exception of aspects relating to family law.
The objective of this paper is to give an overview of the *acquis communautaire* relating to the family and to assess how the (nuclear) family is conceived in these legislative and policy measures.

It should be made clear from the outset that marriage as a foundation of a family and aspects relating to the development, dissolution and reconfiguration of a family will be looked at from a civil law perspective. Although some Member States of the European Union attribute civil effects to canonical marriages and to decisions of ecclesiastical authorities and tribunals on those marriages, this is not the rule and the premise in this paper is that there is a need, or at least, a demand for the legal recognition of forms of civil union other than marriage within the Christian (or other religious) meaning.

1. The “Nuclear” Family

According to the Universal Declaration of Human Rights, the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

The traditional European model of the so-called “nuclear family” or “cornflake family” (as distinct from the extended family) can be described a household consisting of two married, heterosexual parents and their legal children (siblings). Faced with the social, cultural and even economic changes in modern society, one can hardly argue that the nuclear family as described above can still be regarded as the norm, in the sense that intrinsic values and rights and obligations attributed to family members only apply to such nuclear family. For instance, it is generally accepted that discrimination in treatment of “legitimate” and “illegitimate” children is not justified. The number of non-marital families is on the rise, single-parent households are increasingly common and families headed by same-sex couples do not stir up as much controversy as they used to do some decennia ago, at least in certain countries.

2. The Protection of the “Family” by the European Convention for the Protection of Human Rights and Fundamental Freedoms

Although a number of international conventions on human rights and fundamental freedoms contain provisions in connection with the family and family life, these conventions do not define the term “family”. The application and interpretation of “family rights” show that the concept of “family” is not a static one and that the scope of application of these rights may be extended in view of social, legal, medical and scientific developments. It emerges from the case law of the European Court for Human Rights (the “ECHR”) that “family rights” are

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3 Article 16 of the Universal Declaration of Human Right reads:

“(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
(2) Marriage shall be entered into only with the free and full consent of the intending spouses.
(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”
to be assessed in the light of present-day conditions\textsuperscript{4}, and that the protection conferred by the Council of Europe’s Convention for the Protection of Human Rights and Fundamental Freedoms does not exclusively concern the traditional nuclear family as defined above.

In terms of Community law and policy, the Convention for the Protection of Human Rights and Fundamental Freedoms (the “Convention”) is probably the most significant amongst the international human rights instruments. Pursuant to the Treaty establishing the European Union, the European Union (the “EU”) will respect fundamental rights, as guaranteed by the Convention and as they result from the constitutional traditions common to the Member States, as general principles of Community law.\textsuperscript{5} The Court of Justice of the European Communities has explicitly referred to ECHR case law in certain cases touching upon human rights.

Some examples (by no means intended as an exhaustive overview) will therefore be given in this section of cases in which the ECHR has interpreted Articles 8 and 12 (in some instances, in combination with Article 14) of the Convention. It should be borne in mind though that there are several international instruments which specifically concern children\textsuperscript{6}, affiliation\textsuperscript{7} and parental responsibilities.\textsuperscript{8}

\section*{2.1 The Right to Found a Family}

The Convention in Article 12 (Right to marry) proclaims that “Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.” The exercise of this right gives rise to personal, social and legal consequences. It is subject to the national laws of the contracting States, but the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired.\textsuperscript{9} In the Council of Europe’s member States, these limitations appear as conditions and are embodied in procedural or substantive rules. The former relate mainly to publicity and the solemnisation of marriage, while the latter relate primarily to capacity, consent and certain impediments.\textsuperscript{10}

\subsection*{2.1.1 Marriage as a Condition to the Right to Found a Family?}

\emph{Prima facie}, it would appear that in Article 12 of the Convention a link is made between the right to marry and the right to found a family. Clearly, if “marriage” in the traditional legal sense would be the exclusive consideration in the definition of family, such definition would be obsolete in this day and age. Even though the ECHR has not formally recognised that

\begin{itemize}
  \item \textsuperscript{4} See, e.g. ECHR, Fretté v. France, no. 36515/97. ECHR 2002-I, paragraph 34 and ECHR, Johnston and Others v. Ireland, judgment of 18 December 1986, Series A no. 112, pp. 24-25, paragraph 53.
  \item \textsuperscript{5} Article 6(2) Treaty on European Union (TEU).
  \item \textsuperscript{6} E.g. UN Convention on the Rights of the Child of 20 November 1989.
  \item \textsuperscript{7} E.g. European Convention on the Adoption of Children, European Convention on the Legal Status of Children born out of Wedlock.
  \item \textsuperscript{8} E.g. European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children; European Convention on the Exercise of Children's Rights; Convention on contact concerning children; Hague Convention of 19 October 1996 on Jurisdiction, Applicable law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children.
  \item \textsuperscript{9} ECHR, Rees judgment of 17 October 1986, paragraph 50.
  \item \textsuperscript{10} ECHR, F v. Switzerland, Case No 21/1986/119/168, paragraph 32.
\end{itemize}
Article 12 entails the right not to marry\textsuperscript{11}, it has indicated that the right to found a family is not a condition of the right to marry and that the inability of any couple to conceive or parent a child cannot be regarded as \textit{per se} removing their right to enjoy the first limb of the provisions of Article 12, i.e. the right to marry.\textsuperscript{12}

So far there is no ECHR case law establishing that the legal effects attaching to marriage should apply equally to situations that are in certain respects comparable to marriage. Nevertheless, it can be argued that marriage is not a condition for enjoyment of respect for private and family life as protected by Article 8 of the Convention.\textsuperscript{13} It must also be mentioned that the Convention proclaims that the enjoyment of the rights and freedoms set forth in the Convention must be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.\textsuperscript{14}

