



Appendix 5

The Concept of ‘Family’ and the Obligation of Maintenance
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Is a family defined by blood relations only? If so, what about husbands and wives? Is a family defined by its functions? If otherwise unrelated people live together and if their relations serve the functions of a family, are they a family? What are the functions of a family? Does something in “human nature” tell us how to define family? In other words, is there something universal in the nature of the family that helps define it, or is “family” a social construct? What purposes does the social construct serve? To what extent can the social construct be deliberately manipulated? Need there be a single definition of “family”? Who decides what a family is? The putative family members themselves? The social group (e.g., a church) of which the individuals are members? Society as represented by the government? Finally, what is society’s interest in defining “family”?¹

I invite you all to take a minute to consider these questions; to recall whether you have ever placed the same questions to yourselves [?].

Almost all of us here may claim that we belong to a ‘family’, and yet, what is this unit to which we claim belonging?

Allow me to take you back in time: the Roman Law of Persons, on which our Law of Persons is based, was principally constructed with reference to the interests of a tightly-knit and select group of persons, the *familia*. **Roman society was composed of *familiae*; these were basically legal constructs having fixed membership and a clearly defined structure. The number of variables within such construct was extremely limited. In the very basic and strict legal sense, the notional *familia* was defined as: ‘(...) an adult male Roman, the *pater familias*, lawfully married, with children born to him and his wife (or successive wives) together with the children, if any, of sons (and their sons, and so on in the male line only, through as many generations as might be simultaneously alive)’. The *familia* was of the very essence to Roman society and provided the structural framework for Roman Law.**³²

On the other hand, nowadays the ‘(...) word ‘family’ is one which is difficult, if not impossible to define.’⁴³

As in Roman times, it is still regarded as essential to the integrity of society and still is one of the main concerns of legislatures and courts.⁴ **Likewise, today, the meaning of ‘family’ exercises an influence in law because the law ascribes consequences to membership in ‘families’; consequences which, as practitioners, we know, come forward in the form of rights and obligations, amongst which, obviously, the obligation of maintenance.**⁶⁵

And yet, alongside this focus on the ‘family’, there comes the absence, in Maltese Law, of an operational and binding definition of the concept. **In the majority of instances our Law refers to ‘family’, but not to its constitutive elements.**

¹ Carl F. Schneider and Margaret F. Brinig, *An Invitation to Family Law: Principles, Process, and Perspectives* (American Casebook Series, 2nd edn West Group, New York 2000) 181-182.

³ Jane F. Gardner, *Family and Familia in Roman Law and Life* (Oxford University Press, New York 1998). 1.

⁴ Nigel Lowe and Gillian Douglas, *Bromley’s Family Law* (9th edn Butterworths, London 1998). 1.

⁵ Richard F. Storrow, ‘The Policy of Family Privacy: Uncovering the Bias in Favour of Nuclear Families in American Constitutional Law and Policy Reform’ (Summer 2001) 66 *Miss. L Rev* 527, 528.

⁶ *An Invitation to Family Law: Principles, Process, and Perspectives* (n 2) 181.

I believe not to be the only person to ask **what ‘family’ is at Maltese Law [?]**.

A short (and non-exhaustive) stroll through Maltese main legislation gives us the following definitions:

- **‘(...) “family” means the father, the mother, the husband or wife, any brother, sister, son or daughter of the applicant.’**
- **Burials Ordinance, Chapter 17, Laws of Malta, Article 3(4)**
- **‘(...) “member of the family” means a lineal ascendant, a lineal descendant, a widow or a widower, a son-in-law, and a widowed daughter-in-law while not remarried, of the tenant or occupier.’**
- **Land Acquisition (Public Purposes) Ordinance, Chapter 88, Laws of Malta, Article 21(3)**
- **‘(...) a relevant family relationship shall be deemed to exist between a councillor and an officer or candidate if they are husband and wife or if the officer or candidate, or the husband or wife of the officer or candidate, is the parent, grandparent, grandson or granddaughter, son or daughter, brother or sister, uncle or aunt, or nephew or niece of the councillor or of the husband or wife of the councillor.’**
- **Local Councils Act, Chapter 363, Laws of Malta, Article 20(4)**

It must be noted that the boundary lines drawn around the concept of ‘family’ in the above provisions are applicable only within the relative provision of the relative law mentioned. Such ‘definitions’, if so we may term them, may neither be extended to the entire Ordinances/Acts cited above, nor to other laws within Malta’s legislative body.

