



ARTICLES

THE EUROPEAN FORM OF FAMILY LIFE: THE CASE OF EU CITIZENSHIP

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ABSTRACT: Considering European Union law through the prism of the “form of life” is part of an effort to go beyond an analysis that most often adheres to the *institutional* foundations of law. The challenge is to show that the European legal discourse contains language that contributes to a re-configuration of the way we live and conceive our lives. Following this *existential* approach of the “form of life”, EU law can be seen as the place of a complex and subtle interaction between the lived and the imagined life. From this meeting comes the foundation as well as the transformation of our relationship to individual and collective life. The *Article* attempts to illustrate this interaction by unveiling how EU law and its interpretation express, often implicitly, a way of practicing and representing family life, its formation, functioning, and the values which drive it, thus giving birth to a European social imaginary in family matters.

KEYWORDS: form of life – family life – EU citizenship – free movement – functionalism – dependency.

I. FAMILY LIFE AS A EUROPEAN LEGAL FORM

The idea of family seems inseparable from the way we conceive human life. The family is probably one of the first mental frameworks which informs the intelligibility of all of life, we might call it “the evidence of all evidences”.¹ The first thing that a human being

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¹ G. RADICA, *Philosophie de la famille. Communauté, normes, pouvoirs*, Paris: Vrin, 2013, p. 316.



comprehends, before realizing that they live in a city, in a state, or even on a certain planet, is that others take care of them and they constitute a family. People perceive this primary link between individuals as so evident that it is on its model that the different collective and social memberships that shape the organization of the world have been progressively built: from the family, to the clan, to the city and then to the state.² The family bond consists not only of a biological, civil or educational dimension, but also of a profound moral significance, as the source of a special obligation, which sustains a perception of the origin of authority, solidarity, and more generally, justice. If a particular link can be established between individuals because they belong to the same family, then it could be thought to establish this type of special link in other circles, i.e. establishing special rights between members of the community, clan, city, or state, at the exclusion of those who are not members.³ Moreover, the idea of the “human family” allows us to include in one community the entirety of humanity.⁴

The link between family and society is not one way. The family idea is the result of a complex process of institutionalization, a “realized category”,⁵ which maintains and sometimes gives rise to what it is supposed to indicate, namely the existence of specific affective bonds presented as natural. It becomes extremely difficult to determine whether the family precedes society or *vice versa*.⁶ Without claiming to settle such a debate, it seems clear that the relationship between family and society is largely intertwined. Recourse to the law constitutes the main tool in the interaction between the family sphere and the social sphere at large, crystallizing a primary conception of what the family should be. Since the taboo against incest in primitive societies,⁷ the organization of family life by means of rules, now for the most part legal, determines family ties and the resulting consequences.⁸ In the European context, an important question

² ARISTOTLE, *Politique*, translated by J. Barthélemy-Saint-Hilaire, Paris: Ladrance, 1874, I, II, pp. 6-9.

³ On the analogy with the family link justifying the distinction between nationals and foreigners, D. MILLER, *Reasonable Partiality towards Compatriots*, in *Ethical Theory and Moral Practice*, 2005, p. 67 *et seq.*

⁴ First sentence of the Preamble of the Universal Declaration of Human Rights.

⁵ P. BOURDIEU, *A propos de la famille comme catégorie réalisée*, in *Actes de la Recherche en Sciences Sociales*, 1993, p. 34.

⁶ For some, the family is a “natural” phenomenon, preceding any society and illustrated by its universalism; while for others, on the contrary, the family would be above all a social “construct”, which would explain its strongly relative nature depending on the different type of society. For the first thesis see Rousseau and Freud; for the second Aristotle and Hegel. This ambivalence is attested in the legal discourse in Art. 16, para. 1, of the Universal Declaration of Human Rights, according to which “the family is the fundamental natural element of society”.

⁷ E. DURKHEIM, *La prohibition de l'inceste et ses origines*, Paris: Petite Bibliothèque Payot, 2008.

⁸ The normative density that characterizes the legal organization of family life is easily explained by the multiplicity of its social functions which range from an economic function of production (the family business) and of consumption (that of “households”), to a function of cohesion (mutual aid, assistance), of responsibility (“civil” responsibility of parents) and education (early childhood, life in society), and on to

therefore arises. Since family and society seem so closely linked, what role can European Union law play in our way of conceiving the family?

I.1. FAMILY LIFE AND SOCIAL LIFE: THE IMPOTENCE OF EUROPEAN UNION LAW?

In the absence of a European society that thinks of itself as such, it is tempting to believe that EU law can claim to fulfil only a limited role in family matters, restricted by national traditions and cultures which have progressively forged a family model specific to their community. As a result, two types of answers will be given to the question of the influence that European Union law can have on our family lives.

The first approach relativizes the possible influence of EU law on national models of family life. In the absence of a sufficiently homogenous social base, EU law lacks a basis for expressing a shared European conception of the family. That is why there can be no real European family law. The ambition of European integration is limited to that of providing instruments for coordinating national orders in family matters with a functional perspective of resolving differences in legislation. With the intention of creating a European civil and judicial area of free movement of persons and acts relating to their state, Union law technically organizes the recognition of matrimonial and parental,⁹ marital,¹⁰ inheritance and estate decisions,¹¹ derived in particular from secondary legislation and related case-law. Mainly articulated around rules of competence and applicable law, EU law is content to link national family rights, without substituting its own values and representations. It should not be denied that coordination gradually brings together national family law that are intertwined with each other.¹² It also happens that through the empowerment of certain notions defining the scope of European coordination, the case law occasionally brings together internal standards relating to family life.¹³ But it is difficult to see the emergence of a real framework embodying the model of family organization peculiar to a European society.

the more individual function of emancipation, becoming oneself and founding a family. See, J. CARBONNIER, *Flexible droit*, Paris: LGDJ, 1995, pp. 241-242.

⁹ See, especially, Council Regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, or Council Regulation (EC) 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

¹⁰ Council Regulation (EU) 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.

¹¹ Regulation (EU) 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

¹² See H. FULCHIRON, *La famille au cœur de systèmes: renouvellement des sources et dynamique des normes*, in B. BONNET (dir.), *Traité des rapports entre ordres juridiques*, Paris: LGDJ, 2016, p. 1195 *et seq.*

¹³ For example, on the notion of "visitation rights", Court of Justice, judgment of 31 May 2018, case C-335/17, *Valcheva*.

The second approach recognizes that EU law has an influence on the balance of national family law, but considers it as essentially negating and destabilizing the family order. As a whole devoted to the attribution of subjective rights for the benefit of individuals and liberal ends, the law of the Union would accentuate a tendency towards individualism and the break-up of the family institution. In a sociological approach to the family, it is common to consider that according to the law of “progressive contraction” the family circle is reduced inversely proportionally to the enlargement of the social circle.¹⁴ Consequently, the extension of the European area beyond the national society would correspond to a further decrease in the family circle. However, the transformation seems this time deeper and more qualitative, as illustrated by the turn taken by the European legal discourse surrounding the right to a family life. To original individualism, understood as the reservation of a private sphere of intimacy to the individual to enjoy freely his family or his friends, European Union Law, like that of the European Convention of Human Rights, would replace the rise of a new individualism, purely ego-centric, rooted in the very heart of the family circle and which destroys in depth any civic sense and solidarity among the new generations. The “des-institutionalization” of the family by these subjective rights is created by an over-valuation of the interest of the person at the expense of the socially dominant conception of the family, as illustrated in particular by the issue of gay marriage. By establishing, as it does in *Coman and Others*, the right to have a legally concluded same-sex marriage in a Member State of the Union produce effects in a State which refuses to legalize that type of union¹⁵ the Court of Justice weakens the dominant conception of the family within societies that remain attached to a representation of marriage as the union of a man and a woman. Only a short step remains to deem that the protection of individual right prevails through Union law over the preservation of the family social model.

These approaches come together around the idea that family life and social life are inseparable. Without the power to incorporate a social body, European Law might expose itself to two critiques: either it will be reduced to a purely technical instrument of coordination of national laws without substantial meaning, or it will be led to become a mechanism of protection of subjective prerogatives at the cost of breaking up all phenomena of social belonging. Assigned this task of either coordinating state judicial orders or protecting individual prerogatives, European Union law will likely struggle to come up with its own social model of family life.

¹⁴ As E. Durkheim writes, “the family must necessarily contract as the social milieu with which each individual is in immediate contact extends further”, quoted by G. RADICA, *Philosophie de la famille*, cit., p. 131.

¹⁵ Court of Justice, judgment of 5 June 2018, case C-673/16, *Coman and Others* [GC]. See D. KOCHENOV, U. BELAVUSAU, *Same-Sex Spouses: More Free Movement, but What about Marriage?* *Coman*, in *Common Market Law Review*, 2020, p. 227 *et seq.*

I.2. THE FAMILY AS A “FORM OF LIFE”: AN EXISTENTIAL APPROACH TO EUROPEAN UNION LAW

Another way of looking at the relationship between European Union law and the idea of the family is to try to uncover in the European legal discourse the emergence of familial “forms of life”. A philosophic invention, the concept of “form of life” lends itself to many projections, especially as its use spreads in the different social sciences. Its principle message seems, at first, quite clear. The approach emphasizes the idea that life is not separable from its forms. Consequently, life becomes unthinkable without the forms in which it expresses itself, and, conversely, the forms of life participate in life itself. However, beyond this basic idea, the theme of the “form of life” lends itself to different declinations. In broad terms, it is possible to distinguish three main perceptions in the philosophical discourse, sometimes close to each other but nevertheless distinct, to which it is possible to match different approaches of law.

The first perception, coming from a critical or conflictual perspective, insists by the idea of “form of life” on the intrinsically ethical nature of social practices and ways of life.¹⁶ These ordinary practices must in fact be understood as the seat of equilibrium of values intended to resolve a conflict so as to make life possible. For example, the transition from a patriarchal form of life articulated around the figure of the family master (marriage as an agreement granted in an authoritarian way between two clan leaders) to a form of conjugal life based on the union of two beings (marriage as an agreement freely agreed by both spouses) illustrates a change in the social practices of which the form of family life is the receptacle. As a process of formalization of social practices, law entrenches, reconfigures and indeed rejects, forms of life in this way. It operates as a sort of filter of the ethical nature of social practices. The conflict at the heart of family life concerns whether it is important to focus on the interests of the family unit or the individual interest of its members.

The second perspective, more cultural, considers the “form of life” as the result of cultural formations which form the basis of a society. The cultural approach finds – in the ways that groups and individuals simply are – an argument maintaining that the perpetuation of certain habits, indeed certain rites, shapes a type of society which fits into the mental processes of each individual.¹⁷ Each type of civilization thus provides a frame of interpretation from which the individual builds their life. For example, the cultural conception of certain people, consisting of individuals living their entire life where they were born, gives rise to social institutions of “furtive” husbands or “visitors” who visit their spouse during the night and then return to their original family’s home.¹⁸ In this scheme, the law expresses and stabilizes ways of life. Rather classically, in a socio-

¹⁶ R. JAEGGI, *Towards an Immanent Critique of Forms of Life*, in *Raisons politiques*, 2015, p. 13 *et seq.*

¹⁷ R. BENEDICT, *Patterns of Culture*, 1934, Boston: Mariner Books, 2008.

