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Pluralism and human rights: a legal foundation for the regulation of families and family law in the European Union

Any study of European Union law must be set within a theoretical framework. Accordingly, the aim of this and the following chapter is to establish just such a framework, laying the foundations for the subsequent examination of the concept of family and emerging family law of the Union. This chapter begins by offering a brief sketch of recent jurisprudential debates regarding the nature and future of European legal integration. This is an essential precursor to the subsequent section which proposes a human rights foundation for analysing concepts of family and as a basis for the Union's family law.

1.1 Positivism, pluralism and the jurisprudence of the European Union

During the previous decade or more, the impact of European integration on established jurisprudential paradigms has become ever more apparent. In simple terms, nothing really seems to fit any more. On the one hand, classical legal positivism, so dependent upon conceptions of unitary sovereignty, coherent systems, hierarchies and rules, suddenly appears to be hopelessly arcane. On the other, the more radical postmodern critique, whilst celebrating this apparent incoherence, rarely seems capable of answering the more pressing policy questions.

The aim of this section is to suggest that the way forward lies between these extremes, with a system of rules that is better able to address the questions of particularity and 'otherness' that underpin the postmodern critique and which moves away from the paradigms of positivism. This is a solution which caters to reality. The new Europe is very much a legalistic Europe. It is often proclaimed that the defining characteristic of the Union is the extent to which it was engineered by lawyers. Law, as one prominent European judge famously declared, is part of the Union's 'genetic code'.[1] Accordingly, families in Europe are regulated and constructed by law, and the evolving family law is described by rules and

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1 Federico Mancini and David Keeling, 'From CILFIT to ERT: The Constitutional Challenge Facing the European Court' (1991) 11 *Yearbook of European Law* 1–13.

legal, moral and social norms, and any change, therefore, requires a legal theory
and solution which can effect change.

1.1.1   Positivism and its critics

Classical positivism finds its most famous expression in the writings of jurists
such as Jeremy Bentham, John Austin and Herbert Hart. All three were deter-
mined to do two things. First, they distinguished questions of law from questions
of morality and therefore reduced the theory of law to a matter of distinguishing
systems of legally credible and enforceable rules. Secondly, in order to give their
systems of rules a necessary coherence, they were equally determined to identify
ultimate sources of authority, or sovereign bodies.

The first argument of the classical positivist, that questions of law can be
readily distinguished from questions of morality, has attracted considerable cri-
ticism for centuries. On the one hand, natural lawyers have long held that any
law is infused with moral attributes and effects. More recent critics have added
further fuel to the critical fire, by asserting that laws are also political, as well as
moral, expressions. They denote, in simple terms, the locus, not so much of right,
as of power. Indeed, it is not too much to say that it seems absurd today to suggest
that law is devoid of political or ideological content. With regard to this first
critique of classical legal positivism, the European experience is typical, but not
particularly unique.

It is in regard to the second strand of the positivists' theories that the European
experience has been more atypical, with the uncompromising destruction of all
the pretences of unitary sovereignty. There is, in simple terms, no single source of
legal or political authority in the new Europe, and nor is there, accordingly, any
such authority in any of the constituent nation-states. As Neil MacCormick
famously put it, Europe has moved 'beyond the nation-state'. And it has, accord-
ingly, moved beyond the idea of a unitary sovereign authority; an idea that was
intrinsically related to modern ideas of the unitary nation-state. MacCormick
concludes that we have escaped from the 'idea that all law must originate in a
single power source, like a sovereign', and in doing so we have the possibility to
discover a 'broader, more diffuse, view of the law'.[2]

This admission has not led to the wholesale abandonment of classical doctrines
of legal positivism.[3] There are still some who pine after coherent systems of rules
and norms. According to Reinhard Zimmermann, for example, legal positivism,
and only legal positivism, can provide the necessary intellectual sustenance to the
idea of a 'European legal science'. There is, Zimmermann alleges, an irreducible

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2   Neil MacCormick, 'Beyond the Sovereign State' (1993) 56 *Modern Law Review* 1–18 at 8.
3   See also the work of those who are seeking to revisit positivism for a new age, proposing a
'general' jurisprudence that would allow us to re-map our new world order, describing firm
legalistic boundaries but also accommodating the substantive political, social and cultural
differences that now exist. For a compelling argument along these lines, see William Twining,
Globalisation and Legal Theory (London: Butterworths, 2000).

