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ESTABLISHING LEGAL FRAMEWORKS FOR A UNIFIED TAKE ON SOLIDARITY, EMPATHY AND CARE WITHIN THE EU

Preamble

This policy brief was developed in collaboration with DialoguePerspectives. Discussing Religions and World Views.

DialoguePerspectives is a programme dedicated to the development and establishment of new and innovative forms of interreligious/worldview dialogue. Its mission is to meaningfully contribute to European understanding and collaboration, to the strengthening and defence of European civil society, and to the shaping of a pluralistic and democratic Europe grounded in the principle of solidarity.

DialoguePerspectives launched its first European Leadership Workshop in 2021, where present and former participants in the programme with a proven track record in interreligious/worldview practice worked together to learn the core principles of policy writing. In this task they were supported by several inputs by and discussions with experts in the field of policy advocacy.

The European Leadership Workshop participants implemented their newly gained knowledge by producing three thematically diverse briefs on policy topics that are situated at the intersection of core societal questions and their relevance for a constructive, socially oriented, religious and worldview dialogue. They speak to central issues of European society such as combating discrimination, racism and anti-Semitism by advocating a pluralistic remembrance culture, strengthening the democratic process by empowering undocumented migrants and recognizing pluralistic co-living through the concept of 'care communities'.

Introduction

The European Union strives for a non-discriminatory society and to foster solidarity and freedom of choice in personal, interpersonal and co-habitation preferences. At the same time, European societies are inherently different, especially when it comes to family models, partnerships and ideas of social coexistence. This diversity across EU member states is evident where different new models are not only practised but have also gained social acceptance. Alongside this, in the long run, a variety of family forms and relationships – such as co-habiting and living-apart-together relationships; patchwork-, foster-, step-, same-sex and single-parent families; and multi-generational housing – are indispensable in societies that are ageing.[1] This brief expands the scope of this debate by putting forward the concept of 'care communities' in interpersonal arrangements, which thus far has been left out of the public discourse in European policymaking.

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[1] Livia Sz. Oláh, Changing families in the European Union: trends and policy implications, analytical paper, prepared for the United Nations Expert Group Meeting, "Family policy development: achievements and challenges", New York, May 14-15, 2015, p. 9, https://www.un.org/esa/socdev/family/docs/egm15/Olahpaper.pdf

The brief first looks at the notion of care. Second, it argues that current laws and regulations regarding family cause problems for many individuals and that this threatens fundamental rights. The brief then considers the relevance of the EU level for different care constellations. This is followed by an analysis of case law in cross-border cases to illustrate how the problem has been dealt with so far. The brief concludes by proposing the establishment of a legal framework that reflects the diversity of pluralistic co-living found across Europe. Specifically, it offers measures for recognizing 'care communities' so as to allow more forms of family, community and kinship to have a secure legal foundation.

Care work

Care work entails all personal and occupational practices directed at the wellbeing of an individual. It ranges from domestic work to health care, elderly care, childcare, education, personal assistance and sex work.[2] As such, care work often remains invisible in everyday practices. It becomes the subject of public administration with the occurrence of disruptive life events – situations in which individuals no longer have autonomy about their own wellbeing or access to care relations from their nuclear family. This narrow concept of care work excludes empathy and solidarity as a practice of everyday life. It does not recognize the individual experience of care and the responsibilities that come with it as an essential part of communion – in a private, political, economical, cultural and social sense. There is a need to establish an elementary understanding of care that fosters empathy and solidarity beyond factors of origin, ability and age, and that is supported by political structures and interfaces. Care is the necessity from which European societies thrive as democratic, tolerant, inclusive and pluralistic.

The EU has put forth the right to community within the framework of mobility and inclusion of people with disabilities.[3] From this, it flows that they have the right to choose the people who should care for them and that people have the right to choose who they want to take care of. However, this proves to be a problem in the EU as there is little to no legal security for families, partnerships and communities that go beyond the traditional nuclear family.

Care constellations and missing legal frameworks

People take responsibility for each other in many different forms beyond that of the nuclear family, classic marriage or registered partnership – all of which focus heavily on the relation between two people. In this regard, there has been a perceivable shift towards not only chosen

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[2] Care Revolution Netzwerk, Material zur Präsentation des Netzwerks Care Revolution, 22 June 2022, https://care-revolution.org/
[3] European Parliament resolution of 25 October 2011 on mobility and inclusion of people with disabilities and the European Disability Strategy 2010-2020, https://op.europa.eu/en/publication-detail/-/publication/20f5cc9b-b820-11e2-ab01-01aa75ed71a1/language-en

families and non-monogamous relationships, but also community networks, interest groups, shared housing, foster care and religious and non-religious communities. These constellations are not necessarily defined by a romantic or sexual relationship between two or more people. They also include lesbian, gay, bisexual, trans, non-binary, intersex and queer (LGBTIQ)[4] people and rainbow families. Within the diverse European context, these different types of relationships are actively established, maintained, organized and chosen. Accordingly, it is time for laws to reflect the existing varied models of taking responsibility for each other in addition to marriage and relationships that focus on two people. Pluralistic societies require a legal basis that facilitates the representation and legal recognition of more diverse individual life choices, including when it comes to the choice of one's care constellation, community or family.