¹⁸ The example is given by G. RADICA, *Philosophie de la famille*, cit., p. 15.

logical approach to law, this last example will only be a passive expression of a preexisting social consensus.¹⁹ More original and interesting for the discussion at hand, one can also envisage that the law actively participates in a cultural construction which confers its forms onto social habits²⁰. As a mental framework, the law itself elaborates a form of culture specifically in family matters.²¹

The third usage of the “form of life” theme, inspired by naturalists, highlights the specificity of human nature in supposing that the ways with which life expresses itself (touch, feel, love, speech, sight, etc...) conditions our conception of life itself while producing their own norms.²² These “ways of being human”, to take the title of P. Donatelli’s work, form a complex network of concepts underpinned by language which retroact on our behaviour.²³ This is the case for example in family matters, where the rather largely undefined concept of childhood (when does it begin and end?) which takes root in physical and mental states, leads us to idealize a form of happiness and innocence whose moral substance affects our ways of educating and treating children. The idea of “form of life” means to rewrite the processes of formation, but also of contestation, of our human representation of being human. This approach is probably the most difficult to integrate into the law. The human “form of life” is hardly replaceable in a positive approach of law and seems to call into question the marked framework of legal normativity.

From these different variations, there is a certain ambiguity in the use of the “form of life” theme, which struggles to place the analysis of legal discourse in an epistemological framework that is stable enough to deliver a fully coherent overall reading. It is, however, from this reflexive plasticity between life and the forms that it takes that the approach draws its interest, especially when considering the law of the Union. As has been said, EU law is regularly considered as devoid of a social base, merely a collection of subjective rights directed towards limited ends. However, in remaking our way of life, the “form of life” approach illustrates that in family matters Union law is probably more than that.

By not choosing between the factual reality of life and the normative dimension of the forms it takes, the “form of life” approach does not necessarily lean the concept of the norm on a homogeneous social body. At the same time “inert” and “moving”,²⁴ the form of life is permanently deconstructed and reformed under the influence of the evolution of human relationships and their incorporation into society. Therefore, despite the lack of a European society per se, it is conceivable that the construction of a Euro-

¹⁹ J. CARBONNIER, *Flexible droit*, cit., pp. 217-225.

²⁰ C. GEERTZ, *Local Knowledge: Fact and Law in Comparative Perspective*, in *Local Knowledge: Further Essays in Interpretive Anthropology*, London: Fontana Press, 1983, p. 167 *et seq.*

²¹ W. GEPHART, *Family Law as Culture*, in K. BOELE-WOELKI, N. DETHLOFF, & W. GEPHART (eds), *Family Law and Culture in Europe*, Cambridge: Intersentia, 2014, p. 347 *et seq.*

²² S. CAVELL, *Les voix de la raison*, Paris: Éditions du Seuil, 1996.

²³ P. DONATELLI, *Manières d'être humain*, Paris: Vrin, 2015.

²⁴ R. JAEGLI, *Towards an Immanent Critique of Forms of Life*, cit., p. 18.

pean area constitutes a place of observation the social imaginary's transformation in family matters. Moreover, while the social sciences face the classical difficulty between taking the individual or the group as the primary subject, choosing between the subjective or the objective, recourse to the concept of form of family life overcomes this problem. The concept of form of life does not choose an approach more individual than collective. Therefore, a family "form of life" must be understood at the same time as absolutely proper to a subjective life, but equally as necessarily shared with a given social group, indeed put in relation with other social groups and the forms which they take. As a result, it is no longer contradictory to envisage the emergence of a collective European imaginary through the protection of subjective rights intended to change the forms of collective life. Through the use of subjective rights conferred at the European level, the individual contributes to reforming new representations of social life which can progressively crystalize through the law and lead to a change in the social structure itself. The exercise of individual prerogatives linked to family life thereby contribute to forging a common representation of what is a "family" which itself is thought of within a larger whole. The individual and the collective find themselves inextricably mixed together. Ultimately, the "form of life" approach permits a realization of the complexity of the constitutive function of European Union law. Considering the family as a "form of life" makes it possible to depart from the too radical demarcation between the concrete and the abstract. In so far as it combines the abstract and the concrete, the concept of "form of life" allows us to overcome this divide. Living in a family is both a mode of life that is projected into the abstract idea of the family institution as well as the realization of a model of life that derives from social and legal norms. Thus, the performative dimension of the use of the law in the European context can be assumed.

It remains to be discovered in the European legal discourse what comes out of an approach to family life as being inseparable from certain forms, which EU law is reformulating, transforming or even deforming in its own way.

1.3. LAW AND FORMS OF EUROPEAN FAMILY LIFE: STARTING WITH CONCRETE LIVES. THE CASE OF CITIZENSHIP

The "forms of life" cannot easily be grasped, either because they hide behind the legal artifice of reconstructing the reality of life or because they seem so obvious to us that their presence in the legal discourse goes largely unnoticed. In EU law, their reality seems all the more hidden because the main concepts are shaped in a frequently functional or instrumental perspective, articulated around a search for full effectiveness of the law. The use of instrumental logic and its apparent neutrality can hide the ethical dimensions of European legal constructions behind technical and repetitive formulas. Nevertheless, it is possible to detect in the legal discourse scattered representations of the family life, which spring up here and there in texts and case law and which gradually give substance to a discourse on this form of life. These representations are the result

of tensions and contradictions, of which law is entirely shaped, which give rise to certain solutions whose meaning otherwise could not easily be explained. These representations in the legal discourse can be deemed as conservative or progressive, alienating or emancipatory, but they are most often used to bring into existence a European point of view on a situation which at first sight does not directly concern it.

Taking several paradigmatic examples, there is, in the often-considered surprising *Carpenter* judgment, a certain representation of family life which consolidates the traditional notion of the wife in the home. In the judgement, the protection of EU law runs counter to the expulsion of the undocumented applicant because, in taking care of the children of her husband, she facilitates his free movement in the European Union.²⁵ In the same vein, the *Zhu and Chen* decision, rendered while sitting as a full Court, recognized a temporary right of residence to the parent of an infant citizen of the EU. In this emblematic case, the Court of Justice openly departed from the political will of the European legislators who had intended a restricted definition of the notion of “family” and developed its own interpretation of what it means to be European for a newborn.²⁶ Finally, in the *Ruiz Zambrano* case, the decision to legalize the stay of parents of vulnerable European citizens can hardly be understood without an appreciation of family unity and of the link which indissolubly connects children to their parents. The radical conceptual shift that takes place from this last decision in the way of thinking about what it means to be a European citizen is materialized in a new famous formula according to which EU law “precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union”.²⁷ The consequence of this shift is that it gives European citizenship access to a normative autonomy by detaching it, at least in practice, from the exercise of cross-border movement. Valuable in and of itself, belonging to the EU justifies the triggering of a specific protection which modifies our perception of what European integration is.

In all of these cases, it is remarkable that the family relation is the path which permits EU law to, under the guise of seeking effectiveness, to expand its field of application to situations which otherwise would escape its grasp, whether this be by characterizing an element of foreign transnationality (*Carpenter*) or by breaking from notions and updating what EU citizenship means (*Ruiz Zambrano*). To justify this, EU law must take into account relational links which forms knots between members of a family and set them up as parameters of an innovative, even unexpected, legal solution. They form the place of “the emergence of a European idea of the family”.²⁸ It has been shown that the concept of European citizenship, despite being presented as stable and almost inher-

²⁵ Court of Justice, judgment of 11 July 2002, case C-60/00, *Carpenter*.

²⁶ Court of Justice, judgment of 19 October 2004, case C-200/02, *Zhu and Chen*.

²⁷ Court of Justice, judgment of 8 March 2011, case C-34/09, *Ruiz Zambrano* [GC], para. 42.

²⁸ G. DAVIES, *The Right to Stay at Home: A Basis for Expanding European Family Rights*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism*, Cambridge: Cambridge University Press, 2017, p. 469.

ent, is in reality the result of ongoing case-law work involving implementation and adaptation that retroacts on the concept itself. This work of conceptualization is led by certain practices and representations, particularly in family matters, on the particular relationship that sentimentally and emotionally unites human beings. Once embedded, it is conceivable that the concept has an influence on its social environment, on how we live our lives and on how we represent our lives in the Union. In this way, a link has gradually been established between the status of European citizens – supposed to confer a sense of belonging to a larger transnational community – and the community family.

It is particularly striking to note that at the heart of the reasoning in the main decisions that precipitated the advent of transnational European citizenship is the recognition of family relationships. From the *Martinez Sala* judgment, which marks the first jurisprudential use of the concept, European citizenship was mobilized in order to extend the scope *ratione personae* of EU law and to allow it to oppose differential treatment between Member State nationals and Community citizens in granting a child-raising allowance.²⁹ Even more clearly, in the *Baumbast* case the Court of Justice explicitly recognized for the first time in EU citizenship an independent basis for European protection and belonging. The case recognized a right of residence for the applicant's children to continue their studies in the host State which then also applied to their parents to remain in the UK despite the termination of the father's economic activity.³⁰ Consequently, we can see the idea that the first and pivotal function of family life serves to support the development of a relationship between the Union's foundational right allowing the worker to move freely in the EU with their family, the correlative right of children to enter and continue their studies in the receiving State, and finally the right of parents to remain in the territory of that State to continue to be with their children as ordinary citizens of the Union.

It is difficult to say with certainty that in these pioneering decisions the family dimension played a decisive role in the extension of European jurisdiction and the creation of a status of social integration benefitting EU citizens. However, it is striking to note the propensity with which innovative solutions, which are decisive for the meaning of European integration, are adopted when the pursuit of family life at the European level is at stake. It is by identifying these diffuse structures of family life forms which span EU law and resolve certain tensions that one can more fully take stock of the change in the frameworks with which we represent life. The most visible illustration is certainly the way in which EU law modifies the main figures of family life.

²⁹ Court of Justice, judgment of 12 May 1998, case C-85/96, *Martinez Sala*.

³⁰ Court of Justice, judgment of 17 September 2002, case C-413/99, *Baumbast and R.*, para. 75.

II. THE EUROPEAN DE-FORMATION OF FAMILY LIFE FIGURES: BIOLOGICAL LIFE AND EMOTIONAL LIFE

By dealing with family life forms in an autonomous way in relation to national rights, EU law is instrumental in reassigning everyone's roles in the particular relationship that makes up the family sphere. It does so, as is often the case in legal reasoning, by delineating the contours of the categories of actors in family life, so that in their definition there are already reconstructions of the concept of family and that which forms the basis of the family relationship. We will focus on the central figures of modern family life, namely the "spouse" and the "parent". Moreover, we will see that behind the parental figure lies a reflection of the figure of "the child".

II.1. THE "SPOUSE": THE CONJUGAL FORM OF LIFE

Continuing the legacy of Regulation 1612/68 as regards workers moving in the European Union,³¹ Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely, which defines the family members of the European citizen, begins with the "spouse".³² Without elaborating, the term invites us to identify what constitutes a "conjugal" relationship, with particular reference to its traditional form of existence in married life.

At first, the European approach remained relatively guarded and traditional. According to the *Reed* judgment, delivered under Regulation 1612/68, the concept of "spouse" is limited in principle, and "in the absence of any indication of a general social development" specifies that it "refers to a marital relationship only."³³ The marital bond thus plays a decisive role in the legal discourse, even supplanting other conflicting interests. Notably, as the case-law will later make clear, once married it does not matter whether the spouse is documented or not to claim the protection of family ties under Union law.³⁴ As powerful as the family bond is, it remains subject to a rather restricted conception. Though the social reality appears much more complex, "conjugal" life has assimilated into "marital" life alone, excluding other forms of union than marriage. However, in the same decision, the Court of Justice admitted, contrary to the Advocate General, that an unmarried partner could also benefit from a right to stay in the host State on the basis of Community law. The Court adopted a broad meaning of the concept of "social benefit", as including a residence permit, in order to judge that refusing

³¹ Art. 10, para. 1, let. a), of Regulation 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community.