'internal coherence' to the law, understood as an 'autonomous discipline'. Zimmermann is desperate to address what he perceives to be the kind of 'higgledy-piggledy' jurisprudence which presently characterises European law.[4] Unsurprisingly, perhaps, Zimmermann is particularly enamoured by legal codes. The idea of a European code of private law has gained considerable currency in contemporary European debates. For some it appears to be the obvious next step in the process of legal integration, despite its resting on an arcane approach to legal theory. Others have suggested that this desire for codes and coherence represents something of a missed opportunity. As Pierre Legrand has suggested, the construction of a new Europe gives us the chance to reach 'beyond a mode of apprehending social relations which has traditionally been linked to the state'.[5] We should, he suggests, have the courage to take this opportunity.

Support for this idea of moving 'beyond' can be found in the ideas of cosmopolitanism, derived from the writings of the German philosopher Immanuel Kant, and applied to the European Union. Cosmopolitanism, recommended by the likes of Ian Ward and Pavlos Eleftheriadis, demonstrates the fallacy of the traditional positivist ideals when considering the context of Europe.[6] Cosmopolitanism deals in the relations between individuals, rather than in the relations between states: it is indeed a 'new kind of law'.[7] This has echoes for the European experience, with its Charter of rights and citizens' rights: it increasingly speaks to individuals and not to nation-states. This is, perhaps, more obviously a cosmopolitan than a Westphalian order which is concerned with relations between states. And it seems, as Eleftheriadis has rightly suggested, to fit the reality of the new Europe, the legal system of which 'is a synthesis of national constitutions, international treaties and an area of cosmopolitan law which applies regardless of hierarchies of sources or state sovereignty'.[8] Eleftheriadis confirms that this Kantian idea of cosmopolitan governance admits a conception of law that does not require firm boundaries or strong hierarchies. Indeed, it embraces the idea that the authority of law might be multidimensional. These ideas have attracted the support of many, including Jürgen Habermas who has argued the need for a 'future cosmopolitan order sensitive both to difference and to social equality'.[9]

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4 Reinhard Zimmermann, 'Savigny's Legacy – Legal History, Comparative Law and the Emergence of European Legal Science' (1996) 112 *Law Quarterly Review* 576–605 at 582–5. See also Christoph Schmid, 'The Emergence of a Transnational Legal Science in European Private Law' (1999) 19 *Oxford Journal of Legal Studies* 673–89, who speaks of the 'chaotic situations' of Community law, at 674.
5 Pierre Legrand, 'Against a European Civil Code' (1997) 60 *Modern Law Review* 44–63 at 59.
6 Ian Ward, 'Kant and the Transnational Order: Towards a European Community Jurisprudence' (1995) 8 *Ratio Juris* 315–29; Pavlos Eleftheriadis, 'Cosmopolitan Law' (2003) 9 *European Law Journal* 241–63.
7 Eleftheriadis, 'Cosmopolitan Law', 242.
8 Eleftheriadis, 'Cosmopolitan Law', 259.
9 Jürgen Habermas, *The Postnational Constellation* (Cambridge: Polity Press, 2001), p. xix.

While cosmopolitanism seeks to chart a middle way between the perceived extremes of intergovernmentalism and federalism, it is the postmodern critique which is embracing the apparent incoherence that the experience of European integration has brought. In his essay, *The Other Heading*, Derrida famously suggested that the 'universal' of Europe was its respect for 'differentness' and it was this apparently ambiguous determinant that made the European project endemically postmodern.[10] It is a view that echoes Albert Camus' famous injunction, made half a century earlier: 'Unity and diversity, and never one without the other – isn't that the very secret of our Europe?'[11] At the same time, however, according to Derrida, the ever-present danger within the present project of 'integration' is that the pretences of uniformity might suppress particularity and respect for 'otherness'.[12]

A wave of European lawyers has followed the Derridean lead. It has been suggested that the 'European Union can be best understood as a postmodern text, and perhaps as a postmodern polity'.[13] Likewise, Deirdre Curtin has argued that the reality of a 'fragmented and fluid' Europe impels us to contemplate the complementary reality of a 'post-national', even 'post-modern', Europe.[14] James Caporaso has described a 'post-modern' Europe that is 'abstract, disjointed, increasingly fragmented, not based on stable or coherent coalitions of issues or constituencies, and lacking in a clear public space within which competitive visions of the good life and pursuit of self-interested legislation are discussed and debated'.[15] This latter thought resonates with the argument that what Europe really lacks today is a credible and inspiring public philosophy, a concern considered further below.

