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Some Developments and Vulnerabilities in the Child Rights Protection System under the Umbrella of the European Family

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Bearing in mind that the European Economic Community was originally a purely economic construction, there is no consistent and relevant degree of conventionality in the relationship between the EU, on the one hand, and the family, in all its configuration, on the other. However, indirectly, through its own policies, the Union has shaped certain aspects of the concept of family, the free movement of European citizens and their family members being a case in point. In this study we aim to determine to what extent we can speak of the existence of the concept of the European family and to present the European standards that circumscribe the child in a family unit, including the adaptation of some "classic" rights of EU law to best suit the specific interests and needs of the child. Last but not least, we aim to present some vulnerabilities in the European system of protection of children's rights, caused either by inconsistency of the European legislator or by a lack of refinement in the interpretation of legal provisions relating to fundamental rights.

Keywords: *Child; Freedom of movement; Citizenship; Family member*

Introduction

In Europe, and not only in Europe, the concept of family life has undergone radical transformations in recent decades[1], its field of application has been extended to coordinates that make it almost impossible to standardise a set of unanimously accepted criteria, such as to configure, as such, the notion of family. Suffice it to consider the heterogeneity of family trajectories that can be found in the contexts generated by marriage or civil partnerships, in couple relationships not covered by conventionality (cohabitation), in parental relationships based or not on the existence of a bio-genetic link, in the complex circle of families with step- parents or step-children, etc.

In addition, the exercise of the rights deriving from the concept of European citizenship, in particular the right to move and reside freely within the EU, introduced by the Maastricht Treaty, has profound repercussions on the natural and harmonious exercise of family relationships. The freedom of movement guaranteed under EU law for EU citizens has not only created the preconditions for relocating family life to a country other than their country of origin, but has also dismantled the classic image of the family where the members live "all under one roof, in an EU Member

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[1]Stark (2005) at 1-2.

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State". It is becoming increasingly common for the family to be in a close-knit family only occasionally, because parents and minor children, the latter left in the care of others (grandparents, aunts, etc.), live mostly in different Member States. The European perspective, built around freedom of movement, has implied a paradigm shift from "all under one roof in one EU Member State" to "together under several roofs in several countries of residence".

In this context, some natural questions arise: Can we speak of the existence of the concept of the European family and, if so, what are the coordinates that shape its architecture? What is the place of the child within this European family and how effective is the child protection system under the umbrella of such a family? To what extent is the European legislature's concern to take children's rights into account in shaping the substance of the rules of European law sufficient to establish a sufficient system of protection? These are the questions to which we will try to find an answer, which will be reflected in the structure of this research.

Literature Review

An analysis of the specialised literature[2] and a careful reading of the primary sources of EU law, with reference to the origins of the European construction, reveals that the founding treaties make no reference to the concepts of family or family life, which is understandable since the premise of the Community architecture was, in essence, the realisation of a purely economic construction. Neither did the substantial reform carried out with the entry into force of the Maastricht Treaty (1992) bring about a radical paradigm shift, since the rules introduced for individuals have had repercussions mainly on individual social destiny.

In essence, EU law preserves the pragmatic interest of the individual, not the family circle.[3] Illustrative in this respect is the fact that the right to free movement and residence or the electoral rights in the State of residence, provided for in Article 20(2) of the Treaty on the Functioning of the European Union (hereinafter TFEU), are guaranteed to the European citizen and not to his family members. The right not to be treated in a discriminatory manner "on grounds of nationality or nationality"[4] also applies to European citizens, just as the minimum standard of social protection is guaranteed to European workers. There is therefore no constant and relevant degree of conventionality in the relationship between the EU, on the one hand, and the family in its entirety, on the other, which is justified by the limits imposed by the application of the principle of conferral of competences. Consequently, we cannot speak of a substantive harmonisation of family law at European level, which is why elements of the lexical field of the family, such as the substantive conditions of marriage, adoption, the effects of divorce, the conditions for establishing maternity/ paternity, etc., remain exclusively subject to national law.

[2]Widiez (2020) at 120; Pataut (2020) at 93; Monedero (2019) at 87; Caracciolo di Torella & Masselot (2010) at 25-26.
[3]Fulchiron (2014) at 171.
[4]Article 18 of TFEU.