³² Art. 2, para 2, let. a), of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

³³ Court of Justice, judgment of 17 April 1985, case 59/85, *Reed*, para. 15.

³⁴ Court of Justice, judgment of 25 July 2008, case C-127/08, *Metock and Others* [GC].

such access to the unmarried partner could undermine the integration of the worker in the host country and would give rise to discrimination on grounds of nationality. A path of evolution was thus opened.³⁵ Since then, Directive 2004/38 has extended the concept of family to “partner”,³⁶ meaning “unmarried”, but on the condition that the partnership is recognized in the host State as equivalent to marriage. This condition – by making its protection aleatory – can be interpreted as the confirmation of a form of superiority of marital life over other forms of conjugal life.

Secondly, the perception of married life has evolved in the European legal discourse. Married life is no longer considered to be of a symbolic and legal superiority over other forms of union outside marriage.³⁷ There is, however, some uncertainty in the law of the Union, which is sheltered behind the reserved competence of States in this area. Departing from the suggestion of the Advocate General, the Court held in *Parris* that a regulation which prohibits the transfer of an allowance to the surviving partner where the partnership was concluded after a certain age does not constitute discrimination based on sexual orientation, even though homosexual partnership was not legally possible before the requisite age was reached. Refusing to express an opinion and to allow each State full latitude to regulate matters of homosexual union, the Court tends to use the language of national competence in conjugal matters.³⁸

Thirdly, the most sensitive question which the Court broached was whether the “married” spouse within the meaning of EU law includes same-sex marriage, which remains an important topic in the debate of opinion. In the rather specific context of the European civil service, the Court of Justice first considered on the basis of a comparative approach – reminiscent of the consensual interpretation technique of the European Court of Human Rights – that a homosexual partnership lawfully registered in a Member State could not be equivalent to a marriage within the meaning of EU law, finding incidentally that “according to the definition generally accepted by the Member States, the term ‘marriage’ means a union between two persons of the opposite sex”.³⁹ For its

³⁵ *Reed*, cit., para. 28. In fact, the relevant Dutch law recognized that the unmarried partner of a national could obtain a residence permit. To deny it to an unmarried partner of a community worker would have resulted in discrimination in this respect.

³⁶ Art. 2, para 2, let. b), of Directive 2004/38/CE, cit.

³⁷ European Court of Human Rights, judgment of 21 July 2015, no. 18766/11 and 36030/11, *Oliari and Others v. Italy*.

³⁸ Court of Justice, judgment of 24 November 2016, case C-443/15, *Parris*, paras 58-59. The Court emphasized “that marital status and the benefits flowing therefrom are matters which fall within the competence of the Member States and that EU law does not detract from that competence” before concluding that “the Member States are thus free to provide or not provide for marriage for persons of the same sex, or an alternative form of legal recognition of their relationship, and, if they do so provide, to lay down the date from which such a marriage or alternative form is to have effect”.

³⁹ Court of Justice, judgment of 31 May 2001, joined cases C-122/99 P and C-125/99 P, *D. and Sweden v. Council*, para. 34.

part, the European Court of Human Rights has not gone so far as to force the institution of same-sex marriage on the Member States.⁴⁰ The question of recognition in a Member State that has not legalized the effects of a same-sex marriage concluded in another Member State of freedom of movement is nonetheless distinct, and provides a gap in which the Court of Justice has stepped in to have a hand in the control of the exercise of state competence. In the *Coman and Others* case, the Court returned to the notion of “spouse” within the meaning of EU law, finding that the notion was to be understood as regardless of gender, “a person joined to another person by the bonds of marriage” further stating that “the term ‘spouse’ within the meaning of Directive 2004/38 is gender-neutral and may therefore cover the same-sex spouse of the Union citizen concerned”.⁴¹ Although the European judges are careful to specify in this case that the obligation of recognition of a homosexual marriage of an EU citizen in another State does not imply in any way that of legalizing in a general way this form of marital life in national law,⁴² many difficulties are sure to arise, including those of reverse discrimination, incentives to circumvent the law, or even lack of coherence of the law of the Union itself when the homosexual partnership could be not recognized while same-sex marriage can no longer not be... The American example shows that it is likely, in the long term, that the obligation of transnational recognition of same-sex marriage will lead to a full legalization of the right to marry for persons of the same sex throughout the common area due to a lack of actual effectiveness of national legislation.⁴³

It is possible to see in EU law a logical reconfiguration of what uniting one’s life to another signifies. Behind such a reconstruction lies an ethical evolution of the different forms that human love can take between two beings. By gradually substituting for the biological nature of the difference of the sexes, which until now underpinned the marital institution, the affective nature of the human feeling, Union law reforms perceptions of the way of living a life.

II.2. THE PARENT: THE PARENTAL FORM OF LIFE

European law also redefines what being a “parent” means. It is through the controversial forms of parental life in the areas of adoption, medically assisted procreation, and gestational surrogacy, that European law has come to pronounce on parenthood, once again tackling the sensitive issue of whether legal parentage is a biological and “natural” link, or rather educational and emotional.

⁴⁰ European Court of Human Rights, judgment of 24 June 2010, no. 30141/04, *Schalk and Kopf v. Austria*; judgment of 23 February 2016, no. 68453/13, *Pajic v. Croatia*.

⁴¹ *Coman and Others* [GC], cit., paras 34-35.

⁴² *Ibid.*, para. 37.

⁴³ US Supreme Court, judgment of 26 June 2015, *Obergefell v. Hodges*.

The European Court of Human Rights has repeatedly confirmed that parenthood is independent of sexuality, believing that parental life cannot be denied solely because of the homosexuality of the natural parent⁴⁴ or the adopter.⁴⁵ Similarly, the Court admitted that parenthood was independent of conjugal family life.⁴⁶ However, such an extension of the parental life form to same-sex parenting and / or single-parenthood does not obscure a possible tension with a more traditional form of parental life. The same Court in *Gas and Dubois v. France* conceded that the homosexual spouse effectively responsible for the upbringing of a child could not from this sole fact be allowed to adopt it, since such an adoption would risk undermining the biological filiation favouring the biological parent and hence what is presumed to be the best interests of the child by national law.⁴⁷ This acknowledges that biological parenthood can continue to benefit from enhanced protection, as a dominant form of parental life, in relation to emotional or educational parenting.

Contrary to the law of the European Convention on Human Rights, European Union law has not yet openly invited itself to the debate on the legal place to be accorded to the form of same-sex parents and / or single-parent life, as opposed to a biological or natural parenthood. It cannot be excluded that it may do so, in particular in a transnational situation in which an applicant claiming recognition in one State of a form of parenthood lawfully constituted in another State in a hypothetical not yet protected by the law of Convention. The approach of EU law seems for the moment rather conservative, privileging classical parenthood over more atypical forms of procreation. In the *Z.* case, the Court of Justice ruled on the meaning of motherhood, and thus the status of “mother”, in the context of a refusal of leave against the sponsor mother of a surrogacy in a quite clearly restrictive sense.⁴⁸ The Court considered that it was not discriminatory, in terms of sex or disability, to grant maternity leave only to the birth mother or adoptive mother of a child, and not to the mother who sponsored a surrogacy carried out by another. The question implicitly raises the meaning to be attributed to maternity and the leave attached to it: is it a matter of producing a child and in that case, it must be concluded that the sponsor mother does not have to be legally protected (biological conception of maternity), or is it on the contrary to nurture and take care of, in which case it is questionable to deprive the sponsor of a surrogacy mother of any leave of “maternity” (affective conception of motherhood). By endorsing a distinction between different ways of becoming a mother, this solution amounts to considering that, legally, the mother-sponsor of a surrogate mother is not re-

⁴⁴ European Court of Human Rights, judgment of 21 December 1999, no. 33290/96, *Salgueiro Da Silva Mouta v. Portugal*.

⁴⁵ European Court of Human Rights, judgment of 22 January 2008, no. 43546/02, *E.B. v. France*.

⁴⁶ European Court of Human Rights, judgment of 28 June 2007, no. 76240/01, *Wagner and J.M.W.L. v. Luxembourg*.

⁴⁷ European Court of Human Rights, judgment of 15 March 2012, no. 25951/07, *Gas and Dubois v. France*.

⁴⁸ Court of Justice, judgment of 18 March 2014, case C-363/12, *Z.* [GC].

ally a “parent”, or at least not in the same way as natural parents, who are better protected than her. It appears that the form of parental life resulting from surrogacy is not as valued in terms of legal protection.

An evolution is starting to appear in the European legal discourse, though it still seems attached to a biological dimension of parenthood. In the cases of *Menesson v. France*, the European Court of Human Rights ordered the national authorities to recognize the parentage of children born by surrogacy abroad, even though such procreation is prohibited in their State of residence. However, it did so only with regard to children's rights to privacy, and not from the perspective of parents who – taken alone – are not recognized as such. In addition, the right to have the parental relationship legally recognized applies only to the biological parent of the child born by gestational surrogacy, and not to the other parent.⁴⁹ In the absence of such a biological link, the protection of parental status is no longer ensured.⁵⁰ In this way, the parental figure is first and foremost constituted by a biological link, and incidentally by an emotional link, provided that the latter, unlike the first, enjoys a certain duration. This does not make biological parentage an imperative criterion of the parental life form. Nevertheless, it retains a dominant dimension in the representation of parenthood conveyed by the European legal discourse.

II.3. THE CHILD: THE “FILIAL” FORM OF LIFE

The child and the parent are two expressions of the same relational reality, such that the category of the parent reflects that of the child. However, it can happen that a certain autonomy characterizes the figure of the child compared to that of the parent.⁵¹ Contrary to parenthood, the biological parent-child relationship no longer seems as decisive for the child. Thus, a discrepancy is created in the legal discourse to understand the same situation according to whether one considers the situation of the parent or that of the child. This discrepancy can hardly be explained other than by a representation of what childhood is and the needs it gives rise to. The example of EU law's apprehension of the blended family illustrates this.

In the *Baumbast* judgment, the Court of Justice faced the situation of a “blended” family. Assessing the entirety of the situation, the Court did not make a distinction between the children based on their biological relationship with the applicants. As a result, the natural daughter of Ms. Baumbast, a Colombian citizen, was treated in the same way as the biological daughter of the Baumbast couple, the natural daughter's half-

⁴⁹ European Court of Human Rights, judgment of 26 June 2014, no. 65192/11, *Menesson v. France*, para. 100.

⁵⁰ European Court of Human Rights, judgment of 26 July 2017, no. 25358/12, *Paradiso and Campanelli v. Italy*.