There are, perhaps, two potential problems with the postmodern critique. The first is that it might just be plain wrong. In this vein, Peter Fitzpatrick has suggested that the 'new' Europe is actually not that new at all, but rather a quintessentially modern phenomenon. Of course, the same implication lies behind Derrida's critique. But it is a conclusion that leads Fitzpatrick to doubt the bolder assertions that the new Europe might describe some kind of postmodern 'text'. All the plumage of modernity, he suggests, is proudly on display in Brussels,

10 Jacques Derrida, *The Other Heading: Reflections on Today's Europe* (Bloomington: Indiana University Press, 1992).
11 Albert Camus, *Resistance, Rebellion and Death* (London: Vintage, 1974), pp. 234–5. This has even been recognised recently by the European Parliament which noted that European unity was itself largely based on diversity: European Parliament Resolution on Cultural Co-operation in the European Union (2000/2323 (INI), OJ 2002 C 72E/142.
12 See Derrida, *The Other Heading*, pp. 11–12.
13 Ian Ward, 'Identity and Difference: The European Union and Postmodernism' in Jo Shaw and Gillian More (eds.), *New Legal Dynamics of European Union* (Oxford: Oxford University Press, 1995), pp. 15–28 at p. 15.
14 Deirdre Curtin, *Postnational Democracy: The European Union in Search of a Public Philosophy* (The Hague: Kluwer Law International, 1997), p. 16.
15 James Caporaso, 'The European Union and Forms of the State: Westphalian, Regulatory or Post-Modern' (1996) 34 *Journal of Common Market Studies* 29–52 at 45.

Strasbourg and Luxembourg: laws and charters of rights, courts and parliaments.[16] The presence of such institutions likewise counsels Jürgen Habermas to prefer the idea of a Europe that is intellectually 'post-metaphysical' if not politically postmodern.[17] There is an element of realism here; for, as Alan Dashwood has affirmed in much the same spirit, when all is said and done, for the present at least, the new Europe is still a Europe of constituent nation-states, even if it is overlaid by some kind of transnational economic, legal, and to a degree political, order.[18] In this way, the modern and postmodern do not have to be mutually exclusive. We are undoubtedly living in a more postmodern, than modern, Europe. There is indeed a diversity of legal structures, multiple sites of legal power, a post-national constitution. But there remain central elements of our more modern traditions, predominantly the trappings of nation-states. So, we must recognise the new legal and political environment of Europe, but not get lost in utopian or disutopian excurses on postmodernism.

The second problem with the postmodern critique of European legal integration is a variant of the wider general critique of postmodernism. Deconstructing things is easy; constructing something that can work in their place is altogether harder to do. And yet it must be done. The regulation of families by the European Union is relentless and a European family law is emergent. There are virtues and vices in these developments and, while it may be very well to identify each, what really matters is suggesting how there might be rather more of the former, and rather fewer of the latter. There are two compelling, and related, possibilities. The first lies in the more theoretical realm of legal pluralism. The second can be found in the idea of rights.

1.1.2   Pluralism

Pluralism has emerged as perhaps the most intriguing theoretical solution to the jurisprudential challenges posed by the experience of European integration. The idea of a 'constitutional pluralism' has been ventured by Neil Walker and also by Ingolf Pernice who refers to a constitutionalism that is 'multilevel' and in which there is a 'divided power system' with governance conducted at various levels.[19] It has also found a strong expression in Neil MacCormick's embrace of a 'new form of legal and plural order' in Europe, one that can accommodate both integration and differentiation. It is the idea of a legal pluralism that underpins MacCormick's vision of a 'broader, more diffuse, view of law'.[20] Such pluralism is

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16 Peter Fitzpatrick, 'New Europe and Old Stories: Mythology and Legality in the European Union' in Peter Fitzpatrick and James Bergeron (eds.), *Europe's Other: European Law between Modernity and Postmodernity* (Aldershot: Ashgate, 1998), pp. 27–46.
17 Habermas, *The Postnational Constellation*.
18 Alan Dashwood, 'States in the European Union' (1998) 23 *European Law Review* 201–16.
19 See Neil Walker, 'The Idea of Constitutional Pluralism' (2002) 65 *Modern Law Review* 317–59 and Ingolf Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited' (1999) 36 *Common Market Law Review* 703–50.
20 MacCormick, 'Sovereign State', 153.

