Kees Waaldijk and Andrew Clapham
editors

European Human Rights Foundation

Homosexuality: A European Community Issue

**Essays on Lesbian and Gay Rights
in European Law and Policy**

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HOMOSEXUALITY: A EUROPEAN COMMUNITY ISSUE

Essays on Lesbian and Gay Rights
in European Law and Policy

Edited by

KEES WAALDIJK and ANDREW CLAPHAM

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The Family Policy of the European Community

by

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Introduction

The traditional family with married partners of opposite sex and their own two or three children is not exactly dying out. However, it seems fair to ask whether this 'normal' family situation should continue to be considered as *the norm*, the standard used to measure all other forms of human relationships in a world where unmarried cohabitation, divorces, children born out of wedlock, single-parenting, and same-sex relationships have become widespread.¹ Whether one welcomes these evolutions or rejects them, they are a fact of life and have developed in spite of many legal and social disadvantages. All three branches of public authority have to deal with these developments in some way or another. Up to now there has been a reluctance in the Community as well as in the Member States to take any measures which might be seen as supporting and contributing to these developments. Often this has resulted in a reluctance to take any measures at all. This 'sit and wait-strategy' is putting the burden on those who are disadvantaged and discriminated against. These persons are thus marginalized. They see that discriminatory and unfair conditions are ignored by the Community and the Member States and become alienated and disillusioned with the authorities and laws.

- 1 It is difficult to give statistical data on these developments. To give two examples: a) The Member States use slightly different criteria as to what constitutes a lone- or single-parent family. If a separated/divorced-parent has a stable relationship with a new partner who does not adopt the child and thus does not become a parent, will this still be considered a lone-parent family? What is a 'stable relationship'? b) Especially in countries where homosexual relationships between consenting adult males have been prohibited until recently and where stigmatization is (still) widespread, lesbians and gay men tend to hide their sexual orientation and will not appear in statistical surveys. The following data can thus be considered only as rough estimates: Over the decade from 1970 to 1980 the total number of marriages in the Community declined by 20%; the number of divorces tripled between 1964 and 1982 (source: *Communication from the Commission on Family Policies*, COM (89) 363 final, at 4 and 5); births outside marriage in 1989: Belgium 11%; Denmark 45%; France 28%; Germany 10%; Greece 2%; Ireland 13%; Italy 6%; Luxembourg 12%; Netherlands 11%; Portugal 15%; Spain 10%; United Kingdom 27%; total divorce rate in 1985: Belgium 32.0%; Denmark 49.1%; France 39.9%; Germany 35.1%; Greece 11.9%; Italy 5.3%; Luxembourg 33.9%; Netherlands 41.1%; Portugal 13.1%; Spain 9.5%; United Kingdom 44.6% (source: Eurostat; taking into account the very pronounced trends from 1960 to 1989, respectively 1985, these figures are definitely higher today). In Germany ('old' eleven federal states) the number of single mothers has risen between 1979 and 1990 from 88.000 to 220.000 according to government statistics (source: *Frankfurter Allgemeine Zeitung*, 14 May 1992, 7). In studies in the USA 20.3% of the men and 13% of the women have admitted sexual encounters with same sex partners to the point of an orgasm. 28% of the women and 50% of the men have acknowledged sexual arousal by members of their own gender (source: Note, 'Sexual orientation and the Law', *Harvard Law Review* (1989) 1508 1671 (at 1511, footnote 1) – in Europe these figures may be lower due to the still prevailing hostility in many Member States; see also note 2 in Chapter Three by Waaldijk.).

By contrast, the respect for human dignity, equality and individuality and the effective guarantee of the free movement of persons in Europe would demand an active role of the authorities on the Community and Member State level. They should do their share to bring about a situation where the fundamental freedoms are best guaranteed for all members of society.

The task of this chapter is to examine 'the family policy' of the Community. Several intertwined issues have to be dealt with: The topic suggests first of all that there is a clear concept of what can be called a 'family'. This implies that there is a sufficiently unambiguous definition of 'family' in Community law. And if there is, does the definition rely on the traditional concept of 'blood families'?² Or does it (could it?) include other forms of human relationships which have otherwise been called 'non-traditional relationships' or 'alternative lifestyles'?

Furthermore, the topic suggests that there is a 'policy', a strategy, an action plan, a concept of what should and what should not be done with and for families. The legal, economic and social privileges granted to traditional families by their mere existence could already be called a policy, albeit only a policy of preference for some form of human relationships over others. However, most if not all of those privileges are granted by the Member States. They could therefore be considered national family policies but would not qualify for the supranational concept to be examined here, applied in a more or less uniform way throughout the Community by its supranational organs. The question will be, whether an independent family policy of the Community can be identified.

The first part of this report will thus examine past and present declarations and actions of the Community which may be taken as expressions of a family policy. This part could be called common ground or the established legal situation of families in Community law and policy. The question will be whether there is a sufficiently homogeneous concept of the various Community organs, making it fair to speak of 'a Community policy'. Otherwise there may be only a list of contradictory and diffuse efforts which do not deserve to be called policy.

In the second part, the focus will be on the question, whether the expressions of family policy identified in the first part can be applied to relationships of lesbians and gay men. This is clearly the case if Community norms expressly include lesbians and gay men in their field of application. More likely, however, the measures will have to be interpreted, as they will not define their range in such clear terms. Finally, some actions may be found to be hostile to same-sex relationships, specifically excluding them. This section is embarrassingly short which is, in the main, a reflection of

2 Under the traditional concept family relations can only be established via blood relationship, marriage, and adoption.

the fact (made plain elsewhere in this report) that the Community has paid little attention to the needs of lesbians and gay men.

The third part will then examine whether the existing legal situation in its treatment of same-sex relationships can be found to be satisfactory from a Community point of view; or, to say it differently, whether the Community should be satisfied with *its* existing family policy and leave the improvement of the situation of lesbians and gay men to the Member States.

The report will conclude by proposing *de lege ferenda* action by the Community wherever it may be necessary or at least useful, to end unjustified differences in the treatment of same-sex relationships.

I. The Present Community Treatment of 'Families'

A. Primary and Secondary Community Law and its Interpretation by the Court of Justice

The word 'family' is contained neither in the EEC-Treaty nor in the Maastricht Treaty. However, there is a reference to 'dependents'. According to Article 51 of both treaties, migrant workers *and their dependents* benefit from the two fundamental principles of Community social security law, namely the principle of aggregation of all insurance periods acquired in any of the Member States and the principle that payments shall be made irrespective of the place of residence in the Community. It is generally accepted that the Treaty never envisaged a freedom of movement restricted to the workers themselves and excluding their families.³

In the present context the Treaty's equal treatment provisions are also important. Article 7 paragraph 1 of the EEC Treaty (Article 6 paragraph 1 in the Maastricht Treaty) generally prohibits any discrimination on grounds of nationality. More specific equal treatment clauses, which take precedence over Article 7 within their proper field of application,⁴ are included in Article 48 paragraph 2 (no discrimination on grounds of nationality 'as regards employment, remuneration and other conditions of work and employment') and Article 119 ('equal pay for equal work' for men and women).

*Council Directive 64/221 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health*⁵ is expressly

3 Cf. Wölker in Groeben, Thiesing, Ehlermann (eds.), *Kommentar zum EWG-Vertrag*, 4th ed. 1991, Vorb. Arts. 48 to 50, para. 40.

4 Established jurisprudence of the Court of Justice, cf. most recently: Case 305/87, *Commission of the European Communities v. Hellenic Republic (Re Acquisition of Immovable Property)* [1989] ECR 1461 (Rec. 12 f.) and AG Jacobs in that case, Rec. 14, at 1472.

5 JOCE, 4 April 1964, 850; special English edition 1963-64, 117.

applicable to 'any national of a Member State who resides in or travels to another Member State of the Community, either in order to pursue an activity as an employed or self-employed person, or as a recipient of services' (Article 1 paragraph 1) and to 'the spouse and to members of the family' (Article 1 paragraph 2). It protects these persons from excess Member State restrictions under the guise of public policy-, security- or health-measures.⁶ However, it does not define 'members of the family'.