Not every EU member state offers the possibility for two people to enter into a legal union regardless of their gender and sexual identity, and therefore to officially assume responsibility for each other. In recent decades, legislative developments, case law and policy initiatives have improved the lives LGBTIQ people and helped to build more equal societies. For example, 22 member states have legally recognized same-gender couples in the form of marriage, registered partnerships or civil unions.[5] However, due to differences in family law across member states, such family ties may cease to be legally recognized when 'rainbow' families cross the EU's internal borders. Recently, this situation was exacerbated by measures governments took to deal with the Covid-19 pandemic. In some cases, people were stopped at borders and prevented from joining their families, as some governments 'forgot' LGBTIQ people in introducing confinement measures based exclusively on a heteronormative family model.[6]

While this is less obvious than the abovementioned constellations, Article 25 of Charter of Fundamental Rights of the European Union[7] on the rights of the elderly to lead a life of dignity and independence as well as to participate in social and cultural life highlights the necessity for an EU framework for an ageing society. This right should also mean the free choice of one's community and/or family based on a secure legal framework, especially when being subject to severe health conditions, isolation or age poverty. Living a dignified and independent life in one's old age must include the ability to choose with whom one wants to be legally associated with and ensuring the legal, medical and emotional support system one needs and wants.

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[4] LGBTIQ people are people who are attracted to others of their own gender (lesbian, gay) or any gender (bisexual); whose gender identity and/or expression does not correspond to the sex they were assigned at birth (trans, non-binary); who are born with sex characteristics that do not fit the typical definition of male or female (intersex); and whose identity does not fit into a binary classification of sexuality and/or gender (queer).

[5] European Economic and Social Committee, Union of Equality: LGBTIQ Equality Strategy 2020-2025, adopted on 27 April 2021, https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/union-equality-lgbtiq-equality-strategy-2020-2025

[6] ILGA Europe, COVID-19 impacts on LGBTI communities in Europe and Central Asia: A rapid assessment report, p. 9, https://www.ohchr.org/sites/default/files/Documents/Issues/SexualOrientation/IESOGI-COVID-19/CSOs/ILGA_EU_covid19-lgbti-assessment-2020.pdf

[7] Charter of Fundamental Rights of the European Union (2012), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT

At the national level, long before the legalization of gay marriage in 1999, France had introduced a new form of legal union between two people: the *pacte civil de solidarité* (PACS). This can apply to straight and same-sex constellations going beyond romantic relationships, such as roommates. Under the PACS status, two people live together and can have a joint tax status as well as legally split their possessions. Several EU countries have followed the French model. In the EU, Austria and Luxembourg followed the French model in 2004.[8]

Most recently, Germany's government elected in 2021 has included a new model called a *Verantwortungsgemeinschaft* (community of responsibility) in its programme. This is intended to create a legal framework that covers two or more elective relatives. In addition, the government wants to make possible agreements on legal parenthood, parental care, rights of access and maintenance even before conception[9] based on a personal but not necessarily romantic relationship.[10] The potential use cases can be as diverse as the social realities in which we live: from the grandmother who in her old age shares a apartment with an older man who became her closest confidant without being her partner to close friends or polyamorous forms of relationships with or without children.[11] However, such legal conditions are missing at the EU level. This leaves the opportunity to establish a unique EU framework to foster a pluralistic society.