often presented in terms of multiplicity. Joseph Weiler's idea of 'multiple *demoi*', of a politics that is encountered and engaged in a variety of public spaces and at all levels in European governance, speaks to this idea of multiplicity in action.[21]

There is, of course, a resonance between aspects of legal pluralism and the kind of postmodern jurisprudence discussed above. Certainly the kind of pluralism recommended by Emilios Christodoulidis, one that embraces a consciously 'disorganised civil society, genuinely plural, resistant to dominant representation', seems to speak to a more radical idea of pluralism. It should, Christodoulidis argues, translate the Derridean urge to deconstruct into a 'constitutional irresolution' that can actually nourish genuine democratic engagement.[22] The same kind of postmodern rhetoric can also be heard in Christodoulidis' earlier suggestion, made with Zenon Bankowski, that the new Europe should be understood as being an 'essentially contested project', one in which there is a 'continuous process of negotiation and renegotiation'.[23] In this way, the postmodern critique and explanation of the new Europe feeds into a reconstructive jurisprudence of pluralism.

This jurisprudence of pluralism is perhaps best illustrated in the constructivist theories of law and society espoused by John Rawls.[24] Developing his earlier, and hugely influential, idea of 'justice as fairness' famously presented in *A Theory of Justice*, Rawls returned to Kantian ideas of moral constructivism in order to flesh out a more 'practicable' theory of justice in his series of essays entitled 'Kantian Constructivism in Moral Theory'.[25] As opposed to the potentially anarchic implications of radical postmodern scepticism, Rawls held that his revised 'Justice as Fairness tries to construct a conception of justice that takes deep and unresolvable differences on matters of fundamental significance as a permanent condition of human life'.[26] Thus, rather than chasing the illusory shadows of presumed ethical commonality, Rawls suggested that the role of a 'constructivist' legal theory is to secure mechanisms within which a plurality of moral positions might be accommodated. It should thus provide the 'formal condition' for a 'well-ordered society'.[27]

It is also liberating and democratic: for although 'a well-ordered society is divided and pluralistic, its citizens have nevertheless reached an understanding on principles to regulate their basic institutions'.[28] In practice, Rawls affirmed, it

21 Joseph Weiler, *The Constitution of Europe* (Cambridge: Cambridge University Press, 1999), p. 262.
22 Emilios Christodoulidis, 'Constitutional Irresolution: Law and the Framing of Civil Society' (2003) 9 *European Law Journal* 401–32.
23 Zenon Bankowski and Emilios Christodoulidis, 'The European Union as an Essentially Contested Project' (1998) 4 *European Law Journal* 341–54 at 342.
24 An idea suggested by Eleftheriadis, 'Cosmopolitan Law', 261–3.
25 John Rawls, 'Kantian Constructivism in Moral Theory' (1980) 77 *Journal of Philosophy* 515–72 at 518.
26 Rawls, 'Kantian Constructivism', 542.
27 Rawls, 'Kantian Constructivism', 516–19.
28 Rawls, 'Kantian Constructivism', 537–40.

presumes little, except the willingness of citizens to converse, to respect the different values of others, and to engage in constructing approximate and contingent models of the good society.[29] Alongside this pluralist idea of 'justice as fairness', Rawls advanced a complementary idea of an 'overlapping consensus'. The idea of such 'consensus', Rawls suggested, is that it 'enables us to understand how a constitutional regime characterized by the fact of pluralism might, despite its deep divisions, achieve stability and social unity by the public recognition of a reasonable conception of justice'.[30] It is a mechanism for promoting liberty and democracy, as well as demanding respect for cultural, moral and political difference. It recognises the 'fact of reasonable pluralism', whilst also providing the degree of political and social stability that a 'good society' requires.