Article 10 of *Council Regulation 1612/68 on freedom of movement for workers within the Community*⁷ contains the following definition of a worker's family:

1. The following shall, irrespective of their nationality, have the right to install themselves with a worker who is a national of one Member State and who is employed in the territory of another Member State:
 - (a) his spouse and *their* descendants who are under the age of 21 years *or* are dependants;
 - (b) dependant relatives in the ascending line of the worker and his spouse.
2. Member States shall facilitate the admission of any member of the family not coming within the provisions of paragraph 1 if dependent on the worker referred to above or living under his roof in the country whence he comes.
3. For the purposes of paragraphs 1 and 2, the worker must have available for his family housing considered as normal for national workers in the region where he is employed; [...]⁸

Subsequent secondary legislation refers to this definition of Regulation 1612/68. For example, *Council Directive 68/360 on the Abolition of Restriction on Movement and Residence within the Community for Workers of Member States and their families*⁹ requires Member States to abolish restrictions previously applied against nationals of other Member States and 'members of their families to whom Regulation (EEC) No. 1612/68 applies' (Article 1). Article 4 paragraph 4 of that same Directive also makes it clear that the family members do not have to be nationals of any Member State of the Community to benefit from the Directive. It is sufficient that the worker be a Community national.

*Commission Regulation 1251/70 on the right of workers to remain in the territory of a Member State after having been employed in that State*¹⁰ gives the right to remain permanently in another Member State also to the members of the family of the worker 'as defined in Article 10 of Regulation (EEC) No. 1612/68' (Article 1). They retain this right even after the death of the worker (Article 3).

6 Cf. for example Case 67/74, *Carmelo Angelo Bonsignore v. Oberstadtdirektor der Stadt Köln* [1975] ECR 297.

7 JOCE 1968 L 257/2; special English edition 1968-69, 475.

8 Ibid., emphasis added.

9 JOCE 1968 L 257/13; special English edition 1968-69, 485.

Thus, the definition of Regulation 1612/68 gains importance beyond its immediate field of application.

In the field of self-employed establishment and the provision of services *Council Directive 73/148 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services*¹¹ provides its own, slightly different definition of members of the family which benefit from the same freedoms:

1. The Member States shall, acting as provided in this Directive, abolish restrictions on the movement and residence of:
 - (a) nationals of a Member State who are established or who wish to establish themselves in another Member State in order to pursue activities as self-employed persons, or who wish to provide services in that State;
 - (b) nationals of a Member State wishing to go to another Member State as recipients of services;¹²
 - (c) the spouse and the children under twenty-one years of age of such nationals, irrespective of their nationality;
 - (d) the relatives in the ascending and descending lines of such nationals and of the spouse of such nationals, which relatives are dependent on them, irrespective of their nationality.
2. Member States shall favour the admission of any other member of the family of a national referred to in paragraph 1 (a) or (b) or of the spouse of that national, which member is dependent on that national or spouse of that national or who in the country of origin was living under the same roof.¹³

Finally, for the area of social security law, Article 1(f) of *Council Regulation 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community*¹⁴ contains the following definition:

'member of the family' means any person defined or recognized as a member of the family or designated as a member of the household by the legislation under which the benefits are provided or [...] by the legislation of the Member State in whose territory such person resides; [...]

10 JOCE 1970 L 142/24; special English edition 1970, 402.

11 OJ 1973 L 172/14; this directive has replaced Dir. 64/220, JOCE 1964 56/845.

12 Recipients of services who are privileged under this directive are *inter alia* tourists, cf. Case 186/87, *Ian William Cowan v. Trésor public* [1989] ECR 195.

13 *Ibid.*, emphasis added. By contrast to Reg. 1612/68, which speaks of the worker, his spouse and *their* descendants, para. 1(c) of Dir. 73/148 speaks only of *the* children of the professional. This may seem to exclude the children of his/her spouse whom he/she has not adopted (e.g. children from a previous marriage of the spouse). However, contrary to para. 1(b) of Reg. 1612/68, para. 1(d) of Dir. 73/148 goes on by giving the right of movement and residence not only to dependant relatives in the *ascending line* of worker and spouse, but to those relatives in the *ascending and descending lines* of professional and spouse. Thus, children related only to the spouse are included after all.

14 Originally published in JOCE 1971 L 149/2; revised current version in OJ 1983 L 230/8.

All three definitions do not purport to contain final and complete lists or criteria for the determination of 'members of the family'. Other persons than those expressly listed can be members of the family according to national law and will benefit from the quoted articles and norms. Furthermore, the definitions refer to relatives in the descending line, i.e. children and grandchildren, without any statement as to how the relationship was established. In particular this means that it is immaterial from a Community-law point of view whether the children were conceived 'naturally', through artificial insemination or were adopted and are thus not biologically related at all. Again, Community law relies on the national requirements as to who is and who is not recognized as a descendent.¹⁵

The Court of Justice has been called upon a number of times to interpret the personal range of the freedom of movement and the social security provisions. Indirectly these judgments are also delimiting the Community's regulatory competence concerning the definition of 'members of the family' and 'spouse' and thus the Community's powers to adopt what could be called an independent family policy.

A rather restrictive view was expressed by Advocate General Trabucchi in Case 21/74.¹⁶ Trabucchi stated that discrimination against married women may result from the fact that,

when he gets married, a man does not automatically acquire the nationality of the wife and would, therefore, never be in the position of losing the privileges associated with the status he had before the marriage [while the opposite will frequently be the case]. But, as I have already indicated, *Community law cannot remould from its own point of view the whole world of social and human relationships*. Where the national legislation provides for a method of acquiring nationality [...], those responsible for drafting the Community legislation rightly accept the situation as they find it as a point of reference, and they will do so long as it is not in itself repugnant to a fundamental human right, as discrimination based on sex alone would be. *Community law cannot object to the fact that, in the management of its internal relationships, each State pays regard to the principle of family unit in accordance with its own conception of it and without in social terms conflicting with the public policy of the Community.* [...] ¹⁷

At first glance the Advocate General seems to reject a Community competence concerning family policy entirely, and rather to leave the field to the Member States. A second look will show, however, that Trabucchi is

¹⁵ The view expressed by Steiner, 1990, on page 168, that it 'would be in keeping with the Court of Justice's approach to take a broad view of the rights of children of the family' and that it may suffice that persons have been 'treated as children of the family even though they were not, strictly speaking, descendants', thus focusses too much on the Court's side, i.e. Community law, and neglects the decisiveness of national law on this question.

¹⁶ *Jeanne Airola v. Commission of the European Communities* [1975] ECR 221.

¹⁷ *Ibid.*, at 233, emphasis added.

making two reservations: the Member States must not obstruct the public policy of the Community and they may not violate fundamental human rights. These reservations shall be examined more closely below.

Some interesting observations on the concept of 'spouse' are contained in Advocate General Mancini's opinion on Case 149/82¹⁸ concerning child benefits for divorced parents:

Various interpretations of the concept of 'spouse' [in Article 10 of Regulation 574/72¹⁹] have been put forward: According to the [British] Insurance Officer, the question is to be resolved on the basis of the law applied by the social security institution which seeks to rely upon Article 10. Under United Kingdom law, only persons whose marriage subsists are regarded as spouses; thus a divorcee is a former spouse and not a spouse. [...] By contrast with that interpretation of the expression 'spouse', which I would describe as restrictive, the Commission and the Council expressly ask the Court to interpret it widely. The Commission submits that, *in the interpretation of Community social security legislation*, emphasis should be placed on the position of the worker as regards his professional trade activity rather than on his status *familiae*. The Council points out that there is a lacunae in the regulation. It therefore proposes that the Court should fill that lacunae by regarding as a 'spouse' any person having legal custody of and residing with the children in respect of whom the benefits are payable. The view of the Insurance Officer is to be rejected. In the first place it overlooks the fact that the reference made in the regulation to national legislation concerns the definition of 'member of the family' and not that of 'spouse'. [...] *As regards the Council's proposal that any person having custody of and residing with the children in respect of whom the benefits are payable should be regarded as 'spouse', I do not consider it acceptable in the context of the proceedings before this Court. It is a matter for legislature. That does not mean that it is not valid as a matter of legal policy.* [...] ²⁰

On the one hand the Advocate General is rejecting the narrow British definition of 'spouse' with the argument that only the definition of 'members of the family' is left to national law. On the other hand he rejects the very wide definition proposed by the Council by saying that such a wide definition could not be introduced by the Court but only by Community legislature. The Court followed the Advocate General by not endorsing the Council's very wide concept of 'spouse', but still included divorced parents amongst those entitled to child benefits as spouses:

[19] However, the task assigned to the Court by Article 177 of the EEC Treaty is not that of delivering opinions on general or hypothetical questions [namely whether a 'spouse' can also be a third person which was never married to either parent] but of assisting in the administration of justice in the Member States. In this case, therefore, the interpretation of the provision in question should be

18 *Stephanie Robards v. Insurance Officer* [1983] ECR 171, 189.