Further:

- **‘(...) “family” means the husband, wife and unmarried children’**
- **Conditions of Employment (Regulation) Act, Chapter 135, Laws of Malta, Article 2(1)**
- **‘(...) “member of the family” means a lineal ascendant, a lineal descendant, a widow or a widower, a son-in-law, and a widowed daughter-in-law while not remarried, of the tenant.’**
- **Agricultural Leases (Reletting) Act, Chapter 199, Laws of Malta, Article 2**
- **‘(...) “familja” tfisser persuna wahda li fl-opinjoni tad-Direttur tkun tabita wahedha jew zewg persuni jew izjed li fl-opinjoni tad- Direttur ikunu jabitaw flimkien bhala familja.’**
- **Social Security Act, Chapter 318, Laws of Malta, Article 2(1)**
- **‘(...) “dependent members of the family” means the spouse of the refugee, provided the marriage is subsisting on the date of the refugee’s application, and such children of the refugee who on the date of the refugee’s application are under the age of eighteen years and are not married.’**
- **Refugees Act, Chapter 420, Laws of Malta, Article 2**

Differently, here, the definitions are applicable to the entire Acts within which they are cited and not to isolated provisions of the Law. Yet, in all four circumstances they are weighed down by the qualification of ‘unless the context otherwise requires’ thereby rendering the term ‘family’ relatively indeterminate.

There seem to exist only two instances within Malta’ legislative ensemble where ‘family’ is extended beyond relationships based on blood and marriage:

- **‘(...) the word “family” shall also include the children born since the commencement of the right of use or habitation, even though the grantee was not married at the time of the commencement of such right, as well as acknowledged illegitimate children, adopted children and servants.’**
- Civil Code, Chapter 16, Laws of Malta, Article 394
- **‘(...) “family member”, in relation to an individual, includes - the parents, the spouse, a son, daughter, brother or sister aged eighteen years or over, and a legal guardian or curator of such individual.’**
- Equal Opportunities (Persons with Disability) Act, Chapter 413, Laws of Malta, Article 2

Evidently, the parameters established for ‘family’ in the above provisions are parameters based on convenience; in the first instance they are applicable only to the institutes of use and habitation and in the second, they are extended owing to impairment and consequential necessity of the institutes of guardianship and curatorship.

Thus, in those Codes, Acts and Ordinances, where the ‘family’ is not given meaning to, Maltese Law depends on absent jurisprudential interpretation.

This is the definitional status of the ‘family’ under Maltese Law; an understanding rested in the general manner, upon **relationships based on blood (*ius sanguinus*), relationships based on marriage (*ius maritalis*) and households. Satisfactory? Deficient?**

Would we rather have an operational and binding definition of the concept? More importantly, can we have such definition?

Allow me to delve into a brief comparative study. As part of, and owing to its European Union Presidency in 2004, the Irish Government has financed a massive, nation-wide consultational exercise with regard to the concept and institution of ‘family’, revisiting the concept as it features within its shores; this has been an unprecedented exercise the findings of which may be virtually, in certain regards, extended to Malta due to the many similarities between the two countries.

Unlike Malta, the Republic of Ireland harbours a constitutionally entrenched definition of ‘family’. **The Irish Constitution, echoing the Universal Declaration of Human Rights,⁶ defines ‘family’ as: ‘(...) the natural primary and fundamental unit group of Society ... a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.’⁷⁷**

The Irish Constitution also views the ‘family’ as **‘(...) the necessary basis of social order and as indispensable to the welfare of the Nation and the State.’⁸⁸The ‘State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.’⁹**

Furthermore, it is also held that the **‘(...) State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide,**

⁶ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR). art 16(3). The family is also recognised as the fundamental group unit of society under International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art. 23 and under the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 3 (ICESCR) art. 10.

⁸ Constitution of the Republic of Ireland, Article 41.1.1°.

⁹ *ibid* Article 41.2°.