⁵¹ It is possible to identify several ways of defining what is a “child” in EU law, depending on whether one considers, for example, a criterion of age, of a biological link, or of dependence, see H. STALFORD, *Children and the European Union: Rights, Welfare and Accountability*, Oxford: Hart, 2012, pp. 21-25.

sister, of both German and Colombian nationality. Otherwise the right to free movement of the Union citizen and members of their family would have been infringed.⁵² Therefore, the concept of the family is not limited to the biological family but also includes step-children as part of a second union. Similarly, contrasting with the dominant biological approach to parenthood, EU law has provided an autonomous definition of who should be considered as "the child" of someone. In the *Depesme and Kerrou* case, rendered again in the framework of a "blended" family, it was recognized that under EU law the child of a spouse is also considered to be the child of the other member of the couple, even though there is no biological or even legal basis of parenthood within the meaning of national law. The litigation concerned blended families of border workers who were working in Luxembourg but residing in another State and who were requesting a study allowance from the Luxembourg authorities for their new spouse's child. The question was whether a scholarship could be awarded to the "child" of a worker, who is neither the natural or adopted father, but only the father-in-law as a spouse of the child's parent from a first union. Under national law, the child was not the legal child of the European worker thereby explaining the refusal of the national authorities to finance his studies. However, the child was "a child" in the autonomous sense of Union law on the ground that the worker is effectively bound to the child's parent and takes charge of their upbringing "and there is no need to determine the reasons for recourse to the worker's support".⁵³ The union of the blended family unit is thus privileged over the reality of the biological link. The effectiveness of the relationship gives shape to a form of life considered as "parental".

However, the evaluation of the kinship bond has also been interpreted in a more restrictive sense. In the case of *O. and S.*, the Court of Justice was seized of the question of whether the *Ruiz Zambrano* case law was applicable to the situation of a "stepfamily" in which a child was born from a first union with an EU citizen before their other parent returned to married life with an undocumented third-country national. Finding that the stepfather of the child, who is a citizen of the Union, enjoys a more limited protection than that of the biological parent, the Court of Justice sought to characterize the degree of "legal, financial or emotional" care the stepfather took over the child in order to know whether a relationship of "dependence" united them to the point that the removal of the latter would risk depriving the child of the essential rights attached to being an EU citizen.⁵⁴ Since such a condition of close dependence between the child and the step-parent was not, in the Court's view, sufficiently established in this case, the child's European citizenship could not prevent the child from being removed from the spouse of their parent.

⁵² *Baumbast and R.*, cit., para. 57.

⁵³ Court of Justice, judgment of 15 December 2016, joined cases C-401/15 to C-403/15, *Depesme and Kerrou*, para. 58.

⁵⁴ Court of Justice, judgment of 6 December 2012, joined cases C-356/11 and C-357/11, *O. and S.*, para. 56.

This solution raises the delicate question of maintaining the unity of a stepfamily, especially if the couple in the blended family have themselves had children who would be forced to be separated from one of their biological parents. In such a case, the citizenship approach would probably be unable to account for the complexity of blended-children families in favour of national flexibility in immigration and public security.

Despite the autonomous qualification of the filiation by EU law, the reference to national law and institution does not disappear totally. Traces of attachment to a biological conception by national law can be noted in the *SM* case, related to the *kafala* institution. At stake was the right of residence of a child who is a third-country national in respect of whom the parents, who are citizens of the Union, exercised guardianship and parental authority under the Algerian *kafala* regime. The Court of justice initially favoured an autonomous approach to the establishment of parentage, holding that, in the absence of any reference by Directive 2004/38, in Art. 2, para. 2, let. c), to the law of the Member States, it was for the Court itself to define the concept of "direct descendant".⁵⁵ While the Court concludes that the concept of direct descendant covers "both the biological and the adopted child of such a citizen, since it is established that adoption creates a legal parent-child relationship between the child and the citizen of the Union concerned",⁵⁶ it excludes the interpretation suggested by the Commission consisting in extending protection to any legal "guardian" of a child. The main reason is the attachment of the formal qualification of the foreigner law: "the Algerian *kafala* system does not create a parent-child relationship between the child and its guardian".⁵⁷ Without saying so openly, it would seem that the Court of Justice is sensitive to the fact that it does not call into question national family law, in particular those refusing to treat *kafala* as a true filiation, in lack of a biological link with the child. However, a child brought up under the *kafala* system is not deprived of any protection, the Court of Justice examining his situation from the point of view of Art. 3, para. 2, of the Directive under the heading of "other" family members not covered by Art. 2, para. 2, of the Directive.

In sum, if EU law reconfigures the roles of the main actors in family life, it does so in a particular context and according to its own reasoning methods, largely linked to the idea of European unity, and thus leading to a European approach to family life being biased by a specific logic. This raises the question to determine what the mindset is behind this reshaping of family life in which EU law operates.

⁵⁵ Court of Justice, judgment of 26 March 2019, case C-129/18, *SM* [GC], para. 50.

⁵⁶ *Ibid.*, para. 54.

⁵⁷ *Ibid.*, para. 56.

III. FUNCTIONALISM AND ESSENTIALISM IN THE EUROPEAN FORM OF FAMILY LIFE: JURIDICAL LIFE AND ETHICAL LIFE

From Union law one can extract two distinct, although sometimes complementary ways to understand family life. The first, and most common, is functional. It is linked to the achievement of the primary goal of open borders and free movement, and shapes the practical or legal reality in accordance with this objective. There is, however, a less explicit and more ethical second approach to family life that makes a judgment on the right way to live as a family, including being a parent. In the European legal discourse, this more essentialist form of family life has emerged.

III.1. THE FUNCTIONALIST FORM OF FAMILY LIFE: FROM PRAGMATISM TO FORMALISM

It is common in Union law for the family member to be considered only as a subject derived from the transnational citizen, in a way as an accessory. As soon as he or she ceases to be a factor facilitating free movement, the citizen's family member leaves the scope of European Union law, which ceases to take into account the reality of social life and focuses solely on intra-European mobility.

a) The emergence of the functional approach to family life.

The main secondary legislation introducing consideration of family life does so in connection with freedom of movement, but by giving family protection its own, autonomous value, based on broader requirements relating to the freedom and dignity of the person. This is particularly the case for the founding Regulation 1612/68, which views freedom of movement as a "fundamental right" for workers and their families which must "be exercised, by objective standards, in freedom and dignity" and implies "the worker's right to be joined by his family" and guarantees "the integration of that family into the host country".⁵⁸ Additionally, the preamble of Directive 2004/38 which expressly provides that "[t]he right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality".⁵⁹ There is no indication in these statements that the Union legislator intended to reduce family life to a mere accessory to transnational mobility. However, the case law has been oriented towards a much more instrumental and functional approach to family life, according to which the person invoking it is seen first and foremost as an agent of European integration and not as a mere person.

⁵⁸ Regulation 1612/68, cit., recital 5.

⁵⁹ Directive 2004/38, cit., recital 5.

Among numerous others, the *lida* case illustrates the instrumental approach to family life, entirely oriented towards the objective of free movement.⁶⁰ As soon as freedom of movement is no longer threatened, Union law seems to lose interest in the nature of the family relationships that have been established. In *lida*, a Japanese family father, married to a German national and a parent of a young European citizen girl, was denied a right of residence based on his status as a family member of a Union citizen, on the ground that he had ceased to accompany his spouse in the exercise of her freedom of movement and could no longer claim the derived European protection resulting therefrom. This means that the continuation of family life is only guaranteed by Union law as long as the transnational movement of the European citizen is used. If this ceases the law's consideration of the family relationship established with the child will be erased. In the same spirit, in the *S. and G.* case, one of the two applicants invoked an extension of the *Carpenter* jurisprudence to request the recognition of her mother-in-law's right of residence on Dutch national territory, on the grounds that by caring for her small child she facilitated the exercise of her freedom of movement by the cross-border worker.⁶¹ While the AG proposed that the granting of the right of residence should depend both on the "closeness of the family connection" between the grandmother and the child on the one hand and on the degree of facilitation of free movement on the other,⁶² the Court of Justice adopts only the second criterion, considering that only the deterrent nature for the exercise of the worker's freedom of movement determines the benefit of the derived right of residence for the relative. Family life is then only understood in a purely instrumental way.

Even where the citizen does not move within the Union, the Court paradoxically links the protection of family members to the exercise of free movement by pointing out that the rights of parents of European citizens are conceived as "derived" rights and that the justification for granting them must be found in the risk of "[interfering], in particular, with the Union citizen's freedom of movement".⁶³ This would in a way protect a future use of intra-European free movement by the citizen, which would be severely compromised in the event of departure from European territory. However, it should be noted that the reference to "in particular" opens up a possible alternative to a strictly functional basis for protection in a purely internal context without a clear definition. The question remains open as to whether family life as such would justify the extension of European protection, regardless of any preservation of the future and possible exercise of transnational movement by the citizen. As a result, the functional approach to family life as an accessory to transnational mobility creates a risk of inconsistency in the un-

⁶⁰ Court of Justice, judgment of 8 November 2012, case C-40/11, *lida*.

⁶¹ Court of Justice, judgment of 12 March 2014, case C-457/12, *S. and G.* [GC].

⁶² Opinion of AG Sharpston delivered on 12 December 2013, case C-457/12, *S. and G.*, para. 123.

⁶³ See for example Court of Justice, judgments of 13 September 2016: case C-165/14, *Rendón Marín* [GC], paras 72-73; case C-304/14, *C.S.* [GC], paras 27-28.

derstanding of the same family unit. In the *Rendón Marín* case, the two European citizen children whose father was the subject of a removal order outside the Union were not born in the same State and therefore did not have the same nationality: one had Polish nationality, the other Spanish nationality.⁶⁴ As the expulsion of their father, convicted of a criminal offence, was decided in Spain, only the eldest daughter of Polish nationality was in a transnational situation of free movement and was therefore able to transmit to her father the protection of Union law resulting from her mobility on the basis of Art. 21 TFEU (in accordance with the *Zhu and Chen* case law).⁶⁵ On the other hand, the second child who was a Spanish national, could not appeal to the exceptional protection of Art. 20 TFEU in an internal situation derived from the *Ruiz Zambrano* jurisprudence and which required to show a sufficient risk of deprivation of the effective enjoyment of essential rights attached to the status of Union citizen. Under the functional lens linked to the value of free movement, a difference in the applicable regime and degree of protection within the same family is apparent, even though the nature of the family ties towards the father is the same. In this particular situation, Union law fragments more than it brings together the different elements of the same family life in an approach that has become formalistic.

b) Assessment of the functional link between family life and free movement: the case of marital life.

Initially the relationship between family life and free movement was established in a pragmatic way rather than by extensive reasoning. It was not necessary for a formal family link to unite the European citizen with a family member who claimed European protection. Thus, in the *Surinder Singh* case, the spouse of the Community worker was deemed as continuing to enjoy the protection of EU law, despite the fact that the movement ceased.⁶⁶ In this respect, it was of little importance that the couple was in the process of divorce in the EU citizen's State of origin to which they had returned together. First and foremost, it was necessary to avoid a situation wherein a worker would be dissuaded from exercising their freedom of movement, which could be the case if they were not sure of being guaranteed upon their return to "at least equivalent conditions" of stay to those that they and their family got when going to another Member State.⁶⁷ Nevertheless, the case law has since moved towards a more strict approach, more closely attached to the formal status of the married couple. In the nearly identical case of *Kudlip Singh and Others*, the Court of Justice clarified that a separated spouse of a Union citizen can no longer benefit from EU protection since the divorce proceedings were initiated after the use of free movement rather than during its exercise.⁶⁸ Conse-

⁶⁴ *Rendón Marín* [GC], cit., paras 72-73.

⁶⁵ *Zhu and Chen*, cit.

⁶⁶ Court of Justice, judgment of 7 July 1992, case C-370/90, *Surinder Singh*, para. 20.