19 Regulation of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No. 1408/71, OJ English Special Edition 1972 (I), 159.

20 Case 149/82, *supra* footnote 18, at 194 and 195, emphasis added.

confined to the case which is before the national court, namely that of a divorced spouse who has not remarried and is carrying on a professional or trade activity. *It would be for the Commission and the Council to take the necessary measures in order to amend the provision in question* if it appeared that such an amendment were necessary in order to enable other cases to be satisfactorily resolved.

[20] The reply to be given [...] to the Social Security Commissioner is that the second sentence of Article 10(1)(a) of Regulation No. 574/72 must be interpreted as meaning that it applies to a divorced spouse. [...] ²¹

While it remains unclear, why 'members of the family' was left to the competence of the Member States' to define and 'spouse' not,²² it must not be forgotten that all this interpretation was done in the context of a very specific application of a very specific regulation and may not be valid in other contexts.

The definition of 'spouse' had very severe consequences for a non-Community national in Case 267/83.²³ The plaintiff of the main proceedings was a Senegalese national, married to a French migrant worker and living in Berlin. After the marriage had broken up and the couple had separated, but before the divorce, the German authorities refused to renew the plaintiff's residence permit on the grounds that she was no longer a 'member of the family' of a Community national. Upon reference for preliminary ruling the Court of Justice rejected this interpretation of Regulation 1612/68 but only on the ground that the marriage, at the point of time in question, had not yet been dissolved. The Court thus established two principles: a) the right of the family members to install themselves with the migrant worker in another Member State does not require that they live permanently with him or her under the same roof; b) once the family bond is legally dissolved through divorce or otherwise, the persons who had derived their rights from the migrant worker cease to be family members and may be expelled.²⁴

²¹ Ibid., at 187, emphasis added.

²² AG Lenz, in Case 59/85, *State of the Netherlands v. Ann Florence Reed* [1986] ECR 1283, held it to be unacceptable that the term 'spouse' were left to be defined by national law because in that case 'there would be divergence in the application of the law on an issue important for freedom of movement, which would be just as unacceptable as divergence with regard to the term "worker" was held to be in the judgments in Cases 75/63 [*Mrs M.K.H. Hoekstra (née Unger) v. Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten* [1964] ECR 177] and 53/81 [*D.M. Levin v. Staatssecretaris van Justitie* [1982] ECR 1035].' (at 1293). However, is the same not also true for the term 'members of the family'?

²³ *Aissatou Diatta v. Land Berlin* [1985] ECR 567.

²⁴ For a very critical discussion of this result see Weiler, 'Thou Shalt Not Oppress a Stranger: On the Judicial Protection of the Human Rights of Non-EC Nationals - A Critique', 3 *EJIL* (1992) 65 (at 85 to 91). In a parallel case which had come before the British courts, High Court Judge Comyn had struck down the expulsion order arguing that if an EEC worker could remove the 'cloak of protection' from a non-EEC spouse by deserting or divorcing him [or her], or by leaving the country, 'this would add a new terror to marriage'. Unfortunately, this view was shared neither by the Court of Appeals

As Weiler has pointed out,²⁵ the Court, in deviating from the guidelines set up by Advocate General Trabucchi²⁶ failed to even consider whether these results might violate fundamental human rights of the plaintiff, e.g. her right to human dignity (by giving the husband the *de facto* power to have her expelled) or her right to family life (had there been children).

At least as far as Community nationals are concerned, the Court is however sensitive to discrimination by a Member State on grounds of nationality.

In a case which came before the Court as a preliminary reference from the Hoge Raad²⁷ a British national had come to the Netherlands to work there for a subsidiary of a British company. His girl-friend had accompanied him. She first applied for a residence permit on the basis that she was looking for work and after she had been unable to find work she based her application on her relationship with the migrant worker. Under Dutch law at that time, a foreigner was entitled to be treated as a spouse for purposes of immigration law, if he or she had a stable relationship with a Dutch citizen, was not otherwise married and appropriate accommodation and sufficient means of existence were provided. Thus, the Hoge Raad asked for interpretation of Community law on two different lines: (a) should Article 10(1)(a) of Regulation 1612/68 nowadays be interpreted to include not only 'spouses' but equally unmarried companions? (b) was the Dutch law a discrimination on grounds of nationality prohibited by Article 7 or 48 EEC?

On the first question, the Dutch government argued

[when], in support of a dynamic interpretation, reference is made to developments in social and legal conceptions, those developments must be visible in the whole of the Community; such an argument cannot be based on social and legal developments in only one or a few Member States.²⁸

The Commission concurred that in 'the Community as it now stands it is impossible to speak of any consensus that unmarried companions should be treated as spouses.'²⁹ And the Court agreed, arguing that such a wide interpretation of Article 10 of Regulation 1612/68 would be binding and directly applicable in all Member States according to Article 189 and therefore 'any interpretation of a legal term on the basis of social developments must take into account the situation in the whole Community, not merely

nor by the House of Lords and a reference to the Court of Justice was not made on the ground that the matter had already been settled in *Diatta*; cf. Steiner, 1990, 167.

25 *Supra* footnote 24, at pp. 87-88.

26 Cf. *supra* footnote 17 and accompanying text.

27 Case 59/85, *State of the Netherlands v. Ann Florence Reed* [1986] ECR 1283.

28 *Ibid.*, Rec. 10.

29 *Ibid.*, Rec. 11.

in one Member State.³⁰ This finding of the Court is evidently based on the *absence of laws* in most Member States to the effect that unmarried couples must (under certain conditions such as long standing stability, exclusivity, etc.) be treated equally to married couples. The Court is evidently not looking at the *presence of millions of unmarried couples* in all Member States.

On the second question, however, the Court did not follow the suggestion of the Dutch Government and the Advocate General. Relying on Article 7(2) of Regulation 1612/68 rather than Article 10, the Court held:

[24] Article 7(2) [...] provides that in the host State a worker who is a national of another Member State must 'enjoy the same social and tax advantages as national workers'.

[25] The Court has emphasized, in particular in its judgment of 30 September 1975 in Case 32/75 (*Cristini v. SNCF* [1975] ECR 1085), that the phrase 'social advantages' in Article 7(2) must not be interpreted restrictively.

[26] As the Court has repeatedly held, the purpose of Article 7(2) of Regulation No. 1612/68 is to achieve equal treatment, and therefore the concept of social advantage, extended by that provision to workers who are nationals of other Member States, must include all advantages 'which, whether or not linked to a contract or employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and the extension of which to workers who are nationals of other member countries therefore seems suitable to facilitate their mobility within the Community' (judgments of 31 May 1979 in Case 207/78 *Ministère public v. Even* [1979] ECR 2019, and 20 June 1985 in Case 94/84 *Office national de l'emploi v. Deak* [1985] ECR 1873). [...]

[28] *In the same way it must be recognized that the possibility for a migrant worker of obtaining permission for his unmarried companion to reside with him, where that companion is not a national of the host Member State, can assist his integration in the host State and thus contribute to the achievement of freedom of movement for workers. Consequently, that possibility must also be regarded as falling within the concept of a social advantage for the purposes of Article 7(2) of Regulation No. 1612/68.*³¹

Understandably, the Court chose what could be called the minimalist solution, helping the plaintiffs in question³² by freely interpreting the Community-law term 'social advantages' instead of redefining the Member State-law term 'spouse' and risking harsh criticism for judicial activism.

30 Ibid., Rec. 12-13; to a limited extent the Court was in agreement with AG Lenz, who had proposed to reject the wide interpretation of Article 10 on grounds of legal certainty: 'if companions are to be treated in the same way as spouses it is imperative to lay down limits, criteria and conditions (in particular with regard to the duration and nature of the relationship). These are certainly a matter for the legislature, and can hardly be determined by the Court of Justice in the course of interpretation of a regulation intended to cover other cases.' (at 1294).

31 Ibid., at 1302-1303, emphasis added.

32 Or rather not helping them as Ms Reed and her partner had given up before the judgment was handed down and had gone back to the UK.

Another famous example where the Court in fact interfered with Member State legislation concerning family rights on the grounds of discrimination based on nationality is Case 249/86.³³ Germany had made the right of the relatives and dependants of migrant workers to stay with him or her conditional upon him or her continually providing adequate housing for the entire family. This had resulted in the expulsion of previously admitted family members after a deterioration of the housing situation, for example through the birth of another child or the arrival at the age of majority of a child. At the same time, German nationals in a comparable position did not have to fear any consequences. The Court rejected the German interpretation of Regulation 1612/68:

[10] Regulation No. 1612/68 must [...] be interpreted in the light of the requirement of respect for family life set out in Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. That requirement is one of the fundamental rights which, according to the Court's settled case-law, restated in the preamble to the Single European Act, are recognized by Community law.