Starting from this premise, we can observe that the intervention of the European legislator is dissipated and can be observed only in cases where the need to protect family ties legitimises or ensures the effective application of the EU regulatory framework. Illustrative in this respect is the diversity of secondary law instruments that are grafted on the social reality of the family relationship, for example: Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction[5]; Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations[6]; 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[7]; Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification[8]; Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings[9]; Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers[10]; Regulation (EU) no. 604/2013 of the European Parliament and of the Council of June 26, 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person[11], etc.

As a result, we are witnessing a fragmented approach to the concept of the family, depending on the specific features of the European legislator's intervention. Some authors focused exclusively on the rules of private international law and provided extensive analysis of Council Regulation (EC) No 2201/2003 of November 27, 2003[12], while the attention of others was directed to the right to free movement[13], respectively the right to family reunification[14]. There are also authors whose studies aim at analysing in depth the implications of family relationships in immigration matters[15], in particular with regard to the determination of the Member State responsible for dealing with an application for international protection lodged by a minor[16].

[5]Published in Of. J. L, 178, 02/07/2019.
[6]Published in Of. J. L. 7, 10.1.2009.
[7]Published in Of. J. L. 158, 30.4.2004.
[8]Published in Of. J. L 251, 03/10/2003.
[9]Published in Of. J. L 132/1, 21.05.2016.
[10]Published in Of. J. L128/8, 30.04.2014.
[11]Published in Of. J. L.180/31, 29.06.2013.
[12]Beilfuss, Carpaneto, Kruger, Pretelli & Župan (2023).
[13]Ismaïli (2019) at 91-131.
[14]Deana (2019) at 32-37; Friedery (2019) at 6-17.
[15]Rodrigues (2019) at 55-72; Zedalis & Weudland (2024) at 547-612; Frasca & Carlier (2023) at 345-390.
[16]Peers (2016) at 519-533; Klaassen & Rodrigues (2017) at 191-218; Smyth (2009).

Other studies focus on how the case law of the Court of Justice of the European Union (CJEU) or the European Court of Human Rights (ECtHR)[17] reflects a particular fundamental right of the child, such as the right to be heard[18] or the right to have personal contact with parents[19] , or a comparative case law overview of such a right[20].

In this study we will try to highlight the consequences of this fragmented approach on the concept of the European family, to which the European legislator has provided an extremely flexible legal framework, on variable coordinates, created in particular by procedural rules designed to protect the unity of the family unit.

Methodology

In methodological terms, this study combines a descriptive-interpretative and comparative approach, which is revealed by the analysis of European primary and secondary legislation with an impact on the system of protection of children's rights and the European family. Accordingly, we aim to identify, firstly, the legal elements that shape the concept of the European family and then, using the comparative method, possible normative inconsistencies in European legislative acts that either highlight the vulnerabilities of the child protection system within the European family or, due to the transposition process, allow for non-uniform approaches in this area.

In addition, using the interpretative method, this study devotes attention to several judgments of the Court of Justice of the European Union (CJEU), which highlight the adjustment of key concepts of European law with the precisely determined aim of preserving family unity.

A New Concept-European Family?

The starting point for this study is that the family, although exogenous to EU law, could not remain in integrum outside the scope of its regulation. It is self-evident that, as long as any legal rule has its source in a social need, the European legislator, concerned as he is about the European worker and the European citizen in general, could not ignore the social reality[21] of belonging to a family circle. How could it be possible to speak of removing all barriers to the free movement of European workers when they were not allowed to be accompanied by their closest family members in order to carry out an economic activity in the Union area? Or how would it be possible to exercise rights that are grafted onto freedom of movement and residence, such as the right to vote and stand for election in local elections in the State of residence, when, because of a total disregard for the fact that

[17]Coester-Waltjen (2016) at 49-95.
[18]Bergamini (2019) at 15-17; Parkes (2013).
[19]Tryfonidou (2019) at 78-82.
[20]Georgios (2021) at 161-189.
[21]For a sociological perspective on the family, see Boghirnea (2023).