¹⁰ *ibid* Article 41.3.1°.

according to their means, for the religious and moral, intellectual, physical and social education of their children.¹⁰¹⁰

As can very well be seen, the Irish Constitution sets marriage as the basis of 'family'; this *ab initio* excludes a good number of 'family types': **cohabiting heterosexual couples** having children or otherwise,¹¹ (a reality which must nowadays be taken into consideration due to its significant presence in any given society), **same-sex couples, single unmarried parents, foster care units, 'blended families', divorced parents, grandparents having the custody of their grandchildren/living with their unmarried children and grandchildren, consanguine units such as two sisters and other relationships of care.** All these units seem not to find comfortable space within the parameters set by the Irish Constitution. Non-marital 'families' are recognised solely for the purpose of exclusion. Such 'family types' remain forced to wade through the other articles of the Irish constitution and through other laws in order to seek and establish their obligations and, most of all, their rights as a 'family'.

The definition of 'family' in the Irish Constitution has been heavily criticised for comprising a view of the concept that is not sufficiently full-bodied so as to allow all 'family forms' of the present day to be treated equally.

In countries such as Ireland, where the definition of 'family' is constitutionally entrenched, it acts to support, and be responsible for, a hierarchy among different kinds of 'family types'. The 'principal family', in such scenarios, becomes the centre of focus for planning as far as policy positions are concerned; such state of affairs, undoubtedly causes privilege to be attached to such 'principal family'. In this context, the needs and circumstances of the so-called 'minority family types' are less readily taken into account, mainly due to the reason that, in such cases, the 'family' becomes an arrangement, existing if and only if, it conforms to a predisposed set of rules.

In fact, in *The State (Nicolaou) v An Bord Uchtala*, [1996] IR 567, a judgment forming part of a series of highly controversial judgments, the Irish Supreme Court held that the Irish Constitution failed to protect any 'family' other than that based on marriage, further stating that in awarding equal constitutional protection to the marriage-based 'family' and the 'family founded on an extra-marital union', the State would be disregarding its pledge to safeguard the institution of marriage.

The Irish Law Society itself, in the 'Tenth Progress Report: The Family' commissioned by the Government of Ireland (2006) and drawn up by The All-Party Oireachtas Committee on the Constitution, takes the view that **'We need to adopt a more 'functional' approach to the family ... We need to depart from a system ... where legal status alone is the sole determinant of family rights and privileges.'**

On a further comparative note, Ireland is not the only country within the EU faced with this state of affairs. In fact many constitutions on the Continent contain provisions of a somewhat similar nature, yet more oriented towards the protection of the 'family' rather than towards its definition. An example which may be of assistance is the **German Basic Law**, which states: **'Marriage and family enjoy the special protection of the state.'**¹² Like in Ireland, in Germany, 'family' is constitutionally construed in terms of marriage, and the same issues as discussed above are seen to emerge yet again in this latter jurisdiction.

If one considers the provisions relating to 'family' in many of the European Constitutions, none seems to attempt a definition of the concept of 'family' in terms other than those whereby marriage is placed at the centre of the said concept and/or recognised as the primary unit of society. **Macedonia and Slovenia**, for example, refer expressly to **non-marital cohabitation in apparent distinction from the 'family'**.

¹¹ *ibid* Article 42.1°.

¹² Basic Law of the Federal Republic of Germany, Article 6(1).

Diametrically opposed to this position, is the definition of 'family' offered by the United Nations in 1994, the UN International Year of the Family:

Any combination of two or more persons who are bound together by ties of mutual consent, birth and/or adoption or placement and who, together, assume responsibility for, inter alia, the care and maintenance of group members, the addition of new members through procreation or adoption, the socialisation of children and the social control of members.

A definition, opposed to that presented by the Irish Constitution and yet in no way free of problematics. This definition allows any two (or more) persons to consensually combine in the formation of a unit which merely because of such consensual combination achieves the status of 'family'. It totally dispenses with the institution of marriage, yet fails to explain its key terms 'combination' and 'mutual consent'. Put simplistically, in such case, four men could be 'family' until one sporadically decides to withdraw his consent to such arrangement, and then ... there simply remain three.

Such definition has been criticised for lacking legal stability in dealing with an institution as central as the 'family'; critics have taken the position that it is virtually impossible to contemplate having appropriate legislation, promulgated to encompass the width offered by such definition, which includes within its parameters every possible conceivable permutation of persons.