[11] [...] Article 10(3) of Regulation No. 1612/68 must be interpreted in the context of the overall structure and purpose of that regulation. [...] in order to facilitate the movement of members of workers' families the Council took into account, first, *the importance for the worker, from a human point of view, of having his entire family with him*, and, secondly, the importance, from all points of view, of the integration of the worker and his family into the host Member State without any difference in treatment in relation to nationals of that State.³⁴

In all cases where the Court of Justice is referring to Articles of the European Convention of Human Rights, it does so only in the fairly general manner exemplified *supra* in recital 10, i.e. to the Convention text itself and the text of the additional protocols. In no case has the ECJ ever referred to or otherwise discernably taken into account the interpretation of those texts by Convention organs in individual cases. Thus, the established practice of the ECJ to refer to the Convention as a source of human rights to be respected in Community law does not necessarily mean that the Human Rights Commission's restrictive interpretation of 'family' as excluding stable gay male³⁵ and lesbian³⁶ partnerships is also valid in Community Law. On the other hand, this established practice may become very significant for Community Law if and when the *Draft Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Elimination of Discrimination Based on Sexual Orientation*³⁷ is adopted

33 *Commission of the European Communities v. Federal Republic of Germany (Re Housing of Migrant Workers)* [1989] ECR 1263.

34 *Ibid.*, at 1290, emphasis added.

35 *X. and Y. v. UK*, 32 DR 220 (1983).

36 *S. v. UK*, 47 DR 274 (1986).

37 For a critical appraisal of the Draft see Helfer, 1991, (especially 188-191).

by the Council of Europe and ratified by the majority of the Member States of the EC.

A second observation is of more immediate relevance: The Court is subscribing to Advocate General Trabucchi's view and the limitation on Member States' family policy drawn by Community legislative acts which have to be interpreted in taking into account (Community) human rights.³⁸ It is just not always consistent in applying those standards.³⁹

B. Non-Binding Recommendations, Resolutions and Reports

A complete list of all the occasions on which any Community organ has ever had to deal in one way or another with family matters would not only be very hard to compile but also very long and fairly meaningless. Thus, the following examples are a rather random selection which attempts to cover those family related matters which represent significant developments also for lesbians and gay men.

1989 saw a *Communication from the Commission on Family Policies*.⁴⁰ The findings of the Communication were based on a seminar on the implications of Community family policies, held in Frankfurt from 18-19 April 1989. They concern primarily the implications of demographic changes in the Member States, in particular the declining birth rate. However, as the name already suggests, the Communication deals with family *policies* in the plural, i.e. above all those of the Member States. Section II on 'Recognition of the Role of the Family and Action in its Favour by the Public Authorities' does contain a chapter 3 on action at Community level. But it previews only the gathering of information, drawing up of an inventory on measures and provisions in effect (at the national levels), long-term population studies and 'concertation at senior national level'.⁴¹ There is no intention of establishing an independent Community family policy.

Of its own motion the Economic and Social Committee decided on 25 April 1991 to draw up an *Opinion on Lone-Parent Families*. The Opinion was adopted on 31 October 1991.⁴² After analysing the overall disadvantaged situation of lone-parent families, the Opinion suggests modifications in the national welfare systems, a new social housing strategy, improved

38 Cf. *supra* footnote 17 and accompanying text. For a general discussion of Community human rights protection cf. Cassese, Clapham, Weiler (eds.), 1991; and in particular therein the contributions by Vila Costa, *Les droits des femmes dans la Communauté européenne* (Vol. III, 177), and Castillo, *Les droits des enfants dans la Communauté* (Vol. III, 225).

39 Cf. Weiler, *supra* footnote 24.

40 COM (89) 363 final; cf. also EP *Resolution on Family Policy*, OJ 1983 C 184 (17 November 1983).

41 *Ibid.*, at 14.

42 CES (91) 1266, Rapporteur: Ms Slipman.

access to child-care resources and improved access to education and training. What the report does not explicitly say is that all measures required to implement these suggestions would, at the present stage of development of European integration, have to be effected by the Member States, who are in no way bound by the Opinion.

In its *Proposal for a Council Recommendation on Child Care*⁴³ the Commission found *inter alia* 'a clear need for closer approximation in levels of support for employed parents, including services providing care for children, in order to eliminate imbalances in the labour market and facilitate mobility between Member States'.⁴⁴ Thus the Commission asked the Council to *recommend* 'that Member States develop measures in order to enable women and men to reconcile their occupational and their family obligations, arising from the care and upbringing of children'.⁴⁵

Concerning rights of lesbians and gay men, the European Parliament took the lead in 1982. Following motions for resolutions by Mr Glinne and others on sexual discrimination⁴⁶ and by Mrs van den Heuvel on statutory and other discrimination against homosexuals⁴⁷ it requested an opinion on sexual discrimination at the workplace from the Committee on Social Affairs and Employment. The result was the so-called Squarcialupi Report⁴⁸ which formed the basis for the adoption by the Parliament on 13 March 1984 of the *Resolution on Sexual Discrimination at the Workplace*.⁴⁹ In that resolution the European Parliament

4. Urges the Member States to:
 - (a) abolish any laws which make homosexual acts between consenting adults liable to punishment,
 - (b) apply the same age of consent as for heterosexual acts, [...]
5. Calls on the Commission to:
 - (a) renew its efforts with regard to dismissals to ensure that [...] certain individuals are not unfairly treated for reasons relating to their private life,
 - (b) submit proposals to ensure that no cases arise in the Member States of discrimination against homosexuals with regard to access to employment and working conditions, [...]
6. Also calls on the Commission to:
 - (a) invite Member States to provide, as soon as possible, a list of all provisions of their legislation which concern homosexuals,

43 Com (91) 233 final, 28 August 1991.

44 Ibid., Explanatory Memorandum, para. A.7.

45 Ibid., Article 1; the Opinion of the Economic and Social Committee on the Commission proposal was adopted on 28 November 1991, CES (91) 1390, Rapporteur: Mrs Guillaume.

46 EP Doc. 1-172/82.

47 EP Doc. 1-1072/82.

48 *Report on Sexual Discrimination at the Workplace*, EP Working Doc. 1-1358/83, 13 February 1984.

49 OJ 1984 C 104/45.

- (b) to identify, on the basis of such lists, any discrimination against homosexuals with regard to employment, housing and other social problems by drawing up a report, pursuant to Article 122 of the EEC Treaty;

On the basis of a mandate provided by *Council Resolution of 29 May 1990 on the Protection of the Dignity of Women and Men at Work*⁵⁰ the Commission elaborated a *Commission Recommendation on the Protection of the Dignity of Women and Men at Work* and, annexed to it, a *Code of Practice on Measures to Combat Sexual Harassment*.⁵¹ The purpose of the Code is

to give practical guidance to employers, trade unions, and employees on the protection of the dignity of women and men at work. [...] The aim is to ensure that sexual harassment does not occur and, if it does occur, to ensure that adequate procedures are readily available to deal with the problem and prevent its recurrence.⁵²

The Code explicitly identifies lesbians and gay men amongst those groups of employees particularly vulnerable to sexual harassment.⁵³

On 30 October 1991 the Economic and Social Committee adopted its Opinion on the *Draft Commission Recommendation on the Protection of the Dignity of Women and Men at Work*.⁵⁴ It welcomed the initiative and generally endorsed the findings and proposals of the Commission, regretting however, that they were limited to a recommendation instead of a more binding EC instrument.⁵⁵

Finally on July 1992 Parliament adopted the Resolution on *Rights of the Child* which provides for the rights of children to grow as full members of society, including their freedom of conscience and right to self determination. Paragraph 8.5. specifically outrules discrimination of children on the basis of sexual orientation.⁵⁶

C. Results of Part I

Two results should be obvious from the foregoing analysis: Firstly, the Community has clearly not taken over the main responsibility for family matters from the Member States. All binding acts of Community law are without exception closely related either to migrant workers and thus the fundamental freedom of movement, provision of services and establish-

⁵⁰ OJ 1990 C 157/3.

⁵¹ OJ 1992 L 49/1.

⁵² Ibid., para. 1, at 3.

⁵³ Ibid. For a further discussion on sexual harassment at work and employment protection and controls for lesbians and gay men in the workplace, see Chapter Fourteen by Betten.