the citizen is not part of a family circle, he would be discouraged from leaving his State of origin? Or how attractive and effective would a social policy be which aims to modernise the social system and invest in people, while at the same time assuming a natural combination of work and family life, when silence on the part of the law would lead to the establishment of certain implicit barriers affecting the dynamics of the labour market? Thus, without benefiting from a legal definition[22] and rules to give a stable shape to its configuration and effects, but bearing the stamp of social reality, the family, understood as a mosaic of emotional and patrimonial relationships, not necessarily grafted on the validity of legal ties from the perspective of all the national rights involved[23], could not be ignored by EU law. Illustrative in this respect is the judgment of the CJEU in the Coman case[24], which obliges a Member State which not only prohibits, but does not recognise, legal marriages concluded between persons of the same sex abroad (in this case Romania), to recognise the limited effects of this type of marriage, solely in terms of the implications for the right to free movement within the EU. However, the consequences of establishing such a couple on the territory of a Member State which does not recognise same-sex marriage remain to be discussed, as such an interpretation is likely to create the paradoxical situation where one and the same person (the homosexual spouse, a family member of the EU citizen) "is treated simultaneously as a single and married person, depending on the applicable legal system"[25]

The above shows, therefore, that the family created by EU law in contexts with cross- border elements is emancipated from the national understanding of the concept, but does not have a well-defined content and does not benefit from any express rules on the conditions of substance or form. It can be portrayed exclusively as a mixture of personal and property ties (grafted onto a legal relationship established under national law) which enjoy legal protection under specific policies designed to safeguard, in particular, the free movement of persons and judgments within the European territory[26].

Children and their Rights

There is no doubt that the European legislator, from the perspective of both primary and secondary law, has set out to establish a system for the protection of children's rights.

Thus, the second sentence of Article 3(3) TFEU states that "*The Union shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child*", and paragraph 5 of the same article states that

[22]See also De Baere & Gutman (2016).
[23]CJEU, Case C-673/16 Coman (2018).
[24]Idem.
[25]At length see Oprescu (2022) at 345-358.
[26]The literature has revealed in this respect that "at least three particular branches of European law shape the European perspective on the family: EU social policy, the free movement of EU citizens and their family members (the so-called right to family reunification) and, last but not least, private international law". See Pataut (2020) at 102.

"*The Union shall [...] contribute [...] to the protection of human rights and in particular children's rights [...]*".

There are also references to direct and indirect mechanisms for the protection of children in other provisions of the TFEU, such as Article 79(2), according to which the European Parliament and the Council may adopt legislative measures "*on the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including for the purpose of family reunification*" (lit. a) and "*to combat trafficking in persons, especially women and children*" (lit. d), respectively Article 83(1) of the same legislative instrument, which creates the legal basis for the adoption of directives which may establish "*minimum rules concerning the definition of criminal offences and sanctions in areas of crime of particular seriousness with a cross-border dimension*", such as "*trafficking in human beings and sexual exploitation of women and children*".

It cannot be overlooked either that following the entry into force of the Lisbon Treaty in December 2009, the Charter of Fundamental Rights of the European Union (hereinafter - the Charter) became legally binding in 2016, becoming an integral part of European primary law. Clearly, the provisions of the Charter, within the scope of European law, also cover minor children as subjects of law. Thus, in Article 24 of the Charter, under the marginal heading "Rights of the child", we find the provision according to which "*Children have the right to such protection and care as is necessary for their well-being. They may express their views freely. In all actions concerning children, whether undertaken by public authorities or private institutions, the best interests of the child shall be a primary consideration (1). Every child shall have the right to maintain on a regular basis personal relations and direct contact with both parents, unless these are contrary to his or her best interests (3)*". Clearly, it is not only this article that concerns children, as it applies in conjunction with the other provisions of the Charter, such as the right to integrity (Art. 3), the prohibition of torture and inhuman or degrading treatment or punishment (Art. 4), the right to education (Art. 14), the prohibition of all forms of discrimination (Art. 217), etc.[27]

It can be seen from the above that the European system of child protection, built under the auspices of the Charter, is essentially a particularised replica of the general system of human rights protection: in essence, the child becomes the subject of protection, as it is recognised, de jure, the status of person, of human being who, by the mere fact of birth, benefits from rights that must be guaranteed and respected[28].

In approaching the present study, we propose, however, to limit the research exclusively to those fundamental rights that highlight the reverberations of the child's circumscription in a family circle (nuclear or extended family). In this respect, we will observe the binary intervention of the European legislator by: (A) enshrining fundamental rights specific to the condition of the child, with the aim of ensuring the effective application of European secondary law instruments, and (B) instrumentalizing classic European rights to protect other fundamental rights of the child, precisely in order to safeguard family stability and unity, which cannot be ignored.

[27]Bergamini (2019) at 9.
[28]Oprescu (2021) at 391.