2.1.2 \textit{The Right to Marry only between Men and Women?}

In the \textit{Rees} judgment of 1986, the ECHR was of the opinion that the right to marry guaranteed by Article 12 refers to the traditional marriage between persons of opposite biological sex.\textsuperscript{15} In more recent cases\textsuperscript{16} though, the ECHR proposed to look at the situation within and outside the contracting State (\textit{in casu} the United Kingdom) to assess “in the light of present-day conditions” what is now the appropriate interpretation and application of the Convention.\textsuperscript{17} Reviewing the situation in 2002, the ECHR observed that Article 12 secures the fundamental right of a man and woman to marry and to found a family. Although the first sentence of Article 12 refers in express terms to the right of a man and woman to marry, the ECHR was not persuaded that at the date of the case cited it could still be assumed that these terms must refer to a determination of gender by purely biological criteria. It was also noted that Article 9 of the Charter of Fundamental Rights of the European Union departs, no doubt deliberately, from the wording of Article 12 of the Convention in removing the reference to men and women.\textsuperscript{18} The ECHR thus reached the conclusion that a post-operative male to female transsexual who did not have the possibility to marry her male partner because of the allocation of sex in UK law to that registered at birth, was entitled to claim that her right to marry had been infringed because the limitation

\textsuperscript{11} See e.g. the ECHR’s landmark decisions rendered in 1979 in the Marckx case (ECHR, Case of Marckx vs. Belgium). Ms. Paula Marks maintained the view that the right to not to marry is inherent in the guarantee embodied in Article 12; she argued that in order to confer on her daughter the status of a “legitimate” child, she (the mother) would have to legitimate her and, hence, to contract marriage. In this respect the ECHR noted that there was no legal obstacle confronting Ms. Marckx in the exercise of the freedom to marry or to remain single, and that consequently, there was no need to determine whether the Convention enshrines the right not to marry. With regards to Ms. Marckx’s argument that the fact that, in law, the parents of an “illegitimate” child do not have the same rights as a married couple also constitutes a breach of Article 12, the ECHR stated that this appears to construe Article 12 as requiring that all the legal effects attaching to marriage should apply equally to situations that are in certain respects comparable to marriage. The ECHR decided that it could not accept this reasoning and found that the issue under consideration fell outside the scope of Article 12.

\textsuperscript{12} ECHR, case Christine Goodwin v. the United Kingdom, paragraph 98.

\textsuperscript{13} See section 2.2 below, in particular the \textit{Evans} case.

\textsuperscript{14} Articles 8 and 12 in combination with Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

\textsuperscript{15} ECHR, Rees judgment of 17 October 1986, paragraph 48.

\textsuperscript{16} ECHR, case I v. the United Kingdom and case Christine Goodwin v. the United Kingdom of 11 July 2002.

\textsuperscript{17} ECHR, case Christine Goodwin v. the United Kingdom, paragraph 75.

\textsuperscript{18} ECHR, case Christine Goodwin v. the United Kingdom, paragraphs 99 and 100.
imposed by UK law was impairing the very essence of the right to marry, and that in her
case there was a breach of Article 12 of the Convention.\textsuperscript{19} As will be discussed below, the
European Court of Justice has explicitly referred to this case in its ruling on \textit{K.B. v NHS}.

Despite a number of invitations, the ECHR has so far refused to apply the protection of
Article 12 to same-sex marriage.

\subsection*{2.2 \ The Right to Respect for Family Life}

It is stated in Article 8 of the Convention that:

\begin{enumerate}
\item Everyone has the right to respect for his private and family life, his home and his correspondence.
\item There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
\end{enumerate}

By guaranteeing the right to respect for family life, Article 8 presupposes the existence of a family - irrespective, it seems, of whether it is based on marriage or not.\textsuperscript{20}

Although the essential object of Article 8 of the Convention is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in an effective respect for private and family life, albeit subject to the State’s margin of appreciation. In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the Convention. In striking this balance the aims mentioned in the second paragraph of Article 8 may be of a certain relevance, although this provision refers in terms only to “interferences” with the right protected by the first paragraph - in other words is concerned with the negative obligations flowing therefrom.\textsuperscript{21}

The principle of equal treatment between “legitimate” and “illegitimate” children which is widely recognised nowadays follows from Article 8.\textsuperscript{22} In this respect, it is worth recalling the \textit{Marckx} judgment, in which it was made clear that Article 8 makes no distinction between the “legitimate” and the “illegitimate” family. Such distinction would not be consonant with the word “everyone”, and this is confirmed by Article 14 of the Convention.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{19} ECHR, case Christine Goodwin v. the United Kingdom, paragraphs 101.
\item \textsuperscript{20} ECHR, case of Marckx vs. Belgium, paragraph 31.
\item \textsuperscript{21} ECHR, Rees judgment of 17 October 1986, paragraphs 35 and 38 (and references therein), see also: ECHR, case Christine Goodwin v. the United Kingdom of 11 July 2002, paragraph 72.
\item \textsuperscript{22} Brussels Convention of 12 September 1962 on the Establishment of Maternal Affiliation of Natural Children, prepared by the International Commission on Civil Status and entered into force on 23 April 1964; Convention of 15 October 1975 on the Legal Status of Children born out of Wedlock, concluded within the Council of Europe and entered into force on 11 August 1978. Both of these instruments are based on the principle \textit{“mater semper certa est”}; the second of them also regulates such questions as maintenance obligations, parental authority and rights of succession. See: ECHR, case of Marckx vs. Belgium, paragraph 41.
\end{itemize}
\end{footnotesize}
with its prohibition, in the enjoyment of the rights and freedoms enshrined in the Convention, of discrimination grounded on “birth”.