⁵⁴ C (91) 1397 final.

⁵⁵ CES (91) 1253, Rapporteur: Ms Maddocks (30 October 1991), para. 1.3.

⁵⁶ EP Document A 30172/92, Rapporteur: Mr Bandres Molet (Report dated 27 April 1992).

ment, or the equality of the sexes as explicitly provided for in Article 119 of the EEC Treaty and what may be called the catalogue of fundamental human rights respected by the Community. Wherever Community organs have become active outside of the context of free movement of persons, the results were without exception non-binding resolutions and recommendations in rather general language.⁵⁷

Secondly, for any person to come within reach of Community regulatory competence there are only two possibilities *de lege lata*: either the person becomes a migrant worker or a member of what is accepted as the family of a migrant worker under Article 10 of Regulation 1612/68, or the person claims a right against a Member State which is guaranteed by the Community *and has to be respected by the Member States*.⁵⁸ Most Community nationals and the larger parts of family life of all Community nationals remain under the exclusive competence of the Member States. Even where binding Community 'family law' does exist, it is not independent from Member States' law. The definition of 'family' depends to a large extent on the definitions of the Member States. Immediate result of this interdependence are differences in the level of personal freedom and the extent of protection from Member State to Member State.

The latter is evident in particular as far as the right of 'members of the family' other than spouses and dependent parents or children are concerned, to migrate with a worker to another Member State. Today there is no legal obligation on the Member States to admit unmarried partners or non-dependent or less close relatives even if they have been living with the migrant worker in the State of origin. Some Member States will have more restrictive policies than others in this area. And the Court of Justice has made it quite clear that it will not 'legislate' new definitions of 'spouse' or 'members of the family' to extend existing Member States' legal obligations of admission, residence, work permits, etc. before a clear majority of the Member States has enacted national legislation in the same direction.

More far-reaching legal obligations have been proposed by Parliament in its *Proposal for a Regulation Amending Council Regulation (EEC) No. 1612/68 on Freedom of Movement for Workers within the Community*.⁵⁹ The European Parliament has suggested the following addition to Article 10:

57 Even in those non-binding acts the Community organs have frequently attempted to establish a connection to the safe-haven of the fundamental freedoms, cf. the *Child Care Recommendation*, *supra* footnotes 43-45 and accompanying text.

58 On the question whether and to what extent Community human rights are binding not only on Community organs but also on the Member States, when the latter are acting within their own area of competence and not implementing Community legislation cf. Chapter Two by Clapham and Weiler, and Chapter Eight by Snyder *et al.*

59 OJ 1990 C 68/88.

2. The right to install themselves referred to in paragraph 1 above shall also cover the person with whom the worker lives in a de facto union recognized as such for administrative and legal purposes, whether in the Member State of origin or in the host Member State, and their dependent offspring.
3. The death of the worker, dissolution of the marriage or ending of the de facto union shall not prejudice the rights acquired under paragraphs 1 and 2 of this Article.

A somewhat less far reaching amendment on similar lines was proposed by the Commission two months later in its *Modified Proposal for a Council Regulation (EEC) Amending Regulation (EEC) No. 1612/68 on Freedom of Movement for Workers within the Community*.⁶⁰ The Commission proposed to rephrase Article 10 subparagraph (a) as follows: '(a) the spouse or any person with similar status under the system of the host country and their descendants';⁶¹

However, these proposals have not been taken up so far by the Council and given the resistance of some Member States against further obligations concerning admission of 'aliens' a positive vote of the Council does not seem likely for some time to come either.⁶²

II. Lesbians and Gay Men under Existing 'Family Law' of the Community

All Community-law documents that refer to lesbians and/or gay men are without exception non-binding recommendations, resolutions and reports. They merely 'urge' Member States to abolish discriminatory legislation, 'invite' them to cooperate by providing information on their laws and practices, etc. Their effect has been virtually zero.⁶³

Lesbians and gay men are not mentioned in one single binding norm of the Community. Thus, the regulations and directives dealing with family law in one way or another have to be interpreted to find out if and to what

⁶⁰ OJ 1990 C 119/10.

⁶¹ Ibid., at 11, emphasis added.

⁶² However, Regulation No. 1612/68 is based on Article 49 EEC. Thus, amendments used to require that the Council is 'acting on a proposal from the Commission and after consulting the Economic and Social Committee' (pre-Single Act), have been altered to the requirement now that the Council is 'acting by a qualified majority on a proposal from the Commission in co-operation with the European Parliament and after consulting the Economic and Social Committee' (current EEC Treaty as amended by the Single Act), and in the future is 'acting in accordance with the procedure referred to in Article 189b and after consulting the Economic and Social Committee' (Maastricht Treaty). These amendments have brought and will bring an increased influence of Parliament and reduced possibilities of individual Member States to block legislation in this area.

⁶³ Tatchell, 1990, 6-7.

extent they would be applied to lesbians and gay men *under the present jurisprudence of the Court of Justice*.

As has been shown *supra*, Community norms as interpreted by the Court leave the definitions of 'spouse' and 'members of the family', which usually decide the personal range of application of the norms, largely to the Member States. How free are the Member States, therefore, in their definition of 'members of the family'? Where is the line beyond which they begin to obstruct the public policy of the Community or the enjoyment of fundamental human rights?

The question whether a lesbian or gay partner of a migrant worker can claim benefits under Community law has not come before the Court thus far. However, the most likely answer is not hard to predict. One might even go so far as to saying that the Court would accept a Member State's (non-discriminatory) exclusion from 'the family' of all persons, except the spouse (of a traditional marriage) and genetically related children. Advocate General Trabucchi once expressed the Member States' competence to define the term 'family members' as follows:

[...] although there may be problems of definition in this matter, they will never relate to the worker's children, whose membership of the family could not be contested even on the narrowest acceptance of the concept of 'member of the family'.⁶⁴

A major 'benefit' offered to lesbians and gay men under existing Community law becomes visible upon application of the Court's decision in the *Reed* case⁶⁵ on a Danish registered partnership. The *Danish Registered Partnership Act of 1989* permits lesbian or gay couples to enter into an institutionalized partnership if (at least) one of the partners is of Danish nationality. The registered partnership has similar legal consequences as marriage. However, the couple cannot adopt children, nor can there be common custody of children, they cannot demand a church wedding and, most importantly, the partnership is not recognized in other countries.⁶⁶

If the Court held in *Reed* that 'the possibility for a migrant worker of obtaining permission for his unmarried [opposite sex] companion to reside with him [...] can assist his integration in the host State' and consequently 'must be regarded as falling within the concept of a social advantage for the purposes of Article 7(2) of Regulation No. 1612/68',⁶⁷ the same must be true of the possibility of a migrant worker to register a same-sex partnership in Denmark the way Danish nationals can.

64 Case 7/75, *Mr and Mrs F. v. Belgian State (Re Handicapped Child)* [1975] ECR 679, at 697.

65 Cf. *supra* footnote 27 and accompanying text.

66 See also paragraph II.B.2.c of Chapter Three by Waaldijk.

67 *Supra* footnote 27, Rec. 28 of the judgment.

Thus, the limitation of the *Danish Registered Partnership Act* to situations where at least one of the partners is of Danish nationality, cannot be upheld against migrant workers who have come to Denmark from other Member States.

III. Evaluation and Proposals

A. What Should the Optimal Situation Be Like?

A convincing presentation of the 'optimal situation' requires first of all an agreement on the moral judgment concerning sexual preference for same-sex partners. It is submitted that homosexuality should be considered as part of someone's personality like blue eyes or left handedness. It is not helpful to look for the reasons of homosexuality when considering how lesbians and gay men should be treated. It seems irrelevant whether or not the reasons are of a genetic nature, stem from early childhood experiences or can be wholly or partially subject to personal decision. The fact is that some persons will have preferences for same-sex lovers. This is not good or bad, it is just different. Moral or legal condemnation will not do away with the factual situation. It has been recognized that homosexuality is not a disease. There are forms of homosexual behaviour which are undesirable in any society but this is equally true for certain forms of heterosexual behaviour (for example rape, seduction of children, incest, etc.).

The sight of lesbians and gay men openly displaying affection in a manner accepted between heterosexual couples such as holding hands or kissing in public is simply unfamiliar. It is no more or no less detestable than heterosexual intimacy in public, merely less common. This is likely due in part to the real threat of violence (physical and verbal) or public censure which remains socially acceptable behaviour in most Member States. We should all be reminded that heterosexual public displays of affection – whilst being considered perfectly normal in modern Western societies – were legally and morally censured until not very long ago. A classification of the one as natural, the other as unnatural is based on prejudice and custom rather than fact.