Speaking of the fundamental rights of the child, a reading of the provisions of the Charter quickly reveals the natural provision contained in Article 7, which concerns the right to respect for family life, thus guaranteeing the right of the child not to be separated from his or her parents. In addition, Article 24 of the Charter, referred to above, also mentions: the right of the child to express his or her views "freely", which shall be considered "in accordance with the age and maturity of the child" (para. 1); the paramountcy of the best interests of the child in all actions concerning him or her (para. 2); the right of the child to maintain on a regular basis personal relations and direct contact with both parents (para. 3).

It should be made clear that, as stated in Article 51(1) of the Charter, its provisions "*are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law*"[29]. In the same sense, in accordance with Art. 51 para. (1), second sentence, the addressees of the Charter "*respect the rights and principles and promote their application in accordance with the powers conferred on them by the Treaties*". Similarly, according to Article 51(2) of the Charter, it "*shall not extend the scope of Union law beyond the competences of the Union, shall not create any new power or task for the Union and shall not modify powers and tasks established by the Treaties*".

In principle, therefore, the provisions of the Charter are directly applicable in national law[30] and enjoy direct effect[31], but only in those situations and areas where Member States are acting in the application of EU law[32], e.g. free movement of persons, asylum, consumer protection, judicial cooperation, etc[33].

Although at first sight, given the limits of the European Union's powers in relation to the concept of "family" or "family relationship", the provisions of the Charter appear rather proclamatory, in reality they underpin the effectiveness of numerous secondary law instruments, which, for example, incorporate provisions on the right of the child to be heard or to have his or her best interests taken into account or the right to have personal ties with his or her parents.

Turning our attention to Council Regulation (EU) 2019/1111 of June 25, 2019[34] , we will pay attention to the provisions on the right of the child to be heard. The premise we will consider is that despite the generous commitments in the Preamble (para. 39) which summarises that "the opportunity of the child to express his or her views freely, in accordance with Article 24(1) of the Charter and in the light of Article 12 of the UN Convention on the Rights of the Child, plays an important role in the application of this Regulation", the right of the child to be heard is not impeccably articulated in the overall jurisdictional proceedings concerned.

Thus, in this Regulation, we will find explicit requirements for hearing the child in the following situations:

[29]On the principle of subsidiarity, see Van Raepenbusch (2014) at 142-148.
[30]See Fabian (2018) at 97-102; Craig & de Búrca (2017) at 445-449.
[31]See Schütze (2015) at 77-87; Foster (2016) at 205-209.
[32]Vrabie (2017) at 9-10.
[33]Oprescu (2021) at 391.
[34]Published in Of.J. L, 178, 02/07/2019.

a) where a Member State exercises jurisdiction in accordance with the Regulation in a case concerning parental responsibility;
b) in the case of return proceedings under the 1980 Hague Convention, where the child under the age of 16 "has been wrongfully removed to or retained in a Member State other than the one where the child was habitually resident immediately before the wrongful removal or retention" (Article 22 of the Regulation);
c) in the context of the refusal to recognise a judgment on parental responsibility, if it was given without giving the child "the opportunity to express his or her views", which denotes a procedural deficiency that deprives the judgment of effectiveness in the European area (Article 39(2) of the Regulation);
d) in the matter of issuing the special certificate on the rights of access or the certificate on the return of the child, which is issued by the court of origin whose judgment on the rights of access/return of the child is to be recognised in another Member State. The court of origin shall issue the certificate only if, inter alia, according to Article 47(3) of the Regulation, "the child has been given an opportunity to express his or her views".

With regard to the assumptions in lit. c) and d), it can be seen that the Regulation refers to "*the child's opportunity to express his or her views* " and not to respect for the child's right to be heard, the terminology used leaving room for interpretation as to whether the hearing is mandatory or, on the contrary, suppletive, and as to who is the person who has to initiate the hearing. In other words, does the infringement of the right to be heard occur only when the child has expressly requested it and the court has arbitrarily refused? Does or doesn't the court have to inform the child that he or she has this right? Moreover, this vagueness is apparent from the very content of Article 21 of the Regulation, which, although it uses the marginal heading "*The **right** of the child to express his or her views*", still refers to "*the […**] possibility** of expressing his or her views*".