⁶⁷ *Ibid.*

⁶⁸ Court of Justice, judgment of 16 July 2015, case C-218/14, *Kudlip Singh and Others* [GC].

quently, if the European citizen returns alone to their country of origin and the divorce is subsequently pronounced, then the former spouse is deprived of any European protection. This difference of treatment is established according to the timing of the divorce, though the reality of the conjugal bond and its cessation is exactly the same. The justification for this difference is difficult to understand and is closely linked to free movement. Family life is only incidental. The Advocate General's opinion considered that depriving the former spouse of the right of residence as soon as the divorce was granted and after the movement in the EU would pose no threat to the "effectiveness" of free movement. The AG held this view despite the possible creation of "unfair situations" depending on the aleatory circumstances of whether the divorce was pronounced before or after the departure of the European citizen of the host State in which they resided with their spouse.⁶⁹ One can see a certain indifference to the social reality towards people who have been married and have legally lived for several years with a European citizen in a State in which they are firmly established without any effect being conferred by Union law to their social integration.

This formalistic tendency in the assessment of the functional link between family life and free movement is reinforced by the *O. and B.* judgment, concerning the refusal of recognition in the State of origin of conjugal relations established by a European citizen in another Member State of the Union. The Court of Justice deepened its earlier case-law on the barriers to "exit" and "return" of workers and their family members. The Court began by recalling the instrumental nature of the European protection of family life which is justified on the basis of Art. 21 TFEU by the fact that in the absence of such protection, "a worker who is a Union citizen could be discouraged from leaving the Member State of which he is a national in order to pursue gainful employment in another Member State simply because of the prospect for that worker of not being able to continue, on returning to his Member State of origin, a way of family life which may have come into being in the host Member State as a result of marriage or family reunification".⁷⁰ It thus brings about a remarkable alignment in the State of nationality of the protection of family life offered by secondary legislation in the host State. The condition for such protection to be invoked against the home State appears simply pragmatic. It is based on the requirement of "sufficient effectiveness" of family life outside the State to enable the applicant to claim and consolidate it in their own State.⁷¹ However, the Court clarifies its assessment by distinguishing thereafter two more cases submitted to its assessment. Whereas in the case of *O.* the applicants were married in France before living together in Spain and claiming a right to stay in the Netherlands; this was not the case of the couple *B.* who had married in Morocco after having made a family life in Belgium

⁶⁹ Opinion of AG Kokott delivered on 7 May 2015, case C-218/14, *Kudlip Singh and Others*, para. 38.

⁷⁰ Court of Justice, judgment of 12 March 2014, case C-456/12, *O. and B.* [GC], para. 46.

⁷¹ *Ibid.*, para. 51.

and then asked for its recognition in the Netherlands. For the Court of Justice, the date of the marriage, more than the actual effectiveness of family life, serves to determine whether the condition of “sufficient effectiveness” is met with the consequence that only the former couple could rely on it and not the latter. The justification for such reasoning is the aforementioned quality of “spouse” of the European national who, according to the interpretation of Directive 2004/38, is reserved for the “married” spouse.⁷² A different solution is thus reached in the two joined cases for the sole reason that the marriage in one case precedes conjugal life while in the second it comes after. Formalism prevails over realism, revealing an attachment to the marital life which benefits from a reinforced protection compared to conjugal life out of wedlock.

Lastly, in *Ogieriakhi*, the artificial maintenance of the marital bond, even though the spouses lived apart and each had a different family life, allowed the applicant to continue to benefit from the derived protection which they benefited as spouse of a Community worker circulating in the Union. Despite the absence of “true sharing of married life together”,⁷³ the Court favoured a formalistic approach in which the marital bond existed administratively and that it could not “be regarded as dissolved as long as it has not been terminated by the competent authority”.⁷⁴ The legal existence of marriage then prevails over the effectiveness of conjugal life. The justification put forward by the Court lies in the desire not to unbalance the situation of third-country nationals and to protect, indirectly, the mobility of Union citizens who might otherwise be exposed to a form of extortion by threat of de facto separation, as divorce in principle requires the agreement of both parties.⁷⁵ Accordingly, the third-party national cannot be required to continue to share the same dwelling as their spouse, from the moment that that was the case at the beginning of their conjugal relationship.

In short, it appears that the European re-composition of family life in a functional perspective of transnational mobility confers a certain artificiality on the European legal construction. At times dictated by the institutional complexity of the European area, it is sometimes necessary to replenish the critique of a law detached from reality and the behaviours it intends to regulate. Taking the idea of life form seriously thus implies seeking in the legal discourse a more ethical approach to the ways of living our lives.

III.2. THE ESSENTIALISM OF FAMILY LIFE: FROM THE SUPERIOR INTEREST OF THE CHILD TO THE “GOOD” AND “BAD” PARENTS

To bring forth the superior interest of the child as an argument in family law litigation has become quite frequent, even in European Union law. To illustrate, let us look at two areas

⁷² *Ibid.*, para. 63.

⁷³ Court of Justice, judgment of 10 July 2014, case C-244/13, *Ogieriakhi*, para. 36.

⁷⁴ *Ibid.*, para. 37

⁷⁵ *Ibid.*, para. 40.

where Union law departs from the logic of free movement in order to enforce the existence of a particular link between members of a family, and without which there is any possible legal explanation. Namely, the question of removing a child away from his home on one hand, and the expulsion of a parent to a third country on the other. For the latter, the legal discourse brings forth a concept of dependence which will be delved into later.

a) The abduction or placement of the child.

The question of the wrongful removal of a child is a major issue at European level, on which the Union's duty is in principle limited to organizing the coordination of national courts and laws mainly on the basis of the so-called Brussels II *bis* Regulation, which is itself largely inspired by the Hague Convention on the Civil Aspects of International Child Abduction. The basic principle of European coordination remains that it is for the court of the child's "habitual" place of residence to have jurisdiction to resolve the question of custody of the child in a way that is understandable enough to avoid encouraging international displacement. The aim is rather to preserve a certain stability in family life, than that of free movement. Consequently, the jurisdiction of the State in which the child is present after his or her removal is most frequently asked to declare that the child should be returned to the State of departure without having to decide on the merits of the case, namely whether it is better for the child to remain within its jurisdiction along with the parent who removed him or her. However, sometimes, behind the objectivity and apparent technicality of the question of where a child's "habitual" residence is located, the question of preserving the best interests of the child may interfere to the extent of modifying the distribution of roles and the resolution of the dispute. This is particularly the case for very young children, to whom it is difficult to assign a habitual place of residence other than by proxy through their parents. In such circumstances, the legal discourse is partially less instrumental in favour of an assessment of the quality of family life. For example, in the *Mercredi* case, which involved the abduction of an infant by his mother, the Court of Justice pointed out that in order to determine the child's "habitual" residence, it must be taken into account that "the environment of a young child is essentially a family environment, determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of".⁷⁶ The affective criterion then becomes more important than other more objective criteria such as the couple's previous residence or the duration of their presence in a territory. This does not prejudge the award of custody of the child, but once such elements are put forward to determine the competent jurisdiction, it seems difficult to ignore them later. Similarly, with regard to a mother's refusal to return to the previous State of residence after childbirth, contrary to what the couple had previously decided, the Court of Justice makes the first months of the infant's concrete life in the State of

⁷⁶ Court of Justice, judgment of 22 December 2010, case C-497/10 PPU, *Mercredi*, para. 54.

childbirth, as well as the social and family environment prevail, in order to avoid abstract respect for the prior joint decision to return to the former State of residence.⁷⁷

For the same reason that Union law in family matters aims rather at coordinating national laws than harmonizing them, the Court of Justice does not in principle rule directly on the advisability of placing a child in foster care, but only on the question on competent jurisdiction eventually on the applicable law. However, as soon as the competent court or applicable law is designated, account is taken of the child's situation and what constitutes his or her "best interest", which already suggests that an assessment of the quality of the education received from his or her parents will be expressed. In case *A.*, the Court of Justice openly specified that in order to determine a child's "habitual" residence, which allows by deduction to designate the court competent to hear his or her situation, a specific reasoning, distinct from that traditionally applicable in civil matters, should be applied in order to ensure that a child's physical presence in a Member State "is not in any way temporary or intermittent and that the residence of the child reflects some degree of integration in a social and family environment".⁷⁸ For the Court, there are a number of factual indications of what constitutes a "habitual" residence such as "the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State".⁷⁹ But sometimes the assessment is less factual, especially when it is difficult to determine a "habitual" place of residence, as was the case in this case, since the children were initially educated in Finland, then after four years of domestic violence in Sweden, before returning to Finland in a precarious situation, without a fixed address and without schooling. European judges therefore accept that it is in the best interest of the child for a national authority to be able to enforce a provisional placement measure, while at the same time notifying a court in another Member State of its decision if necessary in order to obtain more information on the child's family situation. The role of Union law is no longer only functional, or even institutional, in bringing national authorities into contact with each other, but also takes on a truly substantial dimension of what is meant by decent education.

b) The removal of a parent.

The *Rendón Marín* case is an illustration of a refinement of the reasoning behind the protection offered by Union law to the foreign parent, in this case Colombian, who has sole custody of a European citizen according to the degree of attention he devotes to his educational task. In order to consider that it would be disproportionate to automatically expel the applicant, despite his criminal conviction, and to risk infringing the rights

⁷⁷ Court of Justice, judgment of 8 June 2017, case C-111/17, O.L.

⁷⁸ Court of Justice, judgment of 2 April 2009, case C-523/07, *A.*, para. 38.

⁷⁹ *Ibid.*, para. 39.

of children who are Union citizens, the Court of Justice points out that such an expulsion decision “cannot be drawn automatically on the basis solely of the criminal record of the person concerned”.⁸⁰ On the contrary, European citizenship requires that the decision to expel a parent is not an automatic and abstract sanction, but “from a specific assessment by the referring court of all the current and relevant circumstances of the case, in the light of the principle of proportionality, of the child’s best interests and of the fundamental rights whose observance the Court ensures”.⁸¹ Without directly deciding the matter, the Court of Justice suggests that the father was taking good care of his children, as they were “receiving appropriate care and schooling”.⁸² The assessment is no longer only factual or technical, it takes on a strictly ethical dimension of what constitutes a “good” education. A link is characterized between the parent and his children which opens up the protection of Union law, and which itself results from the quality of the exercise of the parental function. Whether or not to be a good parent becomes the cornerstone of European legal reasoning. Thus, the quality of education shows a real dependence of the child on the parent, and a reinforced protection of the latter in the name of the best interests of the former. The quality and closeness of the family relationship shall be established as a determining criterion for the protection offered by European law, despite national legislation to the contrary.

Similarly, a distinction has been made in case law with regard to the ability of the parent remaining in the territory of the Union to properly care for his or her child in the future. The situation concerned the case, which is frequent in practice, of children who are citizens of the Union, one of whose parents is also a European citizen but whose other parent is a third-country national and is the subject of a removal order. In the *Chavez-Vilchez and Others* case the question arose as to the applicability of the *Ruiz Zambrano* case law to the hypothesis that the only third-country national parent who has effective custody of the child who is a Union citizen is removed, so that the latter would not necessarily be exposed to the dilemma of choosing between family life and the “territory” of the Union since he could remain there with his other parent, himself a European citizen.⁸³ However, as the parent remaining in the territory of the Union does not take care of the child, there is a certain deterioration in the quality of family life for the child, as well as a painful separation from the parent who actually has custody of the child. In an attempt to distinguish whether the family life of the European citizen child would be so deeply affected by the removal of one of his or her parents that most of his or her rights would be affected, the Advocate General chose to distinguish between the ability of the parent remaining to take proper care of the child and the ability

⁸⁰ *Rendón Marín* [GC], cit., para. 85.