To support this assertion, some observations concerning a very sensitive area, namely the access of lesbians and gay men to jobs as school teachers, shall be cited. They unmask the shaky foundations of most arguments given in defence of a real or presumed need to discriminate:

The state might argue that because teachers serve as role models for their students and interact with them during adolescence, permitting gays to teach would influence some students to become gay themselves. A common response to this assertion is that it is simply not true: teachers have no influence on the future

sexual identity of their students. This view often relies on the belief that sexual orientation is genetically determined or formed in the early years of childhood. But because we have not yet determined the origins of sexual orientation with any certainty, a response to the state's articulation of its goal must assume that the states's fear is to some degree justified – that some students who would not otherwise have done so would engage in gay sexual activity or even identify themselves as gay. [...] The state would probably argue that an increase in the incidence and acceptability of homosexuality would pose a threat to the institutions of marriage and family – institutions protected in many other contexts. The flaw in this argument is not that the goal is invalid, but that the means are unaccountably underinclusive. Spinsters, bachelors, and divorced people are permitted to teach without challenge, and even unwed mothers and single pregnant women have won constitutional protection for their right to teach, despite their possible encouragement of untraditional lifestyles. [...] The underinclusiveness of discrimination against gay teachers for the purpose of protecting marriage and family suggests that perhaps another principle motivates the singling out of gay teachers. The difference between divorced and gay teachers is not that the latter pose a greater threat to the institutions of marriage, but that homosexuality is today considered immoral, just as divorce once was. [...] ⁶⁸

Once the basic claim to equal treatment regardless of sexual orientation is established, the focus will have to shift to the question whether equality can and should be granted in all aspects of traditional family life. Total equality would mean the granting of all rights thus far reserved to heterosexual couples to same-sex partnerships. This would include the right to sexual relationships among adults and teenagers, the right to marry (in church), to have children (through adoption or artificial insemination), etc. and all benefits and responsibilities related to these social institutions.

It is submitted that the decisions to grant equality can and must be limited to a relatively small number of fundamental questions. All other present forms of discrimination – and there are many⁶⁹ – have to disappear by necessity as a natural and just consequence of the fundamental decisions. For example, if the right to marriage or marriage-like status is recognized, it has to entail the right to free movement as a dependent, the right to equal

⁶⁸ Note, 'The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification', 98 *Harvard Law Review* (1985) 1285, at 1306-1308, footnotes omitted.

⁶⁹ Examples of discriminatory laws in the United Kingdom which have come before the European Commission on Human Rights: *Desmond v. UK*, Appl. No. 9721/82, 7 May 1984 (unpublished) and *X. and Y. v. UK*, 19 DR 66 (1978) on 21 year age of consent requirement for gay men as compared to 16 year age of consent requirement for heterosexuals (and lesbians); *Johnson v. UK*, 47 DR 72 (1986) on criminalization of sexual acts in private where more than two consenting adult males are present; *B. v. UK*, 34 DR 68 (1983) on prohibition from service in the armed forces; *S. v. UK*, 47 DR 274 (1986) on the denial to the surviving lesbian partner of protection under rent control laws if the deceased partner was the only tenant of record (see also *infra* footnote 77); *X. and Y. v. UK*, 32 DR 220 (1983) on deportation on one homosexual partner due to foreign nationality; cf. Helfer, 1991, (at 174). For a general guide to the legal situation of lesbians and gay men in Europe, see the publications listed in note 5 of Chapter Three by Waaldijk.

treatment for social and health insurance, equality concerning intestate inheritance, taxation, divorce or separation, etc. If the right to have children is recognized, it has to entail the right to tax benefits, custody and visiting rights. The one without the other would be abusive, discriminatory and violative of fundamental human rights to equal treatment and respect of human dignity, because after a fundamental opening of these institutions to same-sex couples, there are no justifiable reasons for discrimination in ancillary rights. Half-hearted solutions in this area would only calm the conscience of the majority and take the impetus out of the presently discernable movement towards fair treatment for lesbians and gays.

Thus, the policy decisions will have to be whether or not to allow homosexual relationships between teenagers (age of consent), whether or not to guarantee full equality in the workplace (including employment in traditionally sensitive areas such as school teaching, military and secret services, etc.), whether or not to give same-sex couples the right to traditional marriages (and to make this right enforceable even against religious organizations), whether or not to create an alternative but legally equal status (so-called 'registered partnerships'), whether or not to allow lesbians or gay men to adopt children with both partners becoming 'parents', whether or not to allow artificial insemination of lesbian women with recognition of the equal parenthood of their partner.

It is further submitted that a 'Stufentheorie' should be applied in the process of these policy decisions. Interference must be minimal and protection at a maximum where no third party rights are involved. Once the rights and interests of third persons may be or will be infringed, regulatory intrusion on the rights of lesbians and gay men will gradually become more easily justifiable and protection less comprehensive. Finally, where certain forms of (homosexual) behaviour must by necessity violate overriding rights of others, regulatory prohibition will be mandatory and protection cannot be granted.⁷⁰

At the highest level, where legislative and administrative interference should be totally excluded, would be sexual relationships between consenting adults in private. As the European Court of Human Rights stated in *Dudgeon v. UK*:

Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private

70 This approach is also known as strict, intermediate and minimal scrutiny. If a criterion for different treatment, in our case sexual orientation, is held to be a 'suspect classification' because it should normally not be relevant for legitimate regulatory purposes, any different treatment on the basis of this criterion will be subject to strict scrutiny. In that case the differentiation can only be upheld, if 'pressing public necessity' can justify burdening the suspect class (*Korematsu v. United States*, 323 U.S. 214, 216 (1944)).

homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults only who are involved.⁷¹

In this respect it has to be irrelevant, whether the private sexual acts are taking place between two or more consenting adults. A situation still existing in the United Kingdom⁷² where the presence of a third person ends 'privacy', making the sexual acts between men unlawful, is clearly untenable.

General public safety in terms of relatively accepted social behaviour (holding hands, kissing etc.) should also be placed on a very high level of protection, where legislative and administrative interference would only be acceptable in the face of 'pressing public necessity'. In this respect a useful parallel can be drawn to German Freedom of Assembly law (*Versammlungsrecht*). The free exercise of their rights by minorities has to be protected by the German State (the police, if necessary). Restrictions on peaceful assemblies of minorities are only possible in case of a public emergency, e.g. if police forces protecting a minority group-assembly are grossly outnumbered by a hostile and violent counter-group.

The full equality of lesbians and gay men in 'normal' jobs should also be given a high level of protection. Ordinary labour law is fully capable of treating any problems that might arise in the context of access to employment, remuneration, promotions, termination of work contracts, and working conditions in general. If a person is not performing on his or her contractual obligations, the (private) reasons for this are of little relevance. If the employer and the colleagues cannot remedy the situation in cooperation with the person concerned he or she will have to face consequences such as delayed promotions, or, in extreme cases, termination of the employment. Lesbians and gay men do not deserve and do not demand any discriminatory or preferential treatment in this respect.

However, if a person does fulfil her contractual obligations 'in spite' of his or her non-traditional private- or sex-life, there must not be any discrimination as compared to his or her colleagues. Quite to the contrary, his or her employer may well be obliged to protect him or her against harassment and abuse by colleagues; in extreme cases this may involve a duty to sanction the behaviour of certain colleagues. Just as an employer must not remain indifferent to sexual harassment of a female employee by her male colleagues, the same must be true in the case of harassment due to sexual orientation.

Somewhat lower protection levels may be guaranteed concerning employment in so-called 'sensitive' jobs. However, the State should observe two limitations before discriminatory interferences become permissible:

71 Series A 1981, 24.

72 Cf. *supra* footnote 69 and accompanying text.

firstly, any action against lesbians or gay men should be limited to individual cases where problems have actually arisen. There should be no group-discrimination simply on the basis of sexual orientation. Secondly, the burden of proof should always be on the state or employer who wants to interfere with equality rights. The common argument of the fear of blackmail of lesbian or gay employees in 'sensitive' posts can be countered by the removal of that potential threat i.e. removal of any social stigma from lesbian or gay lifestyles.⁷³

The more third party rights can be or are affected, the lower the protection afforded to sexual orientation minorities. This has to be true in particular where the third parties cannot or not fully protect their rights. Thus, a certain age of consent-limit is required to protect minors. However, it seems difficult to justify a differentiation between the age of consent for heterosexual acts and the one for same-sex acts. If a state has such a low age limit for heterosexual acts (e.g. 12 in Spain) that it may argue that persons of that age 'are not fully responsible for what they are doing', those states should rather consider raising their general age of consent instead of discriminating against lesbians and gay men.