There are other sticking points in this respect. It is true that this regulation concerns the right to be heard from a procedural rather than a substantive perspective, which explains the European legislator's reluctance to define the content of this right more precisely and, consequently, the recognition of a wide margin of discretion in favour of the national court applying national procedural law. However, it cannot go unnoticed that, in the context in which a court of a Member State may refuse to recognise a judgment on parental responsibility where it was given without the child having been given an opportunity to be heard (except where the subject-matter of the case concerned the child's property or where the urgency of the case justifies the refusal of a hearing or hearing- hypotheses referred to in Article 39(2) of the Regulation), the omission of legal details in outlining the "right of the child to be heard" may lead to a lack of uniformity in case-law.

Thus, analysing the content of Article 21 of the Regulation, we note that the "right to express his or her views" is guaranteed only for "the child who is capable of forming his or her own views". But what does it mean that a child is capable of forming his or her own views? Is this requirement conditional on the existence of

discernment or not? If the answer is in the affirmative, can the procedural defect of the child's failure to be heard be covered by the fact that the child lacked discernment anyway? This ambiguity in Article 21 of the Regulation is of relevance in the context of the fact that not all the laws of the Member States make the exercise of the child's right to be heard subject to the child's discernment. For instance, Article 388-1 of the French Civil Code lays down the following rules regarding the hearing of a minor "capable of discernment" (regardless of age) in any proceedings concerning him or her: he or she has the right to be heard if he or she so requests and may also refuse to be heard, in which case the judge must assess the merits of such a refusal; the judge is obliged to inform the minor that he or she has the right to be heard. Romanian law, however, is quite different. According to Article 264 of the Romanian Civil Code, the obligation to hear the child's opinion is not conditional on the existence of discernment and exists when the minor has reached the age of 10. Until this age, the child's hearing is in fact a discretionary right of the judicial or administrative authorities entrusted with taking a measure concerning the child.

Consequently, precisely in order to ensure uniformity in case-law, we believe that more detailed rules on the hearing of the child would be necessary, covering, among other things, the minimum age from which the child's right to be heard cannot be disregarded, the grounds that may justify disregarding the child's right to be heard, the introduction of a restrictive interpretation of the impossibility of hearing the child, the need to give reasons for the impossibility of hearing the child, the obligation to inform the child not only of the right to be heard, but also of the consequences of the hearing and how the information provided will be used, etc.

Another aspect that should be noted is that the fragmentary intervention of the European legislator in the family field highlights the lack of consistency on the subject of protection. Thus, under Article 2(2)(c) of Directive 2004/38, "direct descendants aged 21 or over or dependent on him (the EU citizen) and direct descendants of his spouse or partner" are considered to be family members of the EU citizen and, consequently, beneficiaries of freedom of movement. By contrast, Article 4(1) of Directive 2003/86[35] uses a restrictive definition (it covers the nuclear family with minor children)[36] and it circumscribes to the family member of the sponsor only the minor child who has not reached the age of majority and has not been emancipated by marriage (marriageable majority). This difference in approach highlights the more favourable treatment of the child of an EU citizen compared to the child of a non-EU citizen seeking family reunification. In a school hypothetical situation, the child who has recently come of age (up to the age of 21) and is a descendant of the EU citizen can enjoy the right to free movement within the EU, whereas the child who is 18 years and 1 month old and is a descendant of a third-country national who has already had a residence permit for at least 1 year is not entitled to reside in the EU with his/her parent. In this last hypothesis, the host Member State has a certain margin of discretion as long as it can, and is not obliged to, authorise family reunification.

[35] Published in Of. J, L. 158, 30.4.2004.
[36] Uçarer (2009) at 70-71.

(B) Speaking of the preservation of family unity, the role of the case-law of the CJEU, which has used classic European rights, such as the right to freedom of movement, to protect the right to family life, cannot go unnoticed in this respect.

As regards the right to move and reside freely within the territory of the Member States, governed by Article 20 (2) (a) in conjunction with Article 21(1) TFEU, it is recognised, under the terms of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 (Directive)[37], both for the European citizen and for his/her family members.

It is important to emphasise that the Directive outlines the composition of the family of the European citizen, among its members being "the direct descendants aged 21 or over or dependent on him (the European citizen - s.n.), as well as the direct descendants of his spouse or partner" (Article 2(2)(c) of the Directive). We note that EU law has therefore defined the parental relationship in much broader terms than national law. The following types of family relationship fall within the scope of the parental relationship protected by European law:

- the direct family relationship, based on natural or civil (in the case of adoption) kinship between the EU citizen and his/her direct descendants who are aged 21 or over or are dependent on the EU citizen;
- indirect family relationship, built on the relationship between the EU citizen step-parent and the minor child of the spouse or partner; in such a hypothesis, the family relationship is not directly based on a legal relationship between the step-parent and the step-child, but indirectly on the marital relationship or partnership of the EU citizen with a non-EU citizen who has children from another marriage or out of wedlock or adopted.
- the indirect family relationship, based on the relationship between the EU citizen and the direct adult descendants of the spouse or partner.