Now, in view of the above and in a dynamic society such as ours where nowadays values are ever-changing, where the notion of marriage has shifted to meet the demands of the social circumstances it occurs in, where the Roman Catholic ethos is slowly becoming weaker, where changing attitudes to sexual behaviour are becoming more prevalent, where pre-marital relations, cohabitation and single parenthood are accepted and catered for, to certain extents by our Law, where families are decreasing in size and where one witnesses an increased economic independence of women and an increased readiness to accept separation and annulment, where 'family life' and 'family types' have changed drastically in the past years, where the experience of exposure to varied ethnic, racial and cultural backgrounds as well as to ideological and conceptual differences is starting to have visible and tangible effects, but where the strong currents of validation and acceptance and of tradition and convention still stir social waters ... would it be feasible for Malta to adopt a constitutionally entrenched definition of 'family'? What, if not, is our alternative? Leave matters unchanged while remaining, so to say, unaware as to what our 'family' is?

While imposing a narrow definition, necessarily amounts to exclusion, marginalisation, and disadvantage opting for a wide definition would mean creating an immeasurable distance between the definition of 'family' and the reality that the same social institution necessarily requires legal regulation. Therefore, it is evidently preferable that 'family' be not defined with respect to an entire legal system.

In a 1967 decision, the Supreme Court of Minnesota seems to have circumvented this problem. It observed "[T]he meaning [of 'family'] necessarily depends on the field of law in which the word is used, the purpose intended to be accomplished by its use, and the facts and circumstances of each case."¹³

Efficiency of a legal system may therefore be maximised, in this regard, by having a different definition of 'family' in different branches of law as opposed to the single exhaustive definition. Recognition of 'family' as the fundamental group unit of society may be crystallised at constitutional level but its actual definition should be present depending on the area of law, or specific Code, Act or Ordinance, in which the concept is used, coupled with the aims intended to be achieved by such use.

¹³ John DeWitt Gregory, 'Redefining the Family: Undermining the Family' (2004), Chic. LF Research Paper No. 05-03 380, 382 <<http://ssrn.com/abstract=696882>> accessed 3 November 2005 citing *LeRoux v Edmundson* (1967) 276 Minn. 120 [148 N.W.2d 812].

As such two brothers living as a consanguine unit can be 'family', for example, for tax benefits purposes but not for specific social policy measures, thereby achieving the best stability possible, eliminating exclusion and still affording constitutional protection to the 'family unit'; constitutional protection dependent upon whether a group unit of persons are considered 'family' under the particular law which they may invoke with regard to their constitutional rights. The 'family unit', in its various forms may thus achieve the recognition, legal and judicial, which it deserves.

Such aims could therefore be assessed according to different branches of law, thereby allowing an improved policy formulation, together with a structure that can accommodate such policy and that will protect and support the 'family unit' within the context of any particular law.

'Family' and the Law must therefore be allowed to call upon each other for the safeguarding of rights and the compliance to obligations. This is the true importance of defining 'family'; the ascription of rights and obligations to the institute ... which brings us to the obligation of maintenance.

When compared to 'family', there is little difficulty in defining 'maintenance'; basically stated we are here dealing with an obligation established by law that is based on the premise that spouses have an obligation to support each other, their children and possibly other family members to whom maintenance may be due.

In those cases where parties are unmarried, such obligation persists in respect of children of the particular union and other family members to whom maintenance may be due.

Historically, such obligation arose as a result of the indissoluble nature of marriage and in the course of the years, like the definitional status of 'family', it has presented various jurisdictions with problematic issues which are not, of themselves, insignificant.

To put it simplistically, such issues have mainly stemmed from the problematics of determining those factors which are to affect and establish maintenance obligations in concert with the ancillary problematics of giving consideration to those factors that are affected and determined by the same obligations.

Thus:

- to which 'family' is this right and obligation currently ascribed?
- to which 'family' may this right and obligation be ascribed?
- to which 'family' can this right and obligation be ascribed?
- is this right and obligation ascribed to 'non-families'?
- may this right and obligation be ascribed to 'non-families'?
- can this right and obligation be ascribed to 'non-families'?
- when is maintenance due? To whom is it due? And from whom?
- in what amounts is it due and for how long?
- what position has our jurisprudence taken on the matter?
- what is the consequence of non-fulfillment?
- on which legal spheres does the obligation of maintenance impinge?
- what are the challenges faced by our legal and jurisprudential system, especially in view of Malta's membership in the European Union?
- and what about the best interests of the child and state intervention?