A recent case that made local headlines is that of *Mizzi v. Malta*. According to the ECHR’s case-law, the situation in which a legal presumption is allowed to prevail over biological reality might not be compatible, even having regard to the margin of appreciation left to the State, with the obligation to secure effective “respect” for private and family life. The ECHR considered that the fact that Mr. Mizzi was never allowed to disclaim paternity over his wife’s daughter, was not proportionate to the legitimate aims pursued. It follows that a fair balance had not been struck between the general interest of the protection of legal certainty of family relationships and the applicant’s right to have the legal presumption of his paternity reviewed in the light of the biological evidence. Therefore, despite the margin of appreciation afforded to them, the domestic authorities failed to secure to the applicant the respect for his private life, to which he is entitled under the Convention. Thus, the Court found that there had been a violation of Article 8.  

This seems to imply that the right to respect for one’s private life may entail the right to rebut the existence of a “family” relationship.

Addressing the question whether there is a right to have children would go beyond the remit of this paper. However, it may be useful to mention the recent case in *Evans v. UK* where the ECHR found that in adopting legislation providing for a legal framework authorising and regulating IVF treatment and granting to both parties to IVF treatment the right to withdraw consent to the use or storage of their genetic material at any stage up to the moment of implantation of the resulting embryos, the United Kingdom did not exceed the margin of appreciation afforded to it or upset the fair balance required under Article 8 of the Convention. Although the ECHR stated that it had great sympathy for the plight of the applicant who, if implantation did not take place, would be deprived of the ability to give birth to her own child, the judgment entailed that the applicant, a women whose ovaries were removed following cancer treatment, could not proceed with the implantation of fertilised embryos when her former partner withdrew consent for the embryos to be used after they split up.

In the *Evans* case the applicant had relied amongst others on Article 8 of the Convention and more specifically on the right to respect for one’s private life. The ECHR agreed that the case concerned the applicant’s right to respect for her private life, since “private life” is a broad term, encompassing, *inter alia*, aspects of an individual’s physical and social identity including the right to personal autonomy, personal development and to establish and develop relationships with other human beings and the outside world. It incorporates the right to respect for both the decisions to become and not to become a parent.

24 ECHR, judgment of 7 March 2006 in the case of Evans v. the United Kingdom, paragraphs 68-69.
25 ECHR, judgment of 7 March 2006 in the case of Evans v. the United Kingdom, paragraphs 57.
2.3 Dissolution and Reconfiguration of a Family

2.3.1 The Right to Divorce and the Right to Re-Marry?

In the case of Johnston and others v. Ireland, the ECHR decided that the right to divorce cannot be derived from Article 12 of the Convention. Furthermore, although Article 8 of the Convention applies to families, irrespective of the married status of the parties that found it, and the protection of private or family life may sometimes necessitate means whereby spouses can be relieved from the duty to live together, it does not oblige States that acceded to the Convention to introduce measures permitting divorce and re-marriage. However, the ECHR held that, if national legislation allows divorce, which is not a requirement of the Convention, Article 12 secures for divorced persons the right to remarry without unreasonable restrictions.

As far as the European Union is concerned, it is noteworthy that at present Malta is the only Member State that does not allow divorce (although it recognises divorce judgments given by competent foreign courts).

2.3.2 The Right to Maintain Family Relationships

A considerable number of cases brought before the ECHR on the basis of Article 8, whether on its own or in combination with other articles of the Convention, regard situations where one or both of the parents are denied access to their children.

For example, in the case of Sommerfeld v. Germany, which was referred to the Grand Chamber, the ECHR took the view that decisions refusing a parent access to his child amounts to an interference with his right to respect for his family life, as guaranteed by Article 8(1). Any such interference constitutes a violation of this Article unless it is “in accordance with the law”, pursues an aim or aims that are legitimate under Article 8(2) and can be regarded as “necessary in a democratic society”. The ECHR indicated that in determining whether the refusal of access was “necessary in a democratic society”, consideration of what lies in the best interest of the child is of crucial importance. The margin of appreciation to be accorded to the competent national authorities varies in accordance with the nature of the issues and the importance of the interests at stake. Thus, the ECHR recognised that the authorities enjoy a wide margin of appreciation, in particular when deciding on custody. However, a stricter scrutiny is called for as regards any further limitations, such as restrictions placed by those authorities on parental rights of access, and as regards any legal safeguards designed to secure an effective protection of the right of parents and children to respect for their family life. Such further limitations entail the danger that the family relations between a young child and one or both parents would be effectively curtailed.

26 ECHR, Johnston and others v. Ireland, Case No 6/1985/92/139, see also ECHR, F v. Switzerland, Case No 21/1986/119/168.
In the same case, the ECHR held that German legislation which put fathers of children born out of wedlock in a different, less favourable position than divorced fathers infringed Article 14 in combination with Article 8 of the Convention.\(^\text{29}\)\(^\text{30}\)

3. The “Family” under Community Law

Admittedly, the definition and treatment of “family” in terms of national law is influenced by historical and cultural factors. Since each EU Member State has its own cultural and historical background, there are - sometimes significant - divergences in the family law of the respective Member States. However, the increase in “international” families living and moving within and into the European Union, has prompted issues that transcend the national aspects of family law. Although family law is strictly speaking a competence of the Member States, the European institutions have therefore adopted family-related legislation, in accordance with the principle of subsidiarity laid down in Article 5 ECT, on the basis of:

- Articles 12, 18, 40, 44 and 52 ECT regarding non-discrimination and free movement;
- Article 63(3)(a) ECT concerning measures on immigration policy in the area of conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification, and
- Articles 61(c) and 67(1) ECT, in connection with the establishment of an area of freedom, security and justice.

Furthermore, the Court of Justice of the European Communities has referred to the fundamental “family rights” enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms in a number of cases.