An area which has been subject to very restrictive laws in all Member States is the adoption of children by lesbian and gay couples. Usually, the only way for such couples to adopt children is adoptions by only one partner who is hiding his or her sexual orientation and cohabitation with a same-sex partner from the authorities in charge of the adoption. In most Member States 'single' men are practically excluded from adopting children altogether, whereas it is generally easier for 'single' women to adopt children.

As a result of this policy, whenever one partner of a same-sex couple does succeed with an adoption, the other partner does not become mother/father or otherwise legally responsible for the child.⁷⁴ Thus, although factually the child is raised by two 'parents', it is denied legally equal status and protection. This can have severe consequences e.g. if the adopting partner dies. In this situation, the child will usually be taken away by the authorities from the other partner as well (maybe after many years of 'happy family life') and may well end up in an institution. If the other partner dies, the child will not be entitled to intestate inheritance. This result is all the more serious if the other partner was the only bread-winner and a will does not exist or is successfully contested by relatives of the de-

73 A circular argument has been generally used to restrict lesbians and gay men from assuming top jobs in many civil service departments: If they admit their homosexuality, they will not be hired – although they cannot be blackmailed. Yet, if they hide their homosexuality to get the job, they are open to blackmail only because they were forced to lie in the first place.

74 See paragraph II.C.2 of Chapter Four by Van der Veen and Dercksen.

ceased, because not only will there be no inheritance for child and surviving partner, but the surviving partner (and parent) will then also be left without pension or other income.

Member States' reservations against legalization of adoptions by same-sex couples are increasingly incomprehensible in the light of the growing body of research on the possible effects of growing up in such a 'family' on the children. The care and attention actually given to the children clearly outweighs the gender of the 'parents'. Also, the question arises as to whether the States can remain blind to the fact that all over Europe hundreds of thousands of children are in fact growing up either in 'families' of lesbian or gay couples or often in homes shared by same-sex house mates who may live together for many years just like a family but without having sexual relationships with each other. Last but not least, one might ask whether children are not better off in a 'family' of same-sex lovers rather than in an institution.

The latter question leads directly to the question whether artificial insemination should be made available to lesbians. By contrast to children adopted by same-sex couples, those not yet conceived are not in need of help. Thus, the desires of the prospective parent(s) concerning artificial insemination are decisive. This area of 'family law' may, pending further investigation, be on a very low level of protection for lesbians and gay men.

B. How Can the Optimal Situation Be Achieved?

There are three fundamentally different approaches to the notion of 'family' and the rights and responsibilities attached to family relationships.⁷⁵ The traditional approach has been called 'formal' approach. It refers to traditional statutory language when definitions for 'family' or 'spouse' are needed for example in the context of immigration rights, various social benefits, child-care and custody, etc. Alternative relationships without ties of blood, adoption or marriage do not qualify under this concept for the rights and advantages reserved to families and spouses.

In recent times a 'functional' approach has developed in some contexts and has been applied by some decision-making organs. This approach recognizes the nuclear or formal family definition as the norm but then looks for functional resemblances in non-traditional relationships when

⁷⁵ The terminology used here is loaned from American doctrinal discourse. For a summary of the American situation see Note, 'Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family', 104 *Harvard Law Review* (1991) 1640-1659.

deciding whether or not they should be treated on an equal footing in a certain context.⁷⁶ Thus, if an alternative relationship

shares the essential characteristics of a traditionally accepted relationship and fulfils the same human needs [...] such as economic cooperation, participation in domestic relationships, and affection between the parties [...]⁷⁷

it is granted certain social benefits otherwise reserved to traditional families. This approach is frequently the answer of progressive courts to changes in society in the face of unchanged legislation:

For functionalist courts, the value of marriage and parenthood derives from positive societal effects, such as encouragement of stable, affectionate, and economically efficient human relationships. Because some non-traditional families produce similar beneficial effects, the restriction of benefits to traditional families under the formal approach is underinclusive.⁷⁸

Legislative organs with their inherent tendency to avoid controversial decisions which might alienate voters like to leave the matter at that, i.e. to leave the search for just and fair rules to the courts on a case by case basis. However, some severe disadvantages result from the legislative inactivity:

First of all, the question whether equal treatment will be granted in a certain respect will depend on the individual administrative body or court which is handling the case in question. In the absence of statutory regulation there will always be more conservative and more progressive administrative and judicial organs. This makes it unforeseeable and arbitrary for the parties concerned. Case-law will probably develop some guidelines over time but these will always be limited to certain court districts and instances and will usually be little known outside the sphere of specialized lawyers.⁷⁹

76 For examples see the Council's submission in the *Robards* case, *supra* footnote 18 and accompanying text, or the Dutch treatment of unmarried couples as described in the *Reed* case, *supra* footnote 27 and accompanying text.

77 See Note, *supra* footnote 75, at 1646. Other criteria for functional parallelism: 'exclusivity and longevity of the relationship, the level of emotional and financial commitment, the manner in which the parties have conducted their everyday lives and held themselves out to society and the reliance placed upon one another for daily family services', *ibid.* at 1648-1649, quoted from the New York Court of Appeals' examination of a homosexual relationship which had lasted for 11 years and ended with the death of one partner who happened to be the only tenant of record. The surviving partner was claiming protection under rent control laws which prohibit the dispossession of the surviving spouse (74 N.Y. 2d 201 543 N.E. 3d 49, 544 N.Y. 2d 784 (1989)).

78 See Note 76, *supra* footnote 75, at 1647-1648 (footnote in the original omitted in this quotation).

79 In a number of cases the ECJ has held it unacceptable if directives are transformed merely by (internal) administrative regulations of the Member States, precisely because these will be little known to the individuals concerned, may be subject to creeping modifications and may not be adequately enforceable against the state organs, cf. most recently: Case C-361/88, *Commission of the European Communities v. Federal Republic of Germany (Re Air pollution with sulphur dioxide)* and Case C-59/89, *Commission of*

Secondly, the comparative nature of the functional approach will lead to discrimination against non-traditional partnerships. Whereas traditional families will be accepted as eligible for benefits, etc. as such, non-traditional families will have to prove their eligibility each time they claim a benefit. This will subject them and only them to investigations concerning such private matters as sexual activity, degree of exclusivity, distribution of tasks and responsibilities in the family and management of finances.

Finally, it cannot be denied that legislative disregard and the subsequent legal uncertainty will further stigmatization within a society against non-traditional relationships and adversely affect their stability and longevity.

The only solution to this dilemma is the 'legislative' approach, i.e. action by the legislature in an effort to create for non-traditional relationships an institutionalized basis for equal treatment. The opening up of traditional marriages to lesbian and gay couples is an obviously problematic area, however, as it will meet with widespread resistance from conservative parts of society, churches, etc. and may thus be counterproductive to the efforts for improved recognition and acceptance of lesbians and gay men in everyday life. The best approach is most likely the creation of a new status, as has been done in Denmark,⁸⁰ which may be called 'registered partnerships' and will grant equality before the law to certain alternative partnerships. In an effort to check abuse and disintegration of stable human relationships, this new status may be reserved to certain forms of partnerships and a, once and for all, demonstration of certain criteria.

C. Why Should the Community Take an Active Role Rather Than Leaving it to the Member States?

There are two main reasons why the Community should take a more active role: Firstly, there is the Community's alleged commitment to the protection of fundamental rights and freedoms. If the Community wants to deliver upon the promises made in this respect it cannot go on to ignore the widespread discrimination against lesbians and gay men and the foot-dragging of many Member States when it comes to ameliorating the situation. Secondly, diverging Member State laws on lesbian and gay rights are severely inhibiting the free movement of these persons as migrant workers, providers and users of services and professionals seeking to establish themselves in other Member States.

the European Communities v. Federal Republic of Germany (Re Air pollution with lead), judgments of 30 May 1991, not yet published in the ECR.