⁸¹ *Ibid.*

⁸² *Ibid.*, para 15.

⁸³ Court of Justice, judgment of 10 May 2017, case C-133/15, *Chavez-Vilchez and Others* [GC].

of the parent remaining to take care of the child.⁸⁴ The Court of Justice adopted the main point of the Advocate General's reasoning, namely to consider the best interests of the child. While the national authorities intended to reduce the parent's right of residence to the sole hypothesis that the other parent was absolutely unable to care for the child (detention, internment, hospitalization, or contrary opinion of the administrative or police authorities), the judges considered that Union law offered additional protection for the family life of the European citizen child in the event of "effective dependence" between the child and the parent who is a third-country national by focusing on respect for fundamental rights and the best interests of the child.⁸⁵ Until now, case law had remained relatively deaf to the welfare of the child, preferring the argument of immigration control, as in the case *Dereci and Others*, where it had not been considered contrary to the right of the Union to expel one of the two parents who were third-country nationals at the risk of breaking the unity of the family and referring the question of whether or not such a situation fell within the protection of the Charter of Fundamental Rights to the discretion of the national judge.⁸⁶ At no time was the child's interest mentioned. Only the consideration of the latter element thus justifies a shift in case law in favour of keeping the parent with whom the child has established an effective dependency relationship in the territory of the Union.

Attention to the interests of the child also prompted AG Wathelet to propose a more concrete approach to the criterion of depriving the essential rights attached to European citizenship to the Court in the *N.A.* case, concerning the right of residence of a third-country national after divorce from a Union citizen. Although it was not followed by the Court of Justice, his position is interesting in that it suggests that the legal reasoning should take into account the reality of children's social life in order to extend the protection of Union law to guarantee the maintenance of the parent in a given State, and no longer on the territory of the Union as a whole. The objective of the proposal was to review the *Aloka* case law, which considered that Union citizens were not deprived of most of these rights if the child and his or her parent could find refuge in a Member State other than the one in which they are living. To justify this evolution in the case law, the Advocate General states that "EU law may flesh out the concept of citizenship of the Union only on condition that it links the protection of citizenship to attachment to a place, to the fact of being settled in a territory and of being integrated not only into the administrative and economic life of the host country but also into its social and cultural life".⁸⁷ The argument is aimed for those who want to take seriously the quality of life of children, which is not only due to the presence of the caring parent, but

⁸⁴ Opinion of AG Szpunar delivered on 8 September 2016, case C-133/15, *Chavez-Vilchez and Others*, para. 97.

⁸⁵ *Chavez-Vilchez and Others* [GC], cit., para. 70.

⁸⁶ Court of Justice, judgment of 15 November 2011, case C-256/11, *Dereci*.

⁸⁷ Opinion of AG Wathelet delivered on 14 April 2016, case C-115/15, *N.A.*, para. 113.

also to the social context in which this attention is given and in which they have built their identity. If the case law engages in a qualitative assessment of the educational relationship, it will be difficult for it to avoid reopening this debate for a long time.

Underlying the European legal discourse is the emergence of a more essentialist form of family life that would reflect an inherent representation in Union law of what a “good” family relationship should be. It emerges from the legal concept of dependence. In its light, we can consider a reformation of what it means to live a family life on a European level.

IV. THE EUROPEAN RE-FORMATION OF FAMILY LIFE: THE EMERGENCE OF THE CONCEPT OF “DEPENDENCY”

By claiming that the European citizen “dependent” on an undocumented family member has the right to remain in the Union with the latter, the case law ventures into a strictly existential field. The significance of dependence involves a number of philosophical theories of care, which no longer consider it as a problematic or transitory state, to which it would be desirable to put an end in an autonomist conception of the individual, but on the contrary as a quality common to all human beings and valuable in that it makes our lives liveable. By integrating the legal discourse, the value of dependency as a relationship that is worthy of protection endorses and conveys the idea that there is a moral but also a social foundation, positively rooted in our practices and ways of thinking about life as well as in the intimacy of human relationships. Despite what its wording might suggest, the dependence test gradually developed by European legal discourse does not consist of an assessment – in a counterfactual way – of whether or not a parent’s choice to leave their family member on the territory of the Union is reasonable in order to avoid certain probable and objectively measurable suffering in another State.⁸⁸ The European legal approach to dependency⁸⁹ is rather to attempt to probe the deep nature of a family relationship in order to infer decisive consequences for the pursuit of a decent existence. The re-formation of family life in the legal discourse consists firstly of a qualification of what dependence is, and secondly of an attempt to classify the different forms of dependence within the family unit, or even, ultimately, to recompose their meaning. Living a family life in the sense of Union law then implies a particular representation of this relationship which contributes to the evolution of an existential imagination on how to lead our lives.

IV.1. THE QUALIFICATION OF DEPENDENCY

Union law seems to pay particular attention to the relationship of material dependence which unites the members of a family, particularly in financial and other material matters.

⁸⁸ G. DAVIES, *The Right to Stay at Home*, cit., p. 476.

⁸⁹ See also, K. HYLÉN-CAVALLIUS, *Who Cares? Caregivers’ Derived Residence Rights from Children in EU Free Movement Law*, in *Common Market Law Review*, 2020, p. 399 *et seq.*

Nevertheless, the consideration of an affectionate, or rather emotional, dependence is also present. What is then valued by law is the existence of a deep sense of affection between people as a determining factor in the legal solution to be given. Clearly, this second form of emotional dependence is more fragile as a basis for the emergence of real rights. It gives rise to the protection of a relationship whose foundation is more subjective than objective.

a) The (principally) material dependency.

The relationship of material dependence was first highlighted with regard to the relationship between a parent and a child considered to be “dependent” on him or her. In the *Teixeira* case, the Court of Justice deepened its *Baumbast* case law on Art. 12 of Regulation 1612/68 providing for a right of the migrant worker's children to undertake studies in the host State without discrimination.⁹⁰ The Court extended the right of residence of the parent who actually has custody of a child who is legally pursuing such studies, even though that parent is not economically active, does not have sufficient resources, and that the child has reached the age of majority.⁹¹ The Court of Justice stated in the *Alarape and Tijani* judgment that the parent's right of residence is based on the dependence of the child who is studying with regard to the parent, and more specifically on the fact that “that child remains in need of the presence and care of that parent in order to be able to continue and to complete his or her education”.⁹² In his opinion, the Advocate General identifies three main forms of dependence of the adult student on his or her undocumented parent: financial, emotional, and residential. According to him, it is mainly the “financial” dependence of the student that must justify the necessity of remaining in the parent's country, for the reason that if the parent were to be sent back to his country of origin, in this case Niger, he could no longer provide for his child, which would affect the child's ability to pursue higher studies in peace and serenity. When it comes to the criteria of emotional dependence, the Advocate General does not deem it necessary “that the emotional support should assume a particular quality, proximity or intensity”.⁹³ As a result, the affection between parent and child, even if the latter is of age, is both presupposed and standardized: no evaluation or grading is carried out. Similarly, the common residence requirement between the departing parent and the child, referred to in the *Baumbast* judgment, is diminished by the Advocate General when the “care” that the student can expect to receive from his parent can be provided even though he no longer shares the same domicile. Consequently, it is sufficient for the parent to participate in the financing of the life of his child for the relationship of dependence to be characterized, justifying the triggering of European protection against the parent's removal.

⁹⁰ Article 12 of Regulation 1612/68, cit.

⁹¹ Court of Justice, judgment of 23 February 2010, case C-480/08, *Teixeira*.

⁹² Court of Justice, judgment of 8 May 2013, case C-529/11, *Alarape and Tijani*.

⁹³ Opinion of AG Bot delivered on 15 January 2013, case C-529/11, *Alarape and Tijani*, para. 40.

With some nuances, these dimensions of dependency was subsequently taken up by the Court of Justice in the case of minor children, this time without clearly specifying their articulation and assessment. In the *O. and S.* case, already mentioned, the question was whether the *Ruiz Zambrano* case law opposing the removal from the Union of undocumented parents of European minors would be transposable to the hypothesis of the removal of their mother's new spouse in the event of a "reconstituted" family. Once again, the decisive criterion for deciding the question is based on the relationship of dependence between the Union citizen at an early age and the third-country national who is refused the right of residence. In the Court's view, such dependence is characterised by the "legal, financial or emotional" care of the child.⁹⁴ Dimensions are not cumulative. However, it does not venture to assess it itself, merely doubting the existence of such dependence and referring the matter back to the national court, without distinguishing between the three different dimensions mentioned. The AG is more explicit on the first two aspects, legal and financial, of dependency, which he considers unfulfilled when parents far from the territory of the Union "exercise no parental authority over those children and do not provide for them".⁹⁵ In his view, the lack of European protection is justified by the fact that if the child's mother decided to leave the territory of the Union to maintain the unity of the second family home, she would do so "freely", without being forced by national legislation or by a child support obligation.⁹⁶ *A contrario*, one may ask whether a different solution would have been preferred in the event that the remote step-parent would provide for the child's subsistence. There is no mention of the emotional dimension of the child's dependence on the distant parent. Thus, the question remains as to whether this is really taken into account, since the simple mutual affection that could have been established appears to be indifferent in the absence of any legal and financial link.

This mainly material approach to dependency does not always lead to fully consistent results. In the *Reyes* case, the Court of Justice generously considered that a third-country national, with a diploma and of working age, should be considered as dependent on a Union citizen, and therefore "dependent" on her for a right of residence under Directive 2004/38, since this joint citizen of her mother had regularly paid her money for many years.⁹⁷ The intention is laudable and was intended to enable the applicant of Philippine origin to join her mother who had lived for a long time in the Union and had finally settled in Sweden with the citizen in question, so that the applicant could be considered as the "dependent" descendant of the spouse of a European citizen under Art. 2, para. 2, let. c), of the Directive on the right of residence. Nevertheless, with such a

⁹⁴ Court of Justice, judgment of 6 December 2012, joined cases C-356/11 and C-357/11, *O. and S.*, para. 56.

⁹⁵ Opinion of AG Bot delivered on 27 September 2012, joined cases C-356/11 and C-357/11, *O. and S.*, para. 40.

⁹⁶ *Ibid.*, para. 42.

⁹⁷ Court of Justice, judgment of 16 January 2014, case C-423/12, *Reyes*.

predominantly financial approach to dependency, it is clear that dependency ceases as soon as the beneficiary finds paid employment in the host country and is no longer dependent on the financial support of the citizen. By effectively forcing the applicant not to work in order to be able to stay with her family, the approach chosen by Union law creates a dilemma rather than protecting a dependency which is above all emotional, and not strictly material. As a result, alongside the supposedly objective material approach to dependence, a more emotional, or subjective, approach is developing in the European legal discourse.

b) The (principally) affective dependency.

The mainly materialistic approach to the assessment of dependency clearly shifted in favour of taking into account an emotional dimension with the *Chavez-Vilchez and others* case concerning the removal of the parent who had sole custody of a child whose other parent is a Union citizen. In order to determine whether the mother of a child who is a Union citizen may be expelled if the child is likely to remain in the territory of the Union with his father, the Court of Justice does not merely consider whether the father is in a position to ensure the effective material, legal and financial care of the child. The Court openly raises the question of the appropriateness of separating the child from the sole custodial parent in terms of “the age of the child, the child’s physical and emotional development, the extent of his emotional ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for that child’s equilibrium”.⁹⁸ The sentimental dimension given to the assessment of dependency is evident. It explains why the Court of Justice protects the family relationship constituted on the territory of the Union, despite national legislation to the contrary and even though on a strictly material level the child could, at least in some of the cases in question, have continued his life in the care of his other parent. Emotional dependence takes priority over material dependence, and invites us to take into account the subjective situation of the child’s emotional well-being.