3.1 General principles of Community Law

As mentioned above, the European Union is bound to respect fundamental rights as guaranteed by the Convention, including the right to found a family and the right to respect for one’s family life, as general principles of Community law.\(^\text{31}\)

Article 9 of the Charter of Fundamental Rights (“the Charter”) (which does not have legally binding force) provides that “The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.”

\(^{29}\) Case of Sommerfeld v. Germany of 8 July 2003, paragraphs 62-63 and 93.
\(^{30}\) At this point, the United Nations’ Convention on the Rights of the Child should also be mentioned. For instance, according to Article 9(1) of the Convention: “States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child’s place of residence.” (Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990).
\(^{31}\) Article 6(2) TEU.
According to Article 7 of the Charter, “Everyone has the right to respect for his or her private and family life, home and communications.”

The Treaty establishing a Constitution for Europe incorporates the Charter of Fundamental Rights of the European Union and states that this Charter reaffirms, with due regard for the powers and tasks of the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights. The provisions of the Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.

3.2 The Family of a Union Citizen

3.2.1 The Directive on Free Movement

It is stated in the Preamble (recital 5) of Directive 2004/38/EC on the free movement of citizens of the Union and their family members that “the right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality.”

For the purposes of Directive 2004/38/EC, “family member” is defined as:

(a) the spouse;
(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;
(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);
(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b).

According to Article 3, the Directive applies to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members who accompany or join them. Furthermore, without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State is

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32 Official Journal C 310 of 16 December 2004. The Constitution is yet to be ratified by the Member States. Since the negative referenda regarding the ratification of the Constitution in France and the Netherlands, it is not clear when the Constitution will enter into force.

33 Preamble of Part II and Article II-11 of the Constitution. See also Article I-9 of the Constitution.

obliged, in accordance with its national legislation, to facilitate entry and residence for the following persons:

(a) any other family members, irrespective of their nationality, who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;

(b) the partner with whom the Union citizen has a durable relationship, duly attested.

The host Member State must undertake an extensive examination of the personal circumstances and justify any denial of entry or residence to these people.

The Directive also aims to legally safeguard family members in the event of the death of the Union citizen, divorce, annulment of marriage or termination of a registered partnership. In such circumstances family members already residing within the territory of the host Member State retain their right of residence exclusively on a personal basis.\(^\text{35}\)

In this context it is noteworthy that in January 2006, the European Commission was asked by the European Parliament to put forward proposals guaranteeing the freedom of movement of “EU citizens and their family members and registered partners of either gender”. It appears that one of the main complaints of homosexual associations and NGOs is that registered homosexual couples from Member States where same-sex marriages or partnerships are legal, lose all their rights as official partners - most importantly the right of family reunification - when they move to another Member State which does not recognize same-sex couples. MEPs were also of the opinion that EU countries should enact legislation to end discrimination faced by same-sex partners as regards inheritance rights, property arrangements, tenancy, pensions, tax, and social security.\(^\text{36}\)

3.2.2 The Brussels II Regulation

The new Brussels II Regulation\(^\text{37}\) is one of the instruments contributing to the cooperation in civil law. It aims to establish better collaboration between the authorities of Member States so as to facilitate the movement of citizens. It not only regards recognition and enforcement of judgments in matrimonial proceedings, but covers all decisions on parental responsibility, including measures for the protection of the child, independently of any link with a matrimonial proceeding. For the purposes of this Regulation “parental responsibility” means all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect; the term includes rights of custody and rights of access.

\(^{35}\) Recital 15 and Articles 12, 13 and 18 of Directive 2004/38/EC.


As the combination of different conflict-of-law rules (an area of legislation that is not harmonised) and the current jurisdiction rules may give rise to problems in the context of “international” divorce, a public consultation was launched on the applicable law and jurisdiction in divorce matters. It was highlighted in the Green Paper on applicable law and jurisdiction in divorce matters that “Apart from the lack of legal certainty and flexibility, the current situation may also lead to results that do not correspond to the legitimate expectations of citizens. Moreover, Community citizens who are resident in a third State may face difficulties in finding a competent divorce court and to have a divorce judgment issued by a court in a third State recognised in their respective Member States of origin. There is finally a risk of “rush to court” under the current situation.”

3.3 The Family of a Third Country National

3.3.1 The Directive on the Right to Family Reunification

With regards to third country nationals (i.e. non-EU citizens), it was considered necessary to adopt measures concerning family reunification in conformity with the obligation to protect the family and respect for family life enshrined in many instruments of international law. Family reunification is considered a necessary way of making family life possible. It helps to create socio-cultural stability facilitating the integration of third country nationals in the Member State, which also serves to promote economic and social cohesion, a fundamental Community objective stated in the Treaty.

The scope of application of Directive 2003/86/EC on the right to family reunification is delineated by reference to the “sponsor” of the family whose family members are third country nationals. It is made clear in Directive 2003/86/EC that the need for compliance with the values and principles recognised by the Member States, in particular with respect to the rights of women and of children, justifies the possible taking of restrictive measures against applications for family reunification of polygamous households. In fact, in the event of a polygamous marriage, where the sponsor already has a spouse living with him in the territory of a Member State, the Member State concerned is not allowed to authorise the family reunification of a further spouse and Member States may limit the family reunification of minor children of a further spouse and the sponsor.

Compared to the treatment of EU citizens and their family members in terms of Directive 2004/38/EC, the rights of third country nationals and their family members under Directive 2003/86/EC are similar but not equivalent to those of EU citizens. For instance, there are

38 Green Paper on applicable law and jurisdiction in divorce matters [COM (2005)82 final], paragraph.
39 Recitals 2 and 4 of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification. The United Kingdom, Ireland and Denmark are not bound by this Directive or subject to its application.
40 Subject to exceptions, the Directive applies where the sponsor is holding a residence permit issued by a Member State for a period of validity of one year or more who has reasonable prospects of obtaining the right of permanent residence, if the members of his or her family are third country nationals of whatever status. (Article 3) “Sponsor” means a third country national residing lawfully in a Member State and applying or whose family members apply for family reunification to be joined with him/her. (Article 2(c)).
41 Recital 11 and Article 4(4) of Directive 2004/38/EC.
differences in treatment of minor children, first-degree ascendants, unmarried partners and formalities, examinations and entry and residence requirements.