In the final passages of his *Political Liberalism*, Rawls presented a compelling defence of his constructivist variant of legal pluralism:

> The conception of justice to which these principles belong is not to be regarded as a method of answering the jurist's questions, but as a guiding framework, which if jurists find it convincing, may orient their reflections, complement their knowledge, and assist their judgment. We must not ask too much of a philosophical view. A conception of justice fulfils its social role provided that persons equally conscientious and sharing roughly the same beliefs find that, by affirming the framework of deliberation set up on it, they are normally led to a sufficient convergence of judgment necessary to achieve effective and fair social cooperation.[31]

The attractions of Rawlsian pluralism are obvious. It provides a framework for the European legal and political order that is plural, that respects individual differences and different moral positions, that requires citizens to converse, respect each other and engage in dialogue in seeking an 'overlapping consensus' and that provides the foundations for a 'well-ordered' society, without a top-down imposition of moral standards. And, as Rawls' later work on international order emphasised, there is no compelling reason why they should not apply to a community as grand as the European.[32] Indeed, given the reality of such deep cultural, moral and political plurality in the new Europe, Rawlsian pluralism becomes ever more compelling.

1.1.3   The search for a public philosophy

While Rawls provides the basis for a legal and political order in Europe, it does not prescribe the content of those rules which might characterise the 'overlapping consensus'. It is such a vacuum which has been identified by many as representing a lack of public philosophy for the Union. Law, as Václav Havel rightly observed,

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29 Rawls, 'Kantian Constructivism', 560–1.
30 John Rawls, 'The Idea of an Overlapping Consensus' (1987) 7 *Oxford Journal of Legal Studies* 1–25 at 2.
31 John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), p. 368.
32 John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999).

can only do so much. There has to be more: a 'legal relationship or legal order must be preceded by a connection to an order from the realm of morality, because only a moral commitment imbues the legal arrangements with meaning and makes them truly valid'.[33] Havel is blunt:

> To put it more succinctly, Europe today lacks an ethos; it lacks imagination, it lacks generosity, it lacks the ability to see beyond the horizon of its own particular interests, be they partisan or otherwise, and to resist pressure from various lobbying groups. It lacks a genuine identification with the meaning and purpose of integration. Europe appears not to have achieved a genuine and profound sense of responsibility for itself as a whole, and thus for the future of all those who live in it.[34]

It is a striking condemnation. The absence of a coherent and compelling public philosophy underpins the 'crisis of legitimacy' described by Weiler who came to the 'disconcerting realization that Europe has become an end in itself', and is, accordingly, 'no longer a means for higher human ends'.[35] The idea that Europe's present 'crisis of legitimacy' might be traced to the fatal absence of a public philosophy has been enjoined by the likes of Deirdre Curtin, Larry Siedentop and Ian Ward.[36] According to Ward, the crisis of legitimacy aligns questions of democracy, citizenship and rights. Seizing upon Romano Prodi's proclamation of a coming 'decade' of Europe made back in 2000, Ward suggests that:

> The success or failure of the prospective 'decade' of Europe will not lie in drafting more statutes, arguing more cases, or even making more money. If the 'decade' of Europe is actually to address the 'question' of Europe, it will have to engage once again with an intellectual tradition which champions democracy and humanity, tolerance and compassion.[37]

More recently, the search for a European public philosophy has been championed by Larry Siedentop, who argues that Europe's present 'crisis' is rooted in a mindset that is driven by the demands of 'economism' rather than 'moral consensus'. Where liberalism was once a philosophy of 'human flourishing' and of 'passion', it is now one of alienation and competition. The new Europe is a symbol of this morally impoverished and 'distorted' liberalism.[38] There is, indeed, precious little public philosophy to make sense of Rawlsian pluralism.

33 Václav Havel, *The Art of the Impossible – Politics as Morality in Practice* (New York: Fromm International, 1998), pp. 247–8.
34 Havel, *Art of the Impossible*, pp. 129–30.
35 Weiler, *Constitution of Europe*, p. 259.
36 See Curtin, *Postnational Democracy*; Larry Siedentop, *Democracy in Europe* (London: Penguin, 2000); and Ian Ward, 'The European Constitution, the Treaty of Amsterdam and the Search for Community' (1999) 27 *Georgia Journal of International and Comparative Law* 519–40.
37 Ian Ward, 'A Decade of Europe? Some Reflections on an Aspiration' (2003) 30 *Journal of Law and Society* 236–57 at 257.
38 Siedentop, *Democracy in Europe*, pp. 28–40, 230–1.

