Families and the European Union

In the first book to offer a comprehensive analysis of family law in the European Union, McGlynn argues that a traditional concept of ‘family’, which has many adverse effects – on individuals, on families (in all their diverse forms), and indeed on the economic ambitions of the EU – is forming the basis for the little-recognised and under-researched field of EU family law. This book examines three different aspects of family life – childhood, parenthood and partnerships – and critically analyses existing EU law in relation to each. It examines the emerging field of EU family law, providing a highly sceptical account of recent developments and a robust challenge to the arguments in favour of the codification of European civil law, including family law.

Clare McGlynn is Professor of Law at Durham University. She has previously taught at the University of Newcastle upon Tyne, was Visiting Professor of European Labour Law at Stockholm University in 1999, and qualified as a solicitor in the City of London. She is author of The Woman Lawyer: Making the Difference (1998).
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Hervey & McHale: Health Law and the European Union
Lacey & Wells: Reconstructing Criminal Law
Lewis: Choice and the Legal Order: Rising above Politics
Likosky: Transnational Legal Processes
Maughan & Webb: Lawyering Skills and the Legal Process
McGlynn: Families and the European Union: Law, Politics and Pluralism
Moffat: Trusts Law: Text and Materials
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O’Dair: Legal Ethics
Oliver: Common Values and the Public–Private Divide
Oliver & Drewry: The Law and Parliament
Picciotto: International Business Taxation
Reed: Internet Law: Text and Materials
Richardson: Law, Process and Custody
Roberts & Palmer: Dispute Processes: ADR and the Primary Forms of Decision-Making
Scott & Black: Cranston's Consumers and the Law
Seneviratne: Ombudsmen: Public Services and Administrative Justice
Stapleton: Product Liability
Turpin: British Government and the Constitution: Text, Cases and Materials
Twining: Globalisation and Legal Theory
Twining: Rethinking Evidence
Twining & Miers: How to Do Things with Rules
Ward: A Critical Introduction to European Law
Ward: Shakespeare and Legal Imagination
Zander: Cases and Materials on the English Legal System
Zander: The Law-Making Process
Families and the European Union
Law, Politics and Pluralism

Clare McGlynn
Durham University
Dedicated with love to Ian, Ross and Freya
Contents

Preface xi
Acknowledgments xvi
Table of cases xviii
Table of legislation and documents xxii

1 Pluralism and human rights: a legal foundation for the regulation of families and family law in the European Union 1
2 Families, ideologies and value pluralism: towards an expanded concept of family 23
3 Children and European Union law: instrumentalism, protection and empowerment 42
4 Parenthood and European Union law: old ideologies and new ideals 78
5 European Union law and the regulation of intimate relationships: marriage, partnerships and human rights 112
6 The emergence of a European Union family law 152
7 Harmonisation, codification and the future of family law in the European Union 176

Bibliography 202
Index 219
When this book was first conceived, my aim was to analyse the concept of family employed in a number of different areas of substantive Community law. The thought of writing a book which also included a detailed discussion of the family law of the European Union never entered my head. If it had, I should have thought it would be a very short book indeed. However, in the late 1990s, when carrying out research for an article on the developing concept of family in European Union law, I came across references to family law in discussions regarding the prospects for a European civil code.¹ The deeper I delved, the more astonished I became. Not only was there already a Matrimonial Convention, but also a proposal to Communitarise it in the form of a regulation.² I was very surprised that I had not come across this material before then. Where was the discussion of these extremely important, and potentially very controversial matters, not just in the academy but in public debates more generally?³ While academic scholarship has caught up with these developments, public debate remains scandalously absent. Indeed, in reality, it is only scholarship in common law countries and in the English language that has ‘caught up’; there has been a long and detailed discussion of family law harmonisation in other European jurisdictions.