3.3.2 The Directive on the Status of Long-term Residents

As mentioned above, third country nationals and their family members do not have the “full” rights of free movement enjoyed by EU citizen and their (third-country) family members respectively. Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents aims to approximate the legal status of third-country nationals that have resided in a Member State for a certain period of time to that of Member State’s nationals and to grant third-country nationals with long-term residence status in a Member State a set of uniform rights which are as near as possible to those enjoyed by citizens of the European Union. This Directive also contains provisions on family members of third-country nationals who are long-term residents, in order to preserve family unity and to avoid hindering the exercise of the long-term resident’s right of residence.

3.4 The Court of Justice’s View

The Court of Justice of the European Communities (the “Court”) has been confronted with a number of cases where citizens felt aggrieved because of the lack of assimilation of stable relationships or registered partnerships (either between same-sex or opposite sex couples) to marriage. The Court has held that, considering the circumstances, there is no requirement to regard such de facto or legally recognized relationships as equivalent to marriage and that it is for the legislature alone to adopt, if appropriate, measures which may affect that position. In line with the ECHR’s views on the matter, the Court of Justice stated that:

“It is not in question that, according to the definition generally accepted by the Member States, the term marriage means a union between two persons of the opposite sex.

It is equally true that since 1989 an increasing number of Member States have introduced, alongside marriage, statutory arrangements granting legal recognition to various forms of union between partners of the same sex or of the opposite sex and

42 Family reunification applies in any case to members of the nuclear family, that is to say the spouse and the minor children. It is for the Member States to decide whether they wish to authorise family reunification for relatives in the direct ascending line, adult unmarried children, unmarried or registered partners as well as, in the event of a polygamous marriage, minor children of a further spouse and the sponsor. Where a Member State authorises family reunification of these persons, this is without prejudice of the possibility, for Member States which do not recognise the existence of family ties in the cases covered by this provision, of not granting to the said persons the treatment of family members with regard to the right to reside in another Member State, as defined by the relevant EC legislation. See: Recital 9 and 10 and Article 4 of Directive 2004/38/EC.

43 Chapters III and IV of Directive 2004/38/EC. Specific provisions are laid down with respect to family reunification of refugees (Chapter V).


conferring on such unions certain effects which, both between the partners and as regards third parties, are the same as or comparable to those of marriage.

It is clear, however, that apart from their great diversity, such arrangements for registering relationships between couples not previously recognised in law are regarded in the Member States concerned as being distinct from marriage.⁴⁷

Although in several areas pertaining to its competence, the ECJ has shown a progressive or creative approach in interpreting the provisions of the Treaty establishing the European Community and secondary legislation, it has been criticised for not doing so where it was asked to recognise that stable relationships or registered partnerships may have legal effects similar as those related to marriage. It should be borne in mind in this respect that the Community is restricted in the (legislative) action it can take in view of its lack of specific competence with regards to family law and the principle of subsidiarity. In the Grant judgment, it was re-affirmed by the Court that although respect for the fundamental rights which form an integral part of the general principles of law is a condition of the legality of Community acts, those rights cannot in themselves have the effect of extending the scope of the Treaty provisions beyond the competence inherent in it. The scope of any provision of Community law is to be determined only by having regard to its wording and purpose, its place in the scheme of the Treaty and its legal context.⁴⁸

Nonetheless, in K.B. v NHS⁴⁹, the Court ruled that Article 141 ECT on the principle of equal pay, in principle, precludes legislation, which, in breach of the European Convention for the Protection of Human Rights and Fundamental Freedoms, prevents a couple formed between parties of the same biological sex but where one of the parties has undergone gender reassignment from fulfilling the marriage requirement which must be met for one of them to be able to benefit from part of the pay of the other (in this case a survivor’s pension). It is for the national court to determine whether in a case such as that in the main proceedings a person in K.B.’s situation (the female partner of a female-to-male transsexual) can rely on Article 141 ECT in order to gain recognition of her right to nominate her partner as the beneficiary of a survivor’s pension.

In the same judgment the Court repeated that the decision to restrict certain benefits to married couples while excluding all persons who live together without being married is either a matter for the legislature to decide or a matter for the national courts as to the interpretation of domestic legal rules, and individuals cannot claim that there is

⁴⁷ Judgment of the Court of 31 May 2001 in Joined cases C-122/99 P and C-125/99 P, D and Kingdom of Sweden v Council of the European Union, paragraphs 34-36. The joined cases related to the status of civil servants working for the Council. ‘D’ appealed against a Council decision denying him the household allowance awarded to married couples. D claimed the same right as married partners, given that his partnership with another Swedish citizen of the same sex was recorded in Sweden. His case was rejected. In his Opinion, the Advocate-General referred to Article 9 of the Charter of Fundamental Rights of the European Union as confirmation of the difference between marriage, on the one hand, and unions between people of the same sex on the other. He indicated that “In the explanations drawn up under the aegis of the presidium of the convention, which do not have any legal value but which are simply designed to clarify the provisions of the Charter in the light of the discussions which took place within the convention, there is the remark that Article 9 “neither prohibits nor requires the grant of the status of marriage to relationships between persons of the same sex.” In my opinion, that confirms the difference between marriage and a relationship between two people of the same sex.” (paragraph 97 of the Opinion).

⁴⁸ Judgment of the Court of 17 February 1998 in Case C-249/96, Grant, paragraph 45.