The Court of Justice confirmed this approach in the *K.A. and Others* case, concerning refusals of family reunification under Directive 2008/115, known as the “Return Directive”, which concerns undocumented migrants and in this case those who have been the subject of a decision prohibiting their entry into the territory. This is the situation of the claimants, all family members of Union citizens who highlight the relationship of dependence between them and their families in order to challenge the impossibility of their legal residence in Belgium. The Court of Justice begins by dismissing the argument that mere financial dependence between adults in the same family may be sufficient to trigger the protection of European Union law in this case. Indeed, in the case of adults, the preservation of the family bond against expulsion can only be invoked “in exceptional cases, where, having regard to all the relevant circumstances, there could be no form of separa-

⁹⁸ *Chavez-Vilchez and Others* [GC], cit., para. 71.

tion of the individual concerned from the member of his family on whom he is dependent".⁹⁹ This would not be the case for a "purely financial dependency".¹⁰⁰ The approach is clearly different, if not opposite, to that adopted for the extension of the stay of a student's parent mentioned above. The affective dependence forms a decisive argument for triggering the protection of the relationship between the underage child, especially at an early age, and the distant parent. While reiterating all the parameters to be taken into account in establishing the dependency relationship (age, degree of development, degree of affection, and emotional balance), the Court of Justice considers that certain arguments are ineffective in challenging the existence of such dependency, thus suggesting that such a relationship must be presumed effective. This applies in particular to the absence of cohabitation between parent and child, which must not be established as a necessary condition for establishing the relationship of dependence.¹⁰¹ Indeed, it is clear that an emotional relationship can be established in the absence of permanent contact and cohabitation, as in the case of divorce. Similarly, the fact that the relationship of dependence arose after the decision to expel and prohibit residence was adopted is not considered relevant by the Court of Justice.¹⁰² In doing so, the Court is stating that the choice to become a parent is an intimate decision that does not have to be subordinated to a strictly rational logic, such as a condition of regularity of residence. What is decisive in the judgment is the way in which the legal discourse of the child's relationship with his or her parent is represented in our way of conceiving our lives.

Moreover, this does not appear at any time in the Court of Justice's argument developed in the *Coman and Others* case concerning the recognition of the effects of same-sex marriage of Union citizen.¹⁰³ However, it is possible to wonder whether the basis of the right not to be separated from one's spouse reveals a perception of marriage and the feeling of love that it is supposed to embody as an expression of a relationship of emotional dependence between beings. It is difficult, as the Court of Justice apparently does, to link the right to lead a conjugal life to a simple individual freedom to live with the person one has chosen. In the way we represent our lives, it would be simplistic to reduce the act of marrying to a free and rational will. If marriage were a simple matter of private life and individual freedom, then it should be considered that the choice to marry does not have to be institutionalized and that it should be detached from any form of recognition by the State or society, thus guaranteeing their neutrality vis-à-vis the individual freedom to lead the desired form of married life. However, this is not the case seeing as marriage continues to be viewed as an institution and a publicly recognized union, one must conclude that it is not a defence of a pure individual liberty

⁹⁹ Court of Justice, judgment of 8 May 2018, case C-82/16, *K.A. and Others* [GC], para. 65.

¹⁰⁰ *Ibid.*, para. 68.

¹⁰¹ But it may be taken into account, *ibid.*, para. 73.

¹⁰² *Ibid.*, para. 79.

¹⁰³ *Coman and Others* [GC], cit.

which constitutes the primary objective, but rather the valorisation of a loving bond between two people. Some will say that the initial objective of the institution is rather another natural phenomenon, namely procreation, but it is nowadays perfectly accepted to get married without procreating, by constraint or by choice. This is why, in a sense, it is possible to understand the Court of Justice's recognition of the transnational effects of same-sex marriage as a first step towards the clarification in legal discourse that marriage is the form we give to the expression of emotional dependence of two beings, and not just a matter of freedom.

IV.2. THE GRADATION OF DEPENDENCY

With the ambition being to reduce the complexity of an otherwise unintelligible reality, the law proceeds by categorization and generalization. Over time, several levels of dependency emerge from the case law in relation to family structure, thus maintaining the prevalence of a mainly conjugal and parental form of life to the detriment of other forms of family life.

a) "Principal" and "other" members of the family.

Sometimes, Union law does not provide the same solution depending on the type of family relationship in question. As a result, some relationships are legally better protected than others within the family unit itself. Directive 2004/38 openly distinguishes between family members who are fully protected by a residence permit (Art. 2, para. 2) and "other" members for whom Union law only mandates national authority to "facilitate" the support of the citizen (Art. 3, para. 2). This can be a problem when an increased dependency relationship unites the Union citizen with the least protected category of family member. Admittedly, the Directive emphasizes the dependency relationship between a European citizen and a member of his family whose stay must be "favoured", whether because he is "dependent" on the citizen (in a financial dependency) or because the citizen must take care of him for health reasons (physical dependency), but the fact remains that protection is still less. In the *Rahman and Others* case, the Court of Justice confirmed the difference of treatment between "principal" members of a citizen's family whose right of residency is automatically granted, and the "other" dependent members of a citizen's family whose right of residency is merely "facilitated" by the national authorities. However, the Court limited the national authorities' margin of appreciation by requiring them to take into account the personal situation of each applicant with regard to "the various factors that may be relevant in the particular case, such as the extent of economic or physical dependence and the degree of relationship between the family member and the Union citizen whom he wishes to accompany or join".¹⁰⁴ Despite the vague and imprecise character of the obligation to "favour" the res-

¹⁰⁴ Court of Justice, judgment of 5 September 2012, case C-83/11, *Rahman and Others* [GC], para. 23. See also, judgment of 12 July 2018, case C-89/17, *Banger*.

idence of the dependent family member, the judges deduced from this an obligation to grant “a certain advantage” to “other” members of the family than the “principal” family members according to the degree of dependency observed.¹⁰⁵ To the extent that it is conceivable that an “other” member of the family who is particularly dependent may end up being as well protected as a “main” member. It could be understood as a gradation of dependence between members of the same family, presumed in the case of principal members and to be demonstrated in the case of “other” members.

b) Among “principal” members of the family.

Beyond this first discussion dictated by the European legislative choice, the jurisprudence has surprisingly introduced the case law has introduced more surprisingly sub-distinctions within what Union law considers to be the hard core of the family unit composed of spouses, relative in the ascendant line and dependent descendants. One can deduce a form of implicit valorisation of certain dependency which Union law considers more close-knit than others, notably when a child is involved.

First, a distinction is made between parental life and conjugal life, to the benefit of the former. It is known that the Court of Justice has not extended the *Ruiz Zambrano* case law, which protects the link between the parent and the child who is a Union citizen, to the relationship between two spouses. From this point of view, the *McCarthy* judgment represents a clearly restrictive shift, since the applicant too was faced with the dilemma of relinquishing either the right to remain in the European Union or to continue her conjugal life with her undocumented spouse.¹⁰⁶ In both cases, be it the removal of the parent or the spouse, the family life of the European citizen is threatened, but in a situation purely internal to a State, Union law only grants its protection when it comes to protecting the parental relationship as opposed to the conjugal relationship. It can only be understood as meaning that, in the eyes of the Court of Justice, only the child is in a situation of real dependence on his parent, and not the spouse, establishing a scale of dependence which would be less proven in the case of adults. In a way, parental life would be more worthy of protection than conjugal life, in that, in the case of adults, they would be offered a choice as to whether or not to leave the European Union with the family member, whereas a child could not make such a decision. Although the Court of Justice does not expressly state this, the higher degree of vulnerability of children compared to adults is certainly at the heart of the difference in protection. This distinction is nevertheless questionable, or at the very least insufficiently substantiated.

Second, European jurisprudence provides another distinction between parental life and “grandparental” life. While in *Carpenter*, the Court of Justice had accepted without further explanation that the mother's presence was necessary to take care of the children so that she could facilitate their free movement within the European Union, it adopted a

¹⁰⁵ *Ibid.*, para. 21.

¹⁰⁶ Court of Justice, judgment of 5 May 2011, case C-434/09, *McCarthy*.

more nuanced position in the *S. and G.* case, which concerned a Peruvian national married to a cross-border worker and mother of two children (hypothesis G.), and a Ukrainian national who is the mother-in-law of a cross-border worker and the grandmother of the latter's child (hypothesis S.) Both of these are "principal" members of the citizen's family in accordance with Directive 2004/38 as "spouse" in one case and "dependent relatives in the ascendant line" in the other. Furthermore, they invoked the right to reside in the European Union in order to take care of children of European nationals in order to allow the exercise of their freedom of movement in accordance with *Carpenter*. They nevertheless received different responses. Following the Court of Justice, a distinction must be made according to whether the child is cared for by the spouse himself, namely the mother, or by the relative in the ascendant line of the worker's spouse, in this case the grandmother.¹⁰⁷ While the interest in having the child cared for by his mother is presumed, when it comes to the grandmother, additional evidence, which is potentially difficult to provide, is required because it must be demonstrated that the absence of such a presence to care for the child would really have a dissuasive effect on the mobility of the cross-border worker. Such a difference in solution between the status of the mother and that of the grandmother can hardly be explained without an abstract hierarchy of the parental relationship as being worthier of respect and protection than the grandparental relationship. This distinction is open to criticism in that it is perfectly possible that a grandparental relationship may in practice develop as strong and close ties, emotionally, as a parental relationship. The legal discourse maintains the idea that the mother-child relationship is presumed to be the closest within the purview of family life.

IV.3. THE RECOMPOSITION OF DEPENDENCY

By picking up the dependency relationships which structure the family life's representation, the Union law may act in two opposite directions: whether in aggravating or in inverting them.

a) An "aggravated" dependency relationship.

The functional approach to family life, which is entirely geared towards the free movement of the agent or Union citizen, is likely to accentuate certain phenomena of imbalance, or even the risk of domination, within the family unit, in particular between the European citizen and his foreign spouse on the one hand, and between men and women on the other hand.