When writing, then, in 1999, about the possible creation of a family law for the European Union, I feared I was being too conspiratorial in suggesting such developments. I thought this would be yet another area of Community law in which proposals languished on bookshelves for years before being taken up and usually then radically amended and, if lucky, adopted. But I was wrong. With

incredible speed, the Matrimonial Convention was Communitarised, an amended version has also now been adopted, and further proposals are in the pipeline. These developments are supported at the highest political levels and it is clear that we are only in the first stages of the development of the Union’s competence in the field of family law.

So, while this book began life by examining the concept of family, it now also encompasses the Union’s family law. These two fields of inquiry are, of course, intimately connected. One of my major concerns with the Union’s developing family law is that the existing Union concept of family is based on the dominant ideology of family, premised on the heterosexual married family and the sexual division of labour. For this reason alone, we should be worried about developing Union competence to regulate families and family life. But there are of course further concerns with such developments, as discussed later in the book.

Outline of the book

The discussion in the book proceeds as follows. The first two chapters aim to set the theoretical foundation for the rest of the book. In chapter 1, I consider recent thought on the jurisprudence of the European Union and conclude that the Union is more a postmodern than modern polity. I suggest that Rawlsian pluralism gives us a basis from which to develop the postmodern critique into something more positive and constructive and which meets the lack of a European public philosophy. The realistic, pragmatic, but still positive, basis for such a public philosophy, I suggest, is human rights. These ideas are developed in chapter 2, which examines the dominant ideology of the family, before going on to consider the realities of family life, the new sociological explanations for changes in family practices and the new and emerging ideals of family life. I argue that the Union must embrace a more diverse, pluralist concept of family than has hitherto been the case, based on human rights principles. It is this expanded concept of family which should form the basis for the European Union’s regulation of families and emerging family law.

The following three chapters consider different aspects of the concept of family employed by European Union law. Chapter 3 examines the concept of the child and children’s rights. The role and place of children within the dominant ideology of the family is considered, before going on to examine the newer ways of thinking about children and their rights and interests. While the European Union


6 For further discussion, see chapters 6 and 7.
still has no children's policy to speak of, European Union law is adapting to change and is beginning to reflect more modern approaches to children and their rights. Children's rights in the context of the free movement of persons, the reconciliation of paid work and family life and the evolving family law are analysed. The final section in this chapter examines how the Union's Charter of Fundamental Rights and a rights-based approach to children's law and policy provide the most appropriate way forward for the Union.

Parenthood is the subject of chapter 4. At first sight, it may not be obvious that European Union law and policy engages with the concepts of motherhood and fatherhood. However, as similarly discussed in the previous chapter regarding children, it became clear relatively early in the history of the Community that the impact of its economic policies extended far beyond the mere completion of a single market. In particular, the development of sex equality policies necessarily involved the concept of parenthood, regardless of what the Court of Justice first sought to claim. Thus, for so long as sex equality is an objective of Community policy, the concept of parenthood will be a focus for debate within Community law. Similarly, the Union's employment policy, with its aim to increase the labour market participation of women, must address the balance of paid work and family life, and therefore parental roles, if it is to be successful in achieving its aims. In terms of the future, it may be the Union's emerging family law that will in time have the most impact on the rights of parents and the nature of the parental role. As yet, the direction of these measures is not clear, although the first indications are not wholly positive.

This chapter argues, therefore, that the approach of the Union to parenthood is at best described as ambiguous. The concept of parenthood in the dominant ideology of family is critiqued, followed by a discussion of a more appropriate foundation for the legal regulation of the concept of parenthood. I argue that, if the Community is to achieve its goal of greater workplace participation by women, and if the Union is to receive the support of the European citizens for its incursions into the controversial field of family law, and if the Union is to meet its human rights commitments as detailed in the Charter of Fundamental Rights, it must embrace a concept of parenthood which is more gender neutral than gender distinctive and which furthers the ideals of equal parenting.