⁴⁹ Judgment of the Court of 7 January 2004 in Case C-117/01 K.B. v NHS.
discrimination on grounds of sex, prohibited by Community law. However, the Court followed the Opinion of the Advocate-General in stating that there is inequality of treatment which, although it does not directly undermine enjoyment of a right protected by Community law, affects one of the conditions for the grant of that right. In the case of K.B. v NHS the inequality of treatment does not relate to the award of a widower’s pension but to a necessary precondition for the grant of such a pension: namely, the capacity to marry.\(^{50}\)

The Opinion of Advocate-General Ruiz-Jarabo Colomer on the K.B. v NHS case offers some interesting perspectives. The Advocate-General suggested that:

“It might be asked whether it is reasonable to select marriage as the relationship upon which the grant, in relevant circumstances, of a widow(er)’s pension is conditional. Consideration of that issue would require consideration to be given to the objective pursued by a pension of that kind and, in parallel, to the suitability of a purely formal contract to symbolise a community based on solidarity: consideration should at least be given to the possibility that relations of another kind merit like protection. That type of analysis, which is appropriate in a mature society in which substance prevails over form, is in practice becoming more prevalent. Thus, on the one hand it is permissible to question whether a marriage is genuine in the sphere of, for example, immigration law, whilst, on grounds of fairness, cases of genuine cohabitation having no official recognition are equated to marriage.”

However, realising that such reasoning could still be considered too audacious, the Advocate-General put forward the following solution:

“The question referred, as reformulated, would thus concern the compatibility with Community law of a national rule which, by not recognising marriage between transsexuals, denies them access to a widow’s or widower’s pension.

If the underlying claim is to receive a positive response, a twofold test must be passed:

(a) the national rule must be contrary to Community law; and
(b) the Court of Justice must be competent to make a ruling, i.e. the dispute must concern a matter covered by the Treaty.

There is no doubt that the fact that it is impossible for United Kingdom transsexuals to marry in their new physiological sex is contrary to a general principle of Community law.

It is well established in the case-law of the Court of Justice that in the matter of fundamental rights the general principles of Community law must be derived from the constitutional traditions common to the Member States, in the light of the guidance afforded by international treaties for the protection of human rights which

\(^{50}\) Judgment of the Court of 7 January 2004 in Case C-117/01 K.B. v NHS, paragraphs 28-30.
have been ratified by the Member States. The European Convention on Human Rights is also of particular relevance in that regard.”

Finally, it is worth reproducing the quote with which Advocate-General Ruiz-Jarabo Colomer finishes his Opinion (in the same way as Advocate General Tesauro in his Opinion in P. v S. when he paraphrased the words of Advocate General Trabucchi in an Opinion dating from almost 30 years ago): “If we want Community law to be more than a mere mechanical system of economics and to constitute instead a system commensurate with the society which it has to govern, if we wish it to be a legal system corresponding to the concept of social justice and European integration, not only of the economy but of the people, we cannot fail to live up to what is expected of us.”

Transsexualism is obviously different from the various permutations associated with sexual orientation (heterosexuality, homosexuality or bisexuality). In legal terms this can be translated in the difference between discrimination based on sex and discrimination on the basis of sexual orientation. On the one hand, the Court in P. v S. held that the right not to be discriminated against on grounds of sex is one of the fundamental human rights whose observance the Court has a duty to ensure and that, accordingly, the scope of the Equal Treatment Directive cannot be confined simply to discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, the scope of the Directive is also such as to apply to discrimination arising from the gender reassignment of the person concerned. On the other hand, in Grant, the Court stated that discrimination based on sex did not cover discrimination based on sexual orientation. It also found that the rule in P. v S. was limited to the case of a worker’s gender reassignment. The Court established furthermore that in the state of the law then prevailing within the Community, stable relationships between two persons of the same sex were not regarded as equivalent to stable relationships outside marriage between persons of opposite sex or to stable relationships between spouses.

In the case of D. v Council the Court pointed out that the alleged discrimination based on sex did not exist, since it was irrelevant whether the applicant was a man or a woman; nor was there any unequal treatment on ground of sexual orientation given that it was not the sex of the partner which determined whether the household allowance was granted, but the

51 Opinion of Mr. Advocate General Ruiz-Jarabo Colomer delivered on 10 June 2003 in Case C-117/01 K.B. v NHS, paragraphs 63-66.
52 Opinion of Mr. Advocate General Ruiz-Jarabo Colomer delivered on 10 June 2003 in Case C-117/01 K.B. v NHS, paragraph 80.
54 Judgment of the Court of 17 February 1998 in Case C-249/96, Grant. A female employee of a railway company claimed that the grant of travel concessions to an employee and his or her spouse or common law opposite-sex partner with whom the employee had sustained a “meaningful” and stable relationship, and the corresponding refusal of concessions to same-sex couples in similar circumstances infringed the prohibition on discrimination set out in what was then Article 119 of the EC Treaty.
55 Judgment of the Court of 17 February 1998 in Case C-249/96, Grant.
56 Joined cases C-122/99 and C-125/99 P, D and Kingdom of Sweden v Council of the European Union. A male official of the European Communities, of Swedish nationality, who had a registered partnership under Swedish law with another man, had claimed that he was entitled to the household allowance which the staff regulations confined to married persons. D claimed that terms such as “spouse” or “married official” must be interpreted by reference to the law of the Member States and not be given an independent definition, and that the refusal to pay the allowance therefore amounted to discrimination based on sex.
legal nature of the ties between the official and the partner. The Court went on to consider the views prevailing within the Community as a whole, from which it concluded that there was a diversity of laws and an absence of any general assimilation of marriage and other forms of statutory union.  