1.1.4   Human rights

This leads to a reconsideration of the role of human rights in the Union. Rights are the cornerstone of modern liberal legalism and of European Community and Union law. Indeed, rights have always existed at the heart of Europe and its legal order. The various rights of freedom of movement were a key dynamic in the creation of the common market, and there have always been some, if not too many, collateral social rights. But there has, equally, always been a sense that the Union has not taken rights 'seriously' for their own sake, but merely as tools for the pursuit of economic aspirations.[39] It is perhaps only with the adoption of the Charter of Fundamental Rights that any real commitment to human rights has been realised. A structure of rights, still more so a Charter of rights, presents itself as precisely the kind of structure that a Rawlsian pluralist would expect in any 'well-ordered society'. It should provide a frame of reference within which a discursive democratic society can operate. As such, it is only the beginning, a statement of broad, and contingent, values, not a presumed assertion of legalistic finality.

In this way, it should help to counter one of the most strident criticisms of those who are dismissive of rights and charters of rights, namely that rights are limited by interpretative indeterminacy. Rights, in short, can mean different things to different people. Such an argument was a centrepiece of Critical Legal Studies' critiques of liberal legalism during the 1980s. Scholars were quick to seize on the apparent incoherence of rights in political practice. And indeterminacy is not the only mooted problem with rights. There is also the tendency for the pre-sence of rights to somehow construct the ideal rights-bearing citizen. This asser-tion of 'ideal citizen' models, with its consequent marginalisation and exclusion of the non-ideal, carries a particular resonance for feminists.

Alongside doubts regarding the ideal liberal rights-based citizen is the related critique of negativity. Classical liberal rights tend to be negative, in the sense that they accept the dominant influence of John Stuart Mill's famous 'harm principle'. Accordingly, following Mill, liberal rights protect people from harm, they rarely try to construct solutions. They might, thus, try to protect children from being beaten, but say little about the empowering rights children should enjoy. And a further variant of this negativity critique is the disutility critique. The presence of rights, in charters or even just in the minds of certain judges, brings out the Pangloss in all of us; we assume, just because we have some rights, that we do indeed live in the 'best of all possible worlds'.

Such criticisms again have been central to the feminist distrust of rights. Feminists have argued that a concentration on rights, and their enforcement, can divert attention away from the political sphere: law is limited in its capacity to

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39 See Jason Coppel and Aidan O'Neill, 'The European Court of Justice: Taking Rights Seriously?' (1992) 12 *Legal Studies* 227–45.

bring about changes for women, and it is political reform which offers the best hope for change. Allied to this argument is the fear that rights may in fact lead to a reduction in the existing entitlements of women. Litigation is an inherently risky business, especially when the interpretation of rights is in the hands of a conservative, predominantly male, judiciary. Therefore, surrendering to rights may in fact increase women's disadvantages, rather than improve women's situation. Thus, the dominance of rights discourse is seen as yet another facet of the reifying of law over political and social activism. It is also often suggested that framing reform struggles in terms of rights tends to produce 'politically conservative' or 'classical liberal outcomes'.[40] Thus, more progressive political activism becomes 'channeled and neutralized through the turn to rights'.[41]

There is no doubt that such arguments have force. Sets of charters of rights can be indeterminate, as well as negative in tone. They do presume a degree of commonality amongst citizens and they can be enervating. But, all the same, they are the centrepiece of modern liberal political philosophy and they are the favoured currency in today's Union. And, perhaps most importantly, in the absence of any credible alternative mechanism for promoting the liberties of individuals, and thereby respecting differences, they remain compelling. This essentially pragmatic argument has been famously presented by the likes of Patricia Williams. Speaking as a black woman in the United States, Williams is quick to confirm that working with rights is dramatically more effective than pontificating about indeterminacy in law journals.[42] The insight is valuable. We live in a juristic world of rights, just as we do a world of rules and laws, and it is within this world that a European family law is emerging. Rather than merely casting brickbats at the edifice of rights, it is perhaps better to try to make our rights-mentality better equipped to accommodate the acute diversities and particularities of European communities and citizens.

1.2   Human rights and families

1.2.1   Families and international human rights

The deployment of human rights norms to regulate families and family law can be seen as the result of two converging trends. The first is the growth of human rights norms and consciousness generally in politics and law in recent years. Human rights have become trumps in political and legal debates and have come to occupy an unprecedented place in political and legal discourse. Concepts of family and family law have not been immune to such developments. At the same

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40 Carl Stychin, *Governing Sexuality: The Changing Politics of Citizenship and Law Reform* (Oxford: Hart Publishing, 2003), p. 78.
41 Carl Stychin, *Governing Sexuality*, p. 78.
42 See Patricia Williams, *The Alchemy of Race and Rights* (Cambridge, MA: Harvard University Press, 1991), pp. 146–65.