Chapter 5 considers the role of European Union law in the regulation of intimate relationships. As with parenthood, it may be desirable that there is no regulation of intimate relations at the Union level, but this is not realistic in view of the competence of the Union. In the fields of equality, free movement, immigration, asylum and judicial co-operation, to name just a few areas, it is simply not possible for the Union to avoid encroaching on personal relationships. Indeed, the very existence of the right to marry in the European Convention on Human Rights, and the transposition of a similar right into the Union's Charter of Fundamental Rights, precludes any attempt to eliminate marriage as a legal category, however desirable that might be. The Union, therefore, has to take a
stance on the politically charged and controversial questions regarding the status of marriage, cohabitation and same sex relationships.

At present, the Union, and particularly the Court of Justice, remain faithful to a traditional ideology of the family, with life-long, monogamous, heterosexual marriage viewed, in practice, as the sole legitimate partnership. Nonetheless, the sands are shifting, albeit slowly. The dramatically changing nature and form of family practices are slowly being recognised. That most Member States are already acknowledging this changing landscape of family life in their law and policy is perhaps influencing the Union in turn to take an increasingly progressive approach. In addition, the Court of Justice is beginning to take seriously the application of human rights norms to Community law, at the same time as the Union legislature appears to be increasingly convinced by its own human rights rhetoric. While this remains a patchwork application of human rights principles, it provides a basis for further innovation. Finally, the Union's ambition of creating an area of freedom, justice and security is bringing about demands for further measures to facilitate movement both in order to secure political, integrationist objectives, but also to continue the economic ambition of eradicating obstacles to the free movement of Union citizens.

The final two chapters move from considering the concept of family to the European Union's emerging family law. Chapter 6 examines the background to and development of Union activity in this field and interrogates the justifications for such action. It also considers the detail of the legislation thus far adopted and examines the more immediate proposals for the future. The family law thus far adopted is criticised for its reliance on a dominant ideology of the family and for its instrumental nature. That is, family law has become a focus for legislative attention in the Union more to achieve the aims of greater integration and economic success, than for more appropriate motives regarding the easier and quicker resolution of cross-national family disputes.

Chapter 7 considers the long-term prospects for the development of family law in the Union. The chapter begins by outlining the harmonisation/codification debates in private law, leading to a discussion of recent developments regarding family law in particular. It then proceeds to consider the reasons for opposing greater convergence of family laws, including an analysis of debate as to whether or not European family laws are converging and an examination of the problematic jurisprudential foundation for any proposed code. I argue that the common human rights norms of Europe should form the bedrock of all national family laws, but, beyond this commonality, diversity should reign. Where convergence results from the normal interchange of ideas and policies, this is to be welcomed. This is indeed one of the benefits of diverse and plural legal systems: arguably the ‘success’ of family law requires an ongoing conversation between law reform approaches and possibilities. But convergence at the behest of ideological, political and jurisprudential commitments to universality, supposed jurisprudential coherence and rationality and deeper European integration should be opposed.
Accordingly, the chapter concludes by calling for more fluid and diverse approaches to any further co-ordination of the family laws of the Member States of the Union, warning that greater harmonisation may in fact promote disintegration, rather than greater European integration, contrary to the wishes of harmonisation/codification advocates.

This book, therefore, discusses some of the interstices of European Union law. The aim is to bring together these seemingly disparate aspects of Union law and to see them as a whole. To consider the concept of family employed across a spectrum of fields of substantive law. To consider the rights of children, or the regulation of intimate relationships, conceptually, and not just tied to a particular aspect of Community or Union law. To see the connections between discussions of the concept of family and the emergence of a European Union family law.

In doing so, no attempt has been made to examine the entire field of European Union law. Children’s rights and interests, for example, are affected by many areas of law and policy not considered in chapter 3. It would simply not be possible within the confines of this book to have done so; nor was that the aim of a text which seeks to examine selected areas of Union law, conceptually. Equally, in terms of analysing the concept of family, there are other aspects of ‘family’ which could have been considered, but were simply beyond the scope of this study, including the right to family life, or not to have a family (with the impact of single market rules on access to infertility treatment and abortion especially pertinent).