Finally, reference should be made to the *Safet Eyüp* case, where the Court stated that having regard to the particular facts of the case before the national court, and in particular the fact that the Eyüps’ period of extra-marital cohabitation took place between their two marriages, that period cannot be regarded as an interruption of their joint family life in Austria, so that it must be taken into account in its entirety for the purposes of calculating periods of legal residence within the meaning of the first paragraph of Article 7 of Decision No 1/80 of the Association Council on the development of the Association between the European Economic Community and Turkey. The Court confirmed that the first paragraph of Article 7 of Decision No 1/80 is designed to promote family unity in the host Member State, in order to facilitate the employment and residence of Turkish workers duly registered as belonging to the labour force of the Member State concerned, by first allowing family members who have been authorised to join the migrant worker to be present with him and by then consolidating their position with the right to work as employed persons in that State. Thus, without explicitly recognising the equivalence of marriage and a stable relationship of cohabitation between unmarried partners, the Court came to the conclusion that the unity of the family, in pursuit of which the person concerned entered the territory of the host Member State, should be evidenced for a certain period by actual cohabitation in a household with the worker who is lawfully resident.

As Advocate-General Ruiz-Jarabo Colomer pointed out in his Opinion on *K.B v NHS*, the judgment in *Eyüp* is indicative for the tendency shown by the Court of Justice to interpret family-law concepts in accordance with the spirit and purpose of the legislation with which the reference is concerned and the assessment of the particular features of a specific case which means that an equitable solution is reached (*ex aequo et bono*).

3.5 The Social Agenda

The European Union’s social agenda for 2005-2010 complements and supports the renewed Lisbon Strategy for growth and jobs. Of particular relevance to the subject matter of this paper is the Community’s commitment to gender equality, as part of the social agenda.

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58 Judgment of the Court (Sixth Chamber) of 22 June 2000 in Case C-65/98, Safet Eyüp. The issue to be decided was whether the foreign, cohabiting partner of a Turkish worker lawfully established in a Member State should be regarded as a “family member” for the purposes of the first paragraph of Article 7 of Decision No 1/80 of the Association Council of 19 September 1980 on the development of the Association between the European Economic Community and Turkey. The facts can be summarised as follows: in 1983, Mrs. Eyüp married a Turkish worker who had been part of the legal Austrian labour force since 1975. Between the couple’s divorce in 1985 and their being re-married in 1993 they had continued to live together in Austria, during which time four of the couple’s seven children were born. The Court had to determine whether that period should be included for the purposes of calculating the five years of legal residence, which under Decision No 1/80 was a condition of the members of the family of a Turkish worker having access to the host country’s labour market.  
59 Opinion of Mr. Advocate General Ruiz-Jarabo Colomer delivered on 10 June 2003 in Case C-117/01 K.B. v NHS, paragraph 80.
In terms of family life it is recognised that one of the major factors for the persistence of gender gaps is a poor work-life balance which still drives workers out of the labour market and which contributes to lower fertility rate. In the 2006 Report on equality between men and women, the Commission stated that “A good work-life balance helps to reduce gender gaps and to improve the quality of the work environment while contributing to addressing the challenge of demographic changes. To be effective, it should be devised and promoted as a policy for both women and men at all stages of their life, including for young people as underlined in the European Youth Pact. A renewed commitment is needed to deliver accessible, affordable and good quality care facilities for children and other dependants.”  

In the Roadmap for equality between men and women 2006-2010 key actions identified to enhance reconciliation of work, private and family life include supporting the achievement of the Barcelona targets on childcare and the development of care facilities through the Structural Funds and the exchange of good practices.

The idea of getting more women to work and to encourage men to take up family responsibilities (in particular through incentives to take parental and paternity leaves and to share leave entitlements with women) is an economic and social necessity. It is also a far cry from the traditional or stereotypical role of women within the family as carers of children and other dependants.

Thus, gender equality is not only a fundamental right, a common value of the EU, but also a necessary condition for the achievement of the EU objectives of growth, employment and social cohesion. In spite of the lack of competence in the area of family law and the proposition that respect for fundamental rights as a general principle does not per se extend the scope of the Treaty provisions beyond the competence inherent in it, the EU is in a position to promote and adopt measures to achieve the EU’s economic and social objectives, for instance through reconciliation policies which help create a flexible economy that should at the same time improve the quality of women’s and men’s lives.

4. Conclusions - The Family in a European Multi-Cultural Inclusive Society

The conclusions to be drawn from the legislative and jurisprudential developments described above can be summarised as follows:

(i) the fundamental “family rights” (i.e. the right to found family and the right to respect for family life) are uncoupled from the right to marry;

(ii) in terms of the horizontal relationship between individuals who (wish to) found a family, stable relationships of cohabitation, civil unions and partnerships are not recognised by the ECHR and the Court of Justice as

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60 Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on equality between women and man - 2006 COM(2006)71 final, p. 3 and 7.


producing the same effects as marriage and marriage is still regarded as open only to men and women (although not necessarily based on biological gender);

(iii) insofar as the vertical relationships within the family are concerned (between parents and children), parental responsibility and the rights of children are not considered to be only a matrimonial matter;

(iv) whilst the importance to protect the unity of the family is recognised and protected by law, there seems to be a need to take action in the field of divorce (including legal separation and marriage annulment) and other instances entailing the disruption, dissolution and reconfiguration of family life;

(v) in order to achieve the objectives of growth, economic and social cohesion, the promotion of gender equality requires inter alia the elimination of stereotypes and the balancing of the roles of men and women in the family in order to reconcile work and family life.

In general, it would appear that in spite of limitations in terms of competence and the role of the ECHR and Court of Justice, international and Community law is impinging, albeit slowly, on the margin of appreciation of Member States in family matters, or at least that Member States are induced to take account of clear and uncontested evidence of a continuing international trend in favour of increased social acceptance and legal recognition of alternative forms of “family”, alongside the traditional nuclear family. The areas where the European has been “holding back”, namely alternative forms of civil union (as opposed to marriage) and divorce, are those where the divergences between the family laws of the Member States are still deemed too wide.