In addition to these, there are other sui-generis forms of family relationships, the *SM* judgment being illustrative in this respect[38]. In that case, the question was raised whether a minor in respect of whom guardianship has been granted to European citizens on the basis of the Algerian measure "al kafalah"[39] can be regarded as a direct descendant within the meaning of Article 2(2)(c) of the Directive. The reasoning of the judgment reveals that the placement of a child in "al kafalah" guardianship has no equivalent in the legislation of the Member States, such regime being *sui-generis*, at the confluence of adoption, guardianship and foster care[40]. Thus, one of the particularities of this scheme is that although there is no replacement of natural filiation by adoptive filiation, the child-natural parent relationship remaining intact (para. 56 of the judgment), the child nevertheless takes the name of the guardian. The preservation of natural parentage also explains the temporary and revocable nature of the regime: "al kafalah" ceases when the child reaches the age of majority and can be revoked at the express request of the biological parents

[37] Published in Of. J. L 251, 03/10/2003
[38] CJEU, Case C-129/18 (2019).
[39] At length on this regime, see Malaeb (2015) at 307-342.
[40] Oprescu (2023) at 120.

(para. 45 of the judgment). Moreover, the Algerian regime has no implications in the sphere of succession, the child not being considered as successor to his guardian (para. 45). Essentially, placing a child under this regime obliges the guardian to take care of the child's maintenance and day-to-day protection until the child reaches the age of majority.

The facts set out in paragraphs 23 to 42 of the judgment reveal the situation of a minor girl placed under "al kafalah" guardianship by a French couple with the right of permanent residence in the United Kingdom. In an attempt to regulate her right of residence, the minor SM applied to the British immigration authorities for leave to enter, which was refused on the ground that a minor placed under the "al kafalah" guardianship of a European citizen cannot be considered a direct descendant within the meaning of the Directive. Obviously, the refusal by the UK authorities led to procedural steps before the UK courts, which resulted in the referring court asking a number of questions to the Luxembourg court. The cornerstone of this case was the very concept of direct descendant referred to in Article 2(2)(c) of the Directive, namely the extent to which it also covers a child placed under the "al kafalah" guardianship of a European citizen who has exercised his or her right to free movement within the EU.

In this case, it should be noted that the CJEU continues the series of reasoning by which it interprets concepts in the lexical field of the family uniformly by resorting to autonomous notions. Thus, by way of interpretation, the CJEU provides a definition of the concept of direct descendant in the sense that it covers "both the biological child and the adopted child" of a European citizen (para. 54 of the judgment), excluding the child "placed under the legal guardianship of a Union citizen" (para. 55 of the judgment), as long as the filiation link is missing.

What is striking about this judgment is that the questions referred for a preliminary ruling concerned exclusively the interpretation of Article 2(2)(c) of the Directive, and the Court's reasoning was not limited to formulating a specific answer to the question of law raising questions of interpretation. The CJEU went further and, grafting its reasoning onto the provisions relating to the fundamental rights of the child upheld by Art. 7 (right to family life) and Art. 24 para. 2 (the principle of the best interests of the child) of the Charter, gave the national court an interpretation of the provisions of Article 3(2)(a) of the Directive in such a way that the child can be circumscribed within the concept of "other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependents or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen". Thinking pragmatically and humanely and allowing the national court to assess the consistency of the family relationship of dependency, the CJEU has given the only possible interpretation compatible with the system of protection of the rights of the child. Recognizing the right of the child to enter and reside in the EU territory together with the adult responsible for the exercise of parental responsibilities is in essence a guarantee that the fundamental rights of the child are preserved. This illustrates a paradigm shift by using the right to free movement to preserve the

child's fundamental right to live within the family extensively shaped by the legislation of a non-EU state.

Conclusion

It can be observed that although there are numerous European legislative instruments that directly or indirectly concern the child, the family and family members, these concepts remain deeply rooted in the national law of the Member States. In the absence of European legal definitions and exhaustive elements that give them legal contours, the concepts of child or family are rather described in a particular way, adapted to the purpose of each derived European law instrument. The European directives do not tell us what a family is and what the nature of the legal relationship between its members is, but only indicate who the family members are and how the legal provisions should be applied, precisely in the light of the reality of the family.