Accordingly, the focus of this book has been on seeking to establish a theoretical and conceptual framework for an analysis of ‘family’ and ‘family law’ in the European Union, using such insights in three case studies on different aspects of the family and to examine the emerging family law of the Union.
In writing this book, I have had the help, assistance and support of many people. Much of the preliminary research was carried out while I was Visiting Associate Professor at Stockholm University in 1999. I should like to thank Professor Ronnie Eklund both for inviting me to Stockholm and for his continuing support and interest in my academic work. Thanks must also go to Professor Barbara Hobson of Stockholm University for many stimulating discussions and seminars. My time in Sweden, and frequent return visits, also involving collaboration with colleagues at the universities of Lund and Umea, have greatly enhanced my understanding of issues of families, feminism and law. Working with Professor Kevat Nousianen and Anu Pylkkänen of the University of Helsinki also helped to shape many of the ideas expressed in this book.

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which I have much appreciated; so thank you to Mark Bell, Eugenia Caracciolo di Torella, Peter McEleavy and Ian Sumner. I have enjoyed many discussions with Helen Stalford, on a whole range of different subjects, including the subject matter of this book, and would like to thank her for all her help. I should also like to thank many other colleagues and friends with whom I have enjoyed academic debate and support over the years, not least Rosemary Auchmuty, Joanne Conaghan, Tammy Hervey and Celia Wells.

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# Table of Cases

**European Court of Human Rights**

<table>
<thead>
<tr>
<th>Case</th>
<th>Year of Decision</th>
<th>EHRR Numbers</th>
<th>Relevant Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgian Linguistics (No. 2) (No. 1474/62), (1979–80)</td>
<td>1979–80</td>
<td>1 EHRR 252</td>
<td>15</td>
</tr>
<tr>
<td>Da Silva v. Portugal (No. 33290/96), (2001)</td>
<td>2001</td>
<td>31 EHRR 47</td>
<td>110, 140</td>
</tr>
<tr>
<td>Goodwin v. United Kingdom (No. 28957/95), (2002)</td>
<td>2002</td>
<td>35 EHRR 18</td>
<td>15, 18–19, 140, 144, 145</td>
</tr>
<tr>
<td>I v. United Kingdom (No. 25680/94), (2003)</td>
<td>2003</td>
<td>36 EHRR 53</td>
<td>18–19, 140, 144, 145</td>
</tr>
<tr>
<td>Johnston v. Ireland (No. 9697/82), (1987)</td>
<td>1987</td>
<td>9 EHRR 203</td>
<td>15</td>
</tr>
<tr>
<td>Keegan v. Ireland (No. 16969/90), (1994)</td>
<td>1994</td>
<td>18 EHRR 342</td>
<td>16</td>
</tr>
<tr>
<td>Marckx v. Belgium (No. 6833/74), (1980)</td>
<td>1980</td>
<td>2 EHRR 330</td>
<td>149</td>
</tr>
<tr>
<td>X, Y and Z v. United Kingdom (No. 21830/93), (1997)</td>
<td>1997</td>
<td>24 EHRR 143</td>
<td>16</td>
</tr>
</tbody>
</table>

**European Commission on Human Rights**

<table>
<thead>
<tr>
<th>Case</th>
<th>Year of Decision</th>
<th>EHRR Numbers</th>
<th>Relevant Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lindsay v. United Kingdom (No. 11089/84), (1987)</td>
<td>1987</td>
<td>9 EHRR 555</td>
<td>16</td>
</tr>
<tr>
<td>RB v. United Kingdom (also cited as Bibi v. United Kingdom) (No. 19628/92)</td>
<td>1992</td>
<td>unreported</td>
<td>135</td>
</tr>
</tbody>
</table>