There is no doubt that the foreign spouse is frequently in a vulnerable situation in relation to the national citizen: either because they are undocumented or because they would risk being so in the event of separation. Union law is perfectly conscious of this and Directive 2004/38 explicitly anticipates that "[f]amily members should be legally

¹⁰⁷ *S. and G.* [GC], cit., para. 43.

safeguarded in the event of the death of the Union citizen, divorce, annulment of marriage or termination of a registered partnership”.¹⁰⁸ The aim is to make the protection of the spouse, particularly a foreigner, autonomous in order to free him from his dependence on the Union citizen from whom he indirectly derives his right of residence. For instance, in the *Ogierakhi* judgment, the Court of Justice relied on this objective of non-dependence of the foreigner to consider that his stay was legal, even though he was living separate and apart from his wife, a European citizen, and that their married life was no longer in effect. The rationale for this approach lies in the desire not to force a third-country national to live in a conjugal relationship and to artificially maintain a conjugal bond, under threat of being considered undocumented. In the Court’s view, a different solution would result in “a third-country national [being] vulnerable because of unilateral measures taken by his spouse”.¹⁰⁹ It can be understood as a desire to avoid a form of “blackmail accompanied by threats of divorce” on the part of the citizen towards his or her foreign spouse.¹¹⁰

However, as seen in the *Kudlip Singh and Others* judgment, the Court of Justice adopted a purely instrumental approach, and at least in part contradictory to the previous one, according to which, once the divorce proceedings ordering the separation of spouses were initiated after the departure of the citizen from the State in which he resided with his foreign spouse, the latter is no longer entitled to reside legally in the territory of that State. On the other hand, as provided for in Art. 13, para. 2, of Directive 2004/38, if the divorce had been initiated before the European citizen’s return to his State of origin, and therefore during the exercise of free movement, then the foreign spouse would have continued to enjoy the protection triggered by family life.¹¹¹ This results in a paradoxical situation in which, certainly, the third-country national is protected against “blackmail accompanied by threats of divorce” in the State of cohabitation, since if the divorce is pronounced there he can continue to reside legally as an individual. However, this would lead to his exposure to “non-divorce” blackmail in that State, since if the divorce is pronounced after the end of the exercise of the European citizen’s free movement, the individual would lose all right of residence in the Union. He is thus particularly vulnerable since the only alternative available to him in the event of a refusal to divorce is to continue to accompany his spouse until the divorce is granted, if necessary in a State he does not know and in which he has no ties. This configuration is even more unbalanced in favour of the European citizen because it is easier not to divorce than to divorce... The foreign spouse’s dependence on the European citizen is aggravated by Union law.

¹⁰⁸ Directive 2004/38, cit., recital 15 and Art. 13.

¹⁰⁹ *Ogierakhi*, cit., para. 40.

¹¹⁰ The expression is used in Court of Justice, judgment of 30 June 2016, case C-115/15, *N.A.*, para. 47.

¹¹¹ *Kudlip Singh and Others* [GC], cit., para. 61.

Directive 2004/38 also refers, in Art. 13, para. 2, to domestic violence as typical cases of “particularly difficult circumstances”, justifying protection of the spouse regardless of the continuation of the family relationship with the European citizen. However, the Court of Justice’s restrictive interpretation aggravates, rather than compensates, a relationship of dependence of an abused woman towards her husband. Extending the *Kudlip Singh and Others* case, the Court of Justice reiterated its position in *N.A.* that no residence protection is offered to the citizen’s spouse if the divorce is initiated after his departure from the host Member State. Even more questionably, the Court does not see the fact that the spouse has suffered domestic violence as a circumstance likely to influence this solution,¹¹² unlike its Advocate General.¹¹³ As a result, the abused spouse is exposed to the choice of either persuading the citizen to immediately divorce, which seems difficult in their position, or to remain with the spouse in his or her State of origin and risk the continuation of abuse. Through this approach, the Court of Justice aggravates the dependence of the abused spouse, most commonly women, by offering no guarantee that they will be able to continue to remain in a State after the reporting of such violence, which even helps to dissuade them from doing so. In *N.A.*, the Court of Justice finally recognized the battered wife’s right of residence, but not on the basis of her status as a wife, but rather on the basis of her status as a mother of Union citizens studying in the host country. It was therefore thanks to her children, and not because of her suffering, that the applicant was finally able to claim a right of residence. To an increase in dependency, Union law has responded with an opposite trend of reversal of dependence.

b) A “reversed” dependency relationship.

Sometimes Union law takes into account, or even provokes, a form of “reverse dependence” to take the expression of Advocate General Sharpston,¹¹⁴ between family members, in the sense that the one who is dependent or rendered dependent is not the one who is spontaneously thought of or designated by national law.

The reversal of the classic parent-child dependency ratio in EU law can be seen in the *Baumbast* and *Zhu and Chen* judgments. On reading them, it is clear that the parent who “effectively ensures the custody of the child” derives the protection of the right of residence only from the status of the child, whether the child is a student or even a simple citizen of the Union.¹¹⁵ The child is thus recognised as dependent on the parent who cares for him or her in accordance with a traditional vision of the family relationship, but more surprisingly, the parent is also made dependent on his or her child through Union law since it is through the presence of the latter that rights can be claimed for the benefit of the parent. The existence of a reverse dependency relation-

¹¹² *N.A.*, cit., para. 38.

¹¹³ Opinion of AG Wathelet, *N.A.*, cit., para. 76.

¹¹⁴ Opinion of AG Sharpston delivered on 12 December 2013, case C-456/12, *O.*, para. 48.

¹¹⁵ *Baumbast and R.*, cit., para. 73; *Zhu and Chen*, cit. para. 44.

ship between a parent and a child was confirmed in the *Ibrahim* judgment, in which the Court held that the right of children to benefit from Art. 12 of Regulation 1612/68 is not subject to their parents' right of residence in the host Member State, which requires only that the child has lived with one or both parents in a Member State while at least one parent resides there as a worker.¹¹⁶ Consequently, the right of access to education implies, on the one hand, an autonomous right of residence for the child of a former or present migrant worker, when that child wishes to pursue his or her studies in the host Member State. On the other hand, it also implies a corresponding right of residence in favour of the parent who actually has custody of that child, as the Court of Justice clearly confirms in the *N.A.* judgment, thus compensating, as has been indicated, his or her indifference to the domestic violence suffered by the applicant.¹¹⁷ What is most often perceived as a one-way dependency is thus reformulated in the European legal discourse as an interdependence between family members.

More specifically, the Court of Justice carried out a reverse dependency relationship in the processing of asylum applications. In the *K.* case, it held that a State not responsible for an asylum application within the meaning of Regulation 343/2003 (known as "Dublin II") should nevertheless declare itself competent to hear it,¹¹⁸ if the asylum application was made by a person with whom a legally residing family member was in a situation of dependence.¹¹⁹ In this case, it was a mother-in-law who was taking care of her daughter-in-law, traumatized by a painful event that she had to keep secret and unable to take care of her children alone. However, Art. 15, para. 2, of the Regulation seemed to provide for an obligation to bring members of the same family together only in the event that the person seeking asylum was dependent on the assistance of another, who was also a family member, thereby justifying reunification. Consequently, the situation in which the dependent person was not the asylum seeker but a dependent member of her family was not covered by the text. However, the Court of Justice extended the consideration of the dependency relationship to the opposite hypothesis to that provided for in the Regulation where a family member is dependent on the asylum seeker, as was the case here. Consequently, the asylum seeker is no longer the one who requests assistance but the one who provides it, legitimizing that his application be examined in the State in which a member of his family is closely dependent on it. As a result, the asylum seeker is dependent on the legal residence of the family member, while in return the family member is dependent on the care of the asylum seeker. In Art. 16 of Regulation 604/2013, known as "Dublin III", the Union legislator took into account this

¹¹⁶ Court of Justice, judgment of 23 February 2010, case C-310/08, *Ibrahim* [GC], para. 40.

¹¹⁷ *N.A.*, cit., para. 64.

¹¹⁸ Council Regulation (EC) 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

¹¹⁹ Court of Justice, judgment of 6 November 2012, case C-245/11, *K.* [GC].

possible reversal of dependence, but limited it to “direct” family members (child, father or mother, brother or sister), thus creating a distinction that is inconsistent with the initial spirit of taking dependence into account.¹²⁰

Finally, by reversing the situation that gave rise to the *Ruiz Zambrano* judgment, what would be the situation of a Union citizen’s dependent relative? The Court of Justice considered the possibility of adult dependence very unlikely, but it did not completely rule out the possibility.¹²¹ This would be the case, for example, if a disabled relative of a citizen of the Union on whose care he or she is closely dependent were subject to a removal order. Should we not consider that, with regard to the parent’s dependence on the citizen (and not the other way around), the citizen would be forced to accompany the disabled person because he or she would otherwise have to assume the idea that the disabled person would have been left unable to live decently? To offer protection in such a situation would be to admit that exposing a citizen to the dilemma of leaving the Union or leaving his or her dependent relative would be an unbearable situation. The legal discourse would thus attach importance to the moral duty of the citizen to assist a dependent parent by avoiding such a dilemma. In such a case, one could consider that the perception maintained by the law would be that of dependence not only on the person who needs care, but also on the family member who provides it, in that he or she appears morally inseparable from the former. This would mean recognizing that the citizen too is totally dependent on the parent by force alone on the emotional family bond.

V. CONCLUSION

The aim of the “form of life” approach is to examine the law in a different manner. This is not to deny that Union law is the institutional result of power relations, multiple dominations, as well as competing authorities and normativities. But it is also the site of a reconfiguration of the perception of our lives and the ways we live them. Beyond the raw, and sometimes abrupt, solutions that it is asked to produce, Union law is based on mental constructions and representations that are rooted in the way we think and live our lives. By formalizing them in its own language, according to its own techniques, and in the light of the specific constraints weighing on it, the European legal discourse contributes to the formation of a conceptual space that serves as a framework of meaning for our lives, in particular, as we have heard, with regard to the elementary form of hu-

¹²⁰ Art. 16 of Regulation 604/2013, cit.

¹²¹ *K.A. and Others* [GC], cit., para. 65. In the *Subdelegación del Gobierno en Ciudad Real* judgment, the Court of Justice held that a national measure refusing family reunification which prevents account from being taken of any dependency relationship between a Union citizen and his spouse is incompatible with Art. 20 TFEU. However, in the present case, the mere fact that the spouses are subject to an obligation to live together is not sufficient to characterise such dependence (Judgment of 27 February 2020, case C-836/18, *Subdelegación del Gobierno en Ciudad Real*).

man life that is family life. Updating these conceptual resources, understanding their balances and tensions, even inconsistencies, offers another way of looking at European integration and, possibly, of nuancing the criticisms that see it as nothing more than an artificial, purely functional, and totally disembodied structure.

It must be admitted that these constructions of European legal discourse, which elaborate a conceptual space that values freedom and affectivity in human relations, are often still part of a functionalist approach, emphasizing the instrumental nature of the law in achieving the objectives assigned to it. It is certain that the functionalist approach sometimes leads to certain forms of questionable imbalances and distinctions in the law, whether between citizens and foreigners, within citizens according to their sedentary lifestyle or mobility, between different types of families, or even within the family relationship itself. However, it is also possible to detect a more essentialist discourse on what it means to lead a family life worthy of being lived in the European area. At a time when the precise aims of the European project are fading, a European imagination is emerging through the language of law, which is part of the formation of a certain European culture.

As this *Article* has attempted to show, the de-forming and re-forming by Union law of the representations underlying what it means to lead a family life in the European area reveals the influence of legal discourse in the construction of a social imaginary. It is nevertheless difficult to extract at this stage a clear guideline in this recomposition of our intellectual structure. This nascent European legal discourse is developing in multiple and complex directions, sometimes even opposing. On the surface, it would be possible to detect in the recognition of certain forms of procreation and conjugal union the insinuation in our conceptual apparatus that family life has become a matter of choice rather than a natural process imposed on human beings, fuelling the perception of Union law as mainly liberal, emancipatory and even individualistic. But, in reality, this *Article* has tried to show that most European legal developments relating to family life insist on relationships of sentimentality, affectivity, solidarity or vulnerability that are conceived as specific to the very nature of the human being as fragile, evolving and capable of intense emotions. This is the case, in particular, when it comes to the concept of dependence, the interpretation of which conditions a protection of the individual's own belonging to the European Union.

The question also arises as to how the European approach to family life should relate to the diversity of national models and imaginaries. While transnational situations remain the focus of attention in Union law, it is clear that significant tensions could emerge between Member States in a context of increasing identity claims. The form of family life will be an important issue for transnational democracy, or for the confrontation of democratic choices by Member States on the European way of life.