In addition, the heterogeneity of family situations poses real challenges for the national authorities of the Member States, as the conceptual framework of family law is not harmonised at EU level. However, the common denominator in all these situations in which a decision has to be taken regarding a minor child anchored in a family unit is the preservation of the child's rights, particularly his or her best interests, including the need to provide the necessary framework for the child's personal ties with his or her parents or legal guardians. This is, moreover, one of the reasons why the CJEU, entrusted with the interpretation of provisions of secondary legislation concerning concepts of family law, chooses to provide autonomous definitions, even detached from national law and based exclusively on the reality of the emotional bond.

Moreover, as shown in this study, starting from the reality that the European citizen cannot be detached from the family circle, we are also witnessing a change of perspective, with classic rights belonging to the common European vocabulary, such as the right to free movement, being interpreted extensively precisely in order to protect the fundamental rights of the child. Essentially, when a child, whether a European citizen or a family member of a European citizen, is at the centre of a judicial procedure, with or without a transnational component, everything revolves around the best interests of the child.

References

Beilfuss G., Carpaneto C.L., Kruger T., Pretelli I. & M. Župan (2003). *Jurisdiction, Recognition and Enforcement in Matrimonial and Parental Responsibility Matters*. Cheltenham: Edward Elgar Publishing.

Bergamini, E. (2019) “Human Rights of Children in the EU Context. Impact on National Family Law", in E. Bergamini & C. Ragni (eds). *Fundamental Rights and Best Interests of the Child in Transnational Families*. Cambridge: Intersentia.

Boghirnea, I. (2023). “Legislative Mechanisms of the European Union and of Transposition into the Romanian Legislation Concerning the Problem of Work-Life Balance for

Parents and Caregivers - Sociological Aspects" in *Athens Journal of Law* 9(3):477-492.

Caracciolo di Torella, E. & A. Masselot (2010). *Reconciling Work and Family Life in EU Law and Policy*. Palgrave Macmillan.

Coester-Waltjen, D. (2016). "The impact of the European Convention on Human Rights and the European Court of Human Rights on European Family Law" in Scherpe, J. M. (ed) *European Family Law* (I). Cheltenham: Edward Elgar Publishing.

Craig P. & G. de Búrca (2017), *European Union Law. Commentaries, Case Law and Doctrine*. Bucharest: Hamangiu.

De Baere, G. & K. Gutman (2016). "The impact of the European Union and the European Court of Justice on European family law", in Scherpe, J.M. (ed.) *European Family Law (I).* Cheltenham: Edward Elgar Publishing.

Deana, F. (2019). "Protecting EU Citizen Minors' Right to Identity in the Transnational Family Context" in E. Bergamini & C. Ragni (eds). *Fundamental Rights and Best Interests of the Child in Transnational Families.* Cambridge: Intersentia.

Fabian, G. (2018). *Institutional Law of the European Union*. Bucharest: Hamangiu.

Friedery, R. (2019). "Developments in Family Reunification Cases Before the CJEU" in *Bratislava Law Review* 3(2):6-17.

Foster, N. (2016). *EU Law*. Oxford: Oxford University Press.

Frasca, E. & J.Y. Carlier (2023). "The best interests of the child in ECJ asylum and migration case law: Towards a safeguard principle for the genuine enjoyment of the substance of children's rights?" in *Common Market Law Review* 60(2):345 - 390.

Fulchiron, H. (2014). "A European family model?" in H. Fulchiron & C. Bidaud-Garon (eds.) *Vers un statut européen de la famille*. Paris: Dalloz.

Georgios, M. (2021). "Family Unity and International Protection-EU Regulation and its Compatibility with the ECHR" in *Nordic Journal of International Law* 90 (2): 161-189.

Ismaïli, N. (2019). *Who cares for the child? Regulating custody and access in family and migration law in the Netherlands, the European Union and the Council of Europe* [PhD-Thesis - Research and graduation internal, Vrije Universiteit Amsterdam], 91-131. https://research.vu.nl/ws/portalfiles/portal/77023886/complete+dissertation.pdf.