**European Court of Justice/Court of First Instance**

<table>
<thead>
<tr>
<th>Case</th>
<th>Year of Decision</th>
<th>Relevant Pages</th>
</tr>
</thead>
</table>
Booker Aquacultur Ltd and Hydro Seafood GSP Ltd v. Scottish Ministers (Joined Cases C-20/00 and C-64/00), [2003] ECR I-7411; [2003] 3 CMLR 6 18
Carpenter v. Secretary of State for the Home Department (Case C-60/00), [2002] ECR I-6279; [2002] 2 CMLR 64 47, 124–5
Chen and Zhu v. Secretary of State for the Home Department (Case C-200/02), [2004] 3 CMLR 48 25, 48, 56–7, 61, 73–4, 76–7
Commission v. Italy (Case 163/82), [1983] ECR 3273; [1984] 3 CMLR 169 99–100, 103
Diatta v. Land Berlin (Case 267/83), [1985] ECR 567; [1986] 2 CMLR 164 48, 120–1, 130
European Parliament v. Council (Case C-540/03), [2004] OJ C 47/21 57, 77
Eyüp v. Landesgeschäftsstelle des Arbeitsmarktservice Vorarlberg (Case C-65/98), [2000] ECR I-4747 122–5, 126, 146
Gerster v. Freistaat Bayern (Case C-1/95), [1997] ECR I-5253; [1998] 1 CMLR 303 103
Gruber v. Silhouette International Schmied GmbH & Co. KG (Case C-249/97), [1999] ECR I-5295 103

Hill and Stapleton v. Revenue Commissioners and Department of Finance (Case C-243/95), [1998] ECR I-3739; [1998] 3 CMLR 81 102, 103

Hofmann v. Krieg (Case 145/86), [1988] ECR 645 156


Hughes v. Chief Adjudication Officer, Belfast (Case C-78/91), [1992] ECR I-4839; [1992] 3 CMLR 490 50

Humer, Re (Case C-255/99), [2002] ECR I-1205; [2004] 1 CMLR 41 50–1

Inzirillo v. Caisse d’allocations familiales de l’arrondissement de Lyon (Case 63/76), [1976] ECR 2057; [1978] 3 CMLR 596 49

KB v. NHS Pensions Agency (Case C-117/01), [2004] 1 CMLR 28 148


Lebon, see Centre public d’aide sociale de Courcelles v. Lebon (Case 316/85)


Lubor Gaal, see Landesamt für Ausbildungsförderung Nordrhein-Westfalen v. Lubor Gaal (Case C-7/94)

Merino Gómez v. Continental Industrias del Caucho SA (Case C-342/01), [2004] 2 CMLR 3 C88


Netherlands v. Reed (Case 59/85), [1986] ECR 1283; [1987] 2 CMLR 448 48, 121–2, 123, 125, 126, 127, 128, 130, 133–4, 137, 145–6


Office national de l’emploi v. Deak (Case 94/84), [1985] ECR 1873 49


Reina v. Landeskreditbank Baden-Württemberg (Case 65/81), [1982] ECR 33; [1982] 1 CMLR 744 49

Robards v. Insurance Officer (Case 149/82), [1983] ECR 171; [1983] 2 CMLR 537 120

S. v. Fonds national de reclassement social des handicapés (Case 76/72), [1973] ECR 437 49
<table>
<thead>
<tr>
<th>Case</th>
<th>Year</th>
<th>Case/Volume</th>
</tr>
</thead>
<tbody>
<tr>
<td>Stoeckel, Re (Case C-345/89)</td>
<td>1991</td>
<td>ECR I-4047</td>
</tr>
<tr>
<td>[1993] 3 CMLR 673 100</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Webb v. EMO Air Cargo (UK) Ltd (Case C-32/93)</td>
<td>1994</td>
<td>ECR I-3567</td>
</tr>
<tr>
<td>[1994] 2 CMLR 729 102</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**United Kingdom**