The diversity of laws and the absence of the general acceptance of a given principle by the Member States is used in particular by the Court of Justice (and the ECHR) to justify a more conservative approach than it may perhaps wish to follow. The most recent and future enlargements are likely to result in even less convergence between family laws. It seems however that on a national level, most governments of the EU15 are adopting an increasingly liberal approach in family matters. Several Member States are moving towards the recognition of families other than those based on “traditional” marriage, or have already done so. Member States such as Belgium, Spain, the Netherlands, Sweden and the United Kingdom, have introduced, alongside marriage, statutory arrangements granting legal recognition to various forms of union between partners of the same sex or of the opposite sex and conferring on such unions certain effects which, both between the partners and as regards third parties, are the same as or comparable to those of marriage. Furthermore, there seems to be a trend to allow or to promote “consensualism” in family matters, in particular in the field of divorce law and parental responsibility.63

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63 Although there are significant divergences in national divorce legislation, there seem to be certain convergences, in particular the increasing role of divorce by consent and reduced emphasis on fault. See: Commission Staff Working paper - Annex to the Green Paper on applicable law and jurisdiction in divorce matters [COM (2005)82 final], paragraph 3.1. See also the new Brussels II Regulation.
In the debate about the recognition of alternative forms of civil union or partnership (as opposed to “marriage”), much emphasis is laid on the rights of same-sex couples. Nevertheless, the debate is and should be taking place in a broader context. Opposite sex couples may have equally valid reasons to opt for an alternative to marriage, for instance, for reasons related to religion or belief, or merely because they wish to secure their interests and those of third parties in case the unity of the family is disrupted somehow. It is also conceivable that unmarried individuals wish to assume and share a certain degree of parental responsibility over children of which they are not the natural or adoptive parents and whether they are related to each other or not (e.g. in cases where the parents have passed away).

In a broader context, it can be argued that society in general could benefit from the legal recognition of alternative forms of civil union or partnership. Firstly, there are advantages for social stability in recognising and institutionalising such alternatives in the sense that this could offer protection for essential rights and enforceability of obligations of members of the non-typical family.

Secondly, the debate could be linked to the one regarding parental responsibility. The existence of parental responsibility and family values does not depend on whether the “parents” are married. Insofar as the attribution, exercise, delegation, restriction or termination of parental responsibility is governed by law, parents not opting for marriage or carers who may not be eligible for marriage could benefit from a legal framework which allows them to share the burden as they deem appropriate, within certain boundaries, and which would have legal effects between each other and towards third parties. Inasmuch as marriage can be regarded as an institutionalised relationship with legal effects that also offers a safety net in case of disruption of family life, an alternative, perhaps more flexible and accessible model can be developed in the form of a civil union or partnership.

Finally, if family is the fundamental group unit of society and is entitled to protection by society and the State, it could be argued that partners of whatever sex or sexual orientation, with or without children, that assume economic and social responsibilities towards each other, deserve legal protection and recognition with effects vis-à-vis third parties. The main argument in favour of this position would be that legally recognising such responsibilities can alleviate the economic and social burden of the State (e.g. as a matter of social security) and that it would allow governments to do what they are supposed to do in a democratic society: meet the legitimate needs and expectations of society, rather than adopting a paternalistic approach which may frustrate the basic rights of its citizens.

This brings us again to the question if and whether the European Union has a role to play in the matter. Clearly, the piecemeal approach towards the regulation of family matters is not satisfactory. The increasing mobility of citizens within and the migration of third-country nationals to the European Union engenders an increasing number of “international” marriages and families, where family members are of different nationalities, live in different Member States or live in Member States of which they are not nationals. The argument that there is absent a general consensus in Europe as to the ways in which citizens may found a family and arrange their family responsibilities (horizontal rights and obligations and vertical responsibilities), begs the question whether in an enlarged and possibly further
enlarging European Union, faced with the likelihood of even less convergence in family laws of the Member States, it is possible for the European institutions to refrain from action which would ensure that a EU citizen’s (or third country national’s) family life or situation be recognised by other (host) Member States. In other words, would it be fair to expect EU citizens and their families to accept that the past and future enlargement engenders even less legal certainty and security in terms of mutual recognition of their family situation? In absence of such recognition, non-marital families exercising their free movement will continue to be treated unequally compared to marital families, for instance, when it comes to inheritance rights, pensions, tax, and social security. This seems hard to reconcile with the Union’s fundamental objectives of economic and social cohesion. As the Court of Justice has repeatedly stated it is for the legislature alone to adopt, if appropriate, measures requiring *de facto* or legally recognized relationships to be treated as equivalent to marriage measures. As the European institutions have done in other areas where it was not deemed appropriate to adopt legislative measures, a possible (temporary) solution could be to have recourse to the open method of co-ordination (“OMC”), a method currently used in the policy areas of education, training and culture and employment and social affairs.

In any event, if the EU were to embrace a definition of family, such definition would have to take account of the situation in the whole Community, not merely in one (progressive or conservative) Member State, and would have to respect the principle of equality of treatment and the diversity in a pluralistic and multi-cultural society. Furthermore, it should be sufficiently flexible so that it can be applied in an ever evolving society, irrespective of the degree of “progress” or “acceptance” in the individual Member States. Finally, it must be borne in mind that the concept of family is linked to certain rights and obligations based on underlying family values and the premise that as a fundamental group unit of society, the family is entitled to protection by society and the State. A Community definition of family would therefore have to comprise all types of family units that are deemed to deserve such protection and that should attract a similar (if not the same) set of essential rights and obligations commonly attributed to the traditional nuclear family.