80 Cf. *supra* footnote 66 and accompanying text.

The EEC-Treaty deals with 'workers' more or less on a par with goods, services and capital, i.e. primarily considers them factors of production, and does not as such contain a catalogue of human rights. The families of the workers are mentioned neither in Article 3(c) nor in Article 48. However, the Court of Justice has begun as early as 1969 to glean independent Community human rights and freedoms for migrant workers, their families, and all other Community citizens, from sources such as the 'constitutional traditions common to the Member States'.⁸¹ It was again Advocate General Trabucchi who said:

The migrant worker is not regarded by Community law [...] as a mere source of labour but is viewed as a human being. In this context the Community legislature is not concerned solely to guarantee him the right to equal pay and social benefits in connection with the employer-employee relationship, it also emphasized the need to eliminate obstacles to the mobility of the worker, *inter alia* with regard to the 'conditions for the integration of his family into the host country'.⁸²

And more specifically:

[In] order to attain real freedom of movement for workers within the territory of the Community they must be accorded real equality of treatment with the nationals, at least in regard to economic matters and social benefits in particular. In this context it is not important [...] that the legislation in question was not expressly conceived for workers as such and members of their families, but applies generally to the entire resident population.⁸³

This jurisprudence has been endorsed by Parliament, Council and Commission in their Joint Declaration of 5 April 1977:

1. The European Parliament, the Council and the Commission stress the prime importance they attach to the protection of fundamental rights, as derived in particular from the constitutions of the Member States and the European Convention for the Protection of Human Rights and Fundamental Freedoms.
2. In the exercise of their powers and in pursuance of the aims of the European Communities they respect and will continue to respect those rights.⁸⁴

and by an express mention in the Preamble of the Single Act:

[The Heads of State of the Member States] Determined to work together to promote *democracy on the basis of the fundamental rights* recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice. [...]

81 Cf. in particular Case 4/73, *J. Nold, Kohlen- und Baustoffgroßhandlung v. Commission* [1974] ECR 491, at Rec. 13.

82 Case 7/75, *Mr and Mrs F. v. Belgian State (Re Handicapped Child)* [1975] ECR 679, at 696.

83 *Ibid.*

84 OJ 1967 C 103/1.

Aware of the responsibility incumbent upon Europe *to aim at speaking ever increasingly with one voice and to act with consistency and solidarity* in order more effectively to protect its common interests and independence, in particular to display the principles of democracy and compliance with the law and with *human rights* to which they are attached, so that together they may make their own contribution to the preservation of international peace and security in accordance with the undertaking entered into by them within the framework of the United Nations Charter.⁸⁵

and most recently in the Preamble of the Maastricht Treaty on European Union and in its Article F:

2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.⁸⁶

On the basis of these declarations, the Community would seem *obliged* to take an active role and to stand up against discrimination by any Member State in a field of Community competence.⁸⁷ The Community cannot accept violations of the fundamental rights to human dignity, equality, family life, freedom of opinion, and privacy, where it has a possibility to stop them.

Moreover, diverging Member State laws on lesbian and gay partnerships are inhibiting the free movement of this significant group in the Community. Some of these problems have always been there: if homosexuality is punishable in some states (e.g. Ireland; also in the UK, when more than two consenting adult males are taking part in sexual acts), or different ages of consent are applicable (the range in the Community is from 12 years in Spain to 21 years in the UK⁸⁸), migrant lesbians or gay men will either avoid restrictive States or risk criminal prosecution for something which is totally lawful in their own State of origin (and most other Member States).

One very interesting problem has been added in 1989 with the *Danish Registered Partnership Act*.⁸⁹ Lesbian and gay couples who enter into such a registered partnership – and as has been shown above, the right to do so

85 Bulletin of the EC, Suppl. 2/86, 5, emphasis added.

86 Other acts of Community organs pertaining to human rights are documented in Clapham, 1991, in particular in Annex II; cf. also Hummer, Simma, Vedder and Emmert, 1991, 144.

87 On the problem whether and to what extent Community human rights are binding as such on Member State organs, when the latter are acting in their own area of competencies and not implementing Community law, cf. Chapter Eight by Snyder, Somsen and Hoyer on subsidiarity and competence.

88 *ILGA Pink Book*, and *supra* footnote 69.

89 Cf. *supra* footnote 66 and 80 and accompanying text.

must be open not only to a Danish national and his or her partner but also to any other Community national who has lawfully migrated to Denmark – cannot leave Denmark without losing the benefits of their special status. For them, the free movement of persons under Community law is practically not available, unless they agree to leave their ‘family’ behind.⁹⁰

The only fully satisfactory solution to this dilemma would be a Community directive obliging all Member States to create a status for lesbians and gay men comparable to the Danish registered partnerships.

D. Legal Basis for Community Action

In the so-called Squarcialupi Report, drawn up on behalf of the Committee on Social Affairs and Employment of the European Parliament, one of the conclusions is that

the fact remains that [discrimination against] male and female homosexuality is a real problem and there is thus every justification for raising it in a supranational political body such as the European Parliament, as proof of genuine respect for personal freedom and individual difference. [...] ⁹¹

However, as has been shown in the preceding sections, the protection of human rights and an effective guarantee of free movement for all Community citizens require more than a ‘raising’ of the problems in Parliament.

Nevertheless, Community law is first of all based on the principle of enumerated competence.⁹² By contrast to sovereign states, the only born subjects of international law, the Communities were created by the Member States through the Treaties of Rome and Paris. The creators have chosen in these treaties not to transfer all their inherent rights as states (which would have ended their own existence as independent sovereigns and would immediately have formed a federation), but have chosen rather to transfer only those rights expressly listed in the treaties. Thus, while the Community institutions are certainly not prevented from ‘raising’ topics of family law

⁹⁰ A pragmatic solution to this dilemma is the ‘establishment’ of the partner as a self-employed professional. If the same-sex or opposite-sex but not-married partner cannot find employment to establish his or her independent right of residence, he or she may gain this right e.g. by declaring to be a self-employed private language- or music teacher. However, this opportunity may not always work, is unsatisfactory as to rights beyond mere residence and is unavailable to partners who are not nationals of a Member State of the Community.

⁹¹ *Report on Sexual Discrimination at the Workplace*, EP Working Documents 1983/1984, Doc. 1-1358/83, 13 February 1984, at 16; cf. also *supra* footnote 48 and accompanying text.

⁹² Cf. Art. 4 para 1 of the EEC-Treaty: ‘The tasks entrusted to the Community shall be carried out by the following institutions: an Assembly, a Council, a Commission, a Court of Justice. *Each institution shall act within the limits of the powers conferred upon it by this Treaty.*’ (emphasis added).

and discussing them, they can only take legally binding measures if a competence of the Community can be found in the treaties.⁹³

It has been argued that Article 117 in combination with Article 119 EEC would provide a legal basis sufficient for a redefinition of *Council Directive 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions*⁹⁴ to prohibit also discrimination based on sexual orientation.⁹⁵ However, that approach seems unnecessarily shaky and inadequate. If Community action is necessary for an effective guarantee of the fundamental freedom of movement of persons, Article 100a (together with Article 7a(2) and/or Article 117) provides a solid foundation for such an action. It also has the advantage that the measures to be adopted do not require unanimity in the Council and thus cannot be blocked by one or two hesitant States.

IV. Summary

Whilst the European Community has no single defined 'family policy', a summation of resolutions, statements, directives and articles indicates the existence of a certain 'fluid' policy.

This 'policy' accepts the competence of the Member States to the definition of 'members of the family' whilst retaining some elements of supranational definition of 'spouse' which is narrow in scope.

Until now the Community organs have accepted that Member States have different levels of legislative regulation of homosexuality. However, in terms of family policy and the free movement of workers, any narrow definition of family which excludes lesbian and gay 'family' units will restrict the free movement of this significant percentage of the population.

There is a strong argument that there is no justification for the high level of regulation of the lives of lesbians and gay men by Member States.

93 As to the effects of the principle of subsidiarity as spelled out in the Maastricht Treaty on European Union on the principle of enumerated competences, see Chapter Eight by Snyder *et al.*

94 OJ 1976 L 39/40. The relevant Article 2 of the Directive reads as follows:

1. For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.
2. This directive shall be without prejudice to the right of Member States to exclude from its field of application those occupational activities and, where appropriate, the training leading thereto, for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor. [...]

95 Opinion of the EP Legal Affairs Committee on discrimination against homosexuals (25-26 January 1984, draftsman: Ms Hooper), reproduced in EP Working Document 1-1358/83 (the Squarcialupi Report, cf. *supra* footnote 48 and accompanying text), at 26.

The protection of the rights of the individual must be paramount where there is no infringement on the rights of third parties or the state. This must be true also for lesbians and gay men. Prejudice by certain parts of the population is no excuse for denying same-sex couples social recognition. On the contrary, legal equality and recognition is likely to contribute to the elimination of prejudice and would thus benefit not only the homosexuals but the Member States and the Community as a whole.