<table>
<thead>
<tr>
<th>Case</th>
<th>Year</th>
<th>Case/Volume</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bavin v. NHS Trust Pensions Agency</td>
<td>1999</td>
<td>ICR 1192 149</td>
</tr>
<tr>
<td>R. v. Secretary of State for the Home Department, ex parte McCollum</td>
<td>2001</td>
<td>EWHC Admin 40 126</td>
</tr>
<tr>
<td>Re W: Re B (Child Abduction: Unmarried Father)</td>
<td>1999</td>
<td>Fam 1;</td>
</tr>
<tr>
<td>[1998] 2 FLR 146 17</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Canada**

<table>
<thead>
<tr>
<th>Case</th>
<th>Year</th>
<th>Case/Volume</th>
</tr>
</thead>
</table>
# Table of legislation and documents

## International documents

<table>
<thead>
<tr>
<th>Document</th>
<th>Adopted</th>
<th>Source</th>
</tr>
</thead>
<tbody>
<tr>
<td>Universal Declaration of Human Rights</td>
<td>10 December 1948</td>
<td>UN Doc. A/810 at 71 (1948)</td>
</tr>
<tr>
<td>Declaration of the Rights of the Child</td>
<td></td>
<td></td>
</tr>
<tr>
<td>International Covenant on Civil and Political Rights</td>
<td>23 March 1976</td>
<td>UN Doc. A/6316 (1966), 999 UNTS 171; (1967) 6 ILM 368</td>
</tr>
</tbody>
</table>

Art. 25 67
Art. 29 13
Art. 7 13
Art. 10 13
Art. 11 13
Art. 23 13
Art. 5 14
Art. 2 68
Art. 3 68, 70


Hague Conference on Private International Law


European legislation and documents

EC Treaties

Treaty on European Union (Maastricht), OJ 1992 C 191 155–6, 157, 160–1
Title VI, Art. K.1

Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts, OJ 1997 No. 340/1 63, 66, 132, 158–60, 172, 180

Treaty of Nice (2001), OJ 2001 C 80/1 171, 174, 200

Consolidated Version of the Treaty on European Union, OJ 2002 C 325/1
Art. 2 132, 158
Art. 29 63

Consolidated Version of the Treaty establishing the European Community, OJ 2002 C 325/33
Title IV 138
Art. 61 158
xxiv Table of legislation and documents

Art. 65 158–9, 163, 171, 200
Art. 67 20, 159, 171, 200
Art. 68 165–6
Art. 141 139

Treaty establishing a Constitution for Europe, OJ 2004 C 310 200
Art. I 74
Art. III 74

Conventions and Agreements

Art. 8 16–17, 19, 123–5, 126, 131, 139, 143–4, 183–4
Art. 12 15, 16, 140, 142, 143–5, 183–4
Art. 14 15, 183–4
Art. 141 148, 150
Art. 2 of Protocol No. 1 72

EC–Turkey Association Agreement, OJ 1964 98, 122

Art. 1 155

Community Charter of the Fundamental Social Rights of Workers, 9 December 1989 93

Convention on Cybercrime, Council of Europe ETS No. 185, Budapest, 23 November 2001, in force 1 July 2004 64

Preamble 18, 19, 22, 143
Art. 7 19, 20, 71, 73
Art. 9 19, 144–5
Art. 14 53, 72–3
Art. 15 120
Art. 18 136
Art. 20 71
Art. 21 19, 20, 69, 71–2, 98, 109, 143
Art. 23 98
Art. 24 20–1, 55, 58, 69–71, 98, 109
Art. 28 72
Art. 32 72
Art. 33 19–20, 73, 97, 98
Art. 51 18
Art. 52 19
Explanatory Notes 20

Decisions
Preamble 64–5
Art. 1 65
Art. 2 65
Art. 3 65

Directives
Art. 1 119


Art. 2 105


Art. 1 119


Art. 2 119

Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, OJ 1992 L 348/1 60, 96, 97