Klaassen, M. & P. Rodrigues (2017). "The Best Interests of the Child in EU Family Reunification Law: A Plea for More Guidance on the Role of Article 24(2) Charter" in *European Journal of Migration and Law* 19(2):191-218.

Malaeb, H.N. (2015). "The "Kafala" System and Human Rights: Time for a Decision" in *Arab Law Quarterly* 29(4):307-342.

Monedero, P.J.A. (2019). "Family Laws in the European Union*" in Socialinė Teorija, Empirija, Politika Ir Praktika* 19 (September):87-94.

Oprescu, M.A. (2021). "Principiul interesului superior al copilului în dreptul Uniunii Europene. De la consacrare teoretică la recunoaștere jurisprudențială în contexte cu elemente de extraneitate" (In English: The principle of the best interest of the child in European Union law. From theoretical consecration to jurisprudential recognition in contexts with foreign elements) in *Revista de dreptul familiei* 1:385-407.

Oprescu, M.A. (2022). "The Right to free movement and residence within the eu - beyond its limits?" in *Proceedings of the International Conference European Union's History, Culture and Citizenship*. Bucuresti: C.H.Beck.

Oprescu, M.A. (2023) "The margin of appreciation of the member states in matters of free movement-limited by the system of protection of fundamental rights?", in *Proceedings of the International Conference European Union's History, Culture and Citizenship*. Bucharest: C.H.Beck,

Parkes, A. (2013). *Children and International Human Rights Law. The Right of the Child to be Heard*. Routledge.

Pataut, E. (2020). "The family seized by the Union", in E. Bernard, M. Cresp & M. Ho-Dac (eds). *La famille dans l'ordre juridique de l'Union Européenne*. Brussels: Editions Bruylant.

Peers, S. (2016). "EU Immigration and Asylum Law" in D. Patterson & A. Södersten (eds). *A Companion to European Union Law and International Law*. Wiley-Blackwell.

Rodrigues, P. (2019). "Human Rights and the Best Interests of the Child in European Family Reunification Law" in E. Bergamini & C. Ragni (eds.) *Fundamental Rights and Best Interests of the Child in Transnational Families*, Cambridge: Intersentia.

Schütze, R. (2015). *European Union Law*. Cambridge: Cambridge University Press.

Smyth, C. M. (2009). *The common European asylum system and the rights of the child: an exploration of meaning and compliance*. https:// hdl.handle.net/1887/20462.

Stark, B.K. (2005). *International family law: an introduction*. Burlington: Ashgate Publishing Company.

Tryfonidou, A. (2019). "Rainbow Families and EU Free Movement Law" in E. Bergamini & C. Ragni (eds.). *Fundamental Rights and Best Interests of the Child in Transnational Families*. Cambridge: Intersentia.

Uçarer, E.M. (2009). "Negotiating Third-Country National Rights in the European Union" Elisabeth Prügl and Markus Thiel (eds.) *Diversity in the European Union*. New York: Palgrave Macmillan.

Van Raepenbusch, S. (2014). *Institutional Law of the European Union.* Bucharest: Rosetti.

Vrabie, M. (2017). *Judicial protection of the Charter of Fundamental Rights of the European Union*. București: Universul juridic.

Widiez, G. (2020). "The European family between individualism and mobility" in E. Bernard, M. Cresp and M. Ho-Dac (eds.). *La famille dans l'ordre juridique de l'Union Européenne*. Brussels: Éditions Bruylant.

Zedalis, T. & C. Weudland (2024). "Family unity for migrant minors. Family reunification and European harmonization through the jurisprudence of the CJEU". DOI:10.5281/zenodo.10695821

EU Legislation

Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, published in Of.J. L. 178, 02/07/2019

Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, published in Of. J. L. 7, 10.1.2009.

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, published in Of. J. L 251, 03/10/2003.

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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, published in Of.J. L. 158, 30.4. 2004

Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, published in Of. J. L 132/1, 21.05.2016.

Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers, published in Of. J. L128/8, 30.04.2014

Regulation (EU) no. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, published in Of. J. L.180/31, 29.06.2013

Cases

CJEU, Judgment of 5 June, 2018, Case C- 673/16, **Relu Adrian Coman, Robert Clabourn Hamilton, Asociatia Accept v. Inspectoratul General pentru Imigrari, Ministerul Afacerilor Interne** [Inspectorate General for Immigration, Ministry of the Interior].

CJEU, Judgment of 26 March 2019, Case C-129/18, **SM v. Entry Clearance Officer, UK Visa Section.**