Art. 2 119


Preamble 146

Art. 2 146, 147

Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in
receiving such persons and bearing the consequences thereof, OJ 2001 L 212/12 137
Preamble 137–8
Art. 15 137

Preamble 96
Art. 2 96

Art. 2 137

Preamble 54, 133, 134, 135
Art. 4 54–5, 57, 133, 134, 135
Art. 16 135


Preamble 129–30
Art. 2 47, 48, 128, 129
Art. 3 129
Art. 12 52, 130–1
Art. 13 130–1

Regulations

Art. 7(2) 49, 51, 52
Art. 10 47, 48, 121
Art. 12 51–2

Regulation 1251/70/EEC of the Commission of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State, OJ 1970 L 142/42 119–20
Table of legislation and documents

Council Regulation 1408/71/EEC of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, OJ 1971 L 149/2


Preamble 163
Art. 3 166
Art. 15 166
Art. 234 166


Council Regulation 343/2003/EC of 18 February 2003 (Dublin II) establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ 2003 L 50/1

Preamble 58, 109, 170

Resolutions

Resolution on Family Policy in the European Community, OJ 1983 C 184/116

Resolution on action to bring into line the private law of the Member States, OJ 1989 C 158/400


Resolution on equal rights for homosexuals and lesbians in the EC, OJ 1994 C 61/40

Resolution on the harmonisation of certain sectors of the private law of the Member States, OJ 1994 C 205/518

Resolution on protection of families and family units at the close of the International Year of the Family, OJ 1995 C 18/96

Resolution on the protection of families and children, OJ 1999 C 128/79
Resolution of the Council and of the Ministers for Employment and Social Policy, meeting within the Council of 29 June 2000 on the balanced participation of women and men in family and working life, OJ 2000 C 218/0262, 93–4
European Parliament Resolution on cultural co-operation in the European Union, OJ 2002 C 72E/142 4
European Parliament Resolution on the approximation of the civil and commercial law of the Member States, OJ 2002 C 140E/538 180

Communications
COM (89) 363 final: Communication from the Commission on family policies 153, 154
COM (94) 80 final: Report on the education of migrants’ children in the European Union 54
COM (98) 459: Communication from the Commission – Towards an area of freedom, security and justice 138
COM (98) 770 final: Interim report of the Commission on the implementation of the medium-term Community action programme on equal opportunities for men and women (1996 to 2000) 94
COM (99) 106 final: Annual report from the Commission: Equal opportunities for women and men in the European Union 1998 95
COM (99) 220: Explanatory Memorandum 164
COM (99) 347 final: Communication from the Commission: A concerted strategy for modernising social protection 94
COM (99) 441 final: Proposal for Member States’ employment policies 2000 95
| Art. 3 170 |
| Art. 4 170 |
| COM (2003) 6 final: Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions – The future of the European Employment Strategy (EES) 95, 96 |
| COM (2005) 94 final: Communication from the Commission: Green paper – Confronting demographic change: a new solidarity between generations 95 |
Actions

Recommendations and Reports
Jenard Report, OJ 1979 C 59 155
Conclusions of the Council and of the Ministers responsible for family affairs meeting within the Council of 29 September 1989 regarding family policies, OJ 1989 C 277/2 153, 154
Explanatory Report on the Convention on jurisdiction and the recognition and enforcement of judgments in matrimonial matters prepared by Dr Alegría Borrás Professor of Private International Law University of Barcelona, OJ 1998 C 221/27 157–8, 163
Presidency Conclusions, Tampere European Council 15–16 October 1999 159
Recommendation 1470 (2000) on the situation of gays and lesbians and their partners in respect of asylum and immigration in the Member States of the Council of Europe 150
Recommendation 1474 (2000) on the situation of gays and lesbians and their partners in the Council of Europe Member States 150
Draft programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters, OJ 2001 C 12/1 174

National legislation
United Kingdom
Sexual Offences Act 2003 66