The EU level

People take responsibility for each other in many different forms of communities and family models, regardless of whether or not a legal framework for their relationship exists in their country of residence. Therefore, it is the duty of the EU to recognize the necessity of such a legal structure, ensuring that everybody can build their chosen community, family and relationship on a secure legal foundation. A legal framework enabling people to take responsibility for each other outside of marriage is necessary to achieve equality for all citizens and thereby adhering to the standards the EU set for itself by introducing the Charter of Fundamental Rights.[12] While Article 7 of the charter ensures the right to private and family life, what constitutes a family is not defined and is subject to national laws. The different legal conceptions of family in the member states can therefore lead to intra-EU legal conflicts; for example, regarding freedom of movement and the right to engage in work in any member state, which is one of the key principles of the EU. As

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[8] Selectra, The French PACS System: Everything You Need to Know, https://en.selectra.info/moving-to-france/culture/pacs

[9] Koalitionsvertrag zwischen SPD, Bündnis 90/Die Grünen und FDP, 24 November 2021, p. 101, https://www.spd.de/koalitionsvertrag2021/

[10] Deutscher Bundestag Drucksache 19/16454, 13 Januaryt 2020, p. 3, https://dserver.bundestag.de/btd/19/164/1916454.pdf

[11] Anna Thewalt, 'Nicht nur für Liebesbeziehungen. Die Ampel will einen rechtlichen Rahmen für Wahlverwandte schaffen', Der Tagesspiegel, 21 November 2021, https://www.tagesspiegel.de/politik/nicht-nur-fuer-liebesbeziehungen-die-ampel-will-einen-rechtlichen-rahmen-fuer-wahlverwandte-schaffen/27848938.html

[12] European Commission, LGBTIQ Equality Strategy - 2020-2025, 12 November 2020, https://ec.europa.eu/info/files/lgbtiq-equality-strategy-2020-2025_en

elaborated above, care and family constellations within the EU are lived and experienced beyond the traditional marriage, which should be reflected in EU legislation.

Since the member states have ratified instruments such as the Charter of Fundamental Rights, they have to adhere to them and to make sure that everybody can act on the rights they stipulate. This includes people living in communities and families that are not defined by a marriage and/or romantic relationship between two heterosexual individuals. Several of these rights are under threat in the EU due to differences in national family laws and the lack of a legal framework for communities outside of relationships focused on two people. While family law is a competence not of the EU but of the member states, the EU could still set an overarching direction through its jurisdictional range and power. The following section highlights cross-border cases exemplifying how EU-level case law can shape processes of recognition within different member states.

EU cross-border legal cases

While the EU cannot interfere with national laws in matters of family law, it does play a role through judicial decisions in cross-border cases; that is, cases that do not fall under one national jurisdiction alone. Within the EU, such cases are forwarded to the higher jurisdictional authority in the form of the Court of Justice of the European Union (CJEU), the General Court and its specialized courts, and the European Court of Human Rights that was established on the basis of the European Convention on Human Rights (ECHR). The ECHR, through its Article 14, is the only legally binding international human rights instrument that expressly protects citizens against discrimination on the basis of sexual orientation, therefore putting European courts in a position of responsibility. The decisions of these courts on cross-border cases may possibly later become national law depending on the scope of the issue, the nature of the rulings and the perception of EU institutions by national courts, individuals and countries.

Same-sex couples cannot gain legal status in every EU member state and are therefore not equally protected across them. Marriage or equivalent legal status is not available to same-sex couples in every member state:

- 13 have extended marriage to include same-sex couples[13]
- 8 have implemented registered partnerships or civil unions for same-sex couples[14]
- 6 do not grant any status to same-sex couples[15]

Due to this divergence between member states, the issues arises of the recognition in one member state of a legal status formed in another. A same-sex couple in a legally recognized

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[13] Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Luxembourg, Malta, the Netherlands, Portugal, Spain and Sweden.

[14] Croatia, Cyprus, the Czech Republic, Estonia, Greece, Hungary, Italy and Slovenia.

[15] Bulgaria, Latvia, Lithuania, Poland, Romania and Slovakia.

partnership in one member state moving to another may find itself with no similar legal status there. The existence of such legal status in some member states thus raises questions regarding its recognition and potentially adoption in other ones, especially before their courts.

Freedom of movement throws up cross-border cases regarding divergences in family law in the EU. The right of every EU citizen to freely decide on their place of residence is stipulated in the ECHR (Article 2) and in the Charter of Fundamental Rights (Article 45). Therefore, partners or families, including same-sex couples, must be able to move to another member state and find their legal status recognized in all of them. If same-sex partners that have children move to another member state, however, parentship is often not recognized for both parents but for one of them only.

Freedom of movement was further elaborated in the Family Reunification Directive (2003/86/EC) and the Citizens' Rights Directive (2004/38/EC, also called Free Movement Directive). The Family Reunification Directive paved the way to bring missing parts of a nuclear family into a host country, defining the closest relatives that fall under this directive as the spouse and minor children. The latter Citizens' Rights Directive is also applicable to the spouse or registered partner and minor children. Although there are some required conditions to be fulfilled that these directives take into account, it is nowhere mentioned whether same-sex spouses, registered same-sex partners and cohabiting partners shall be recognized too. This leaves the door of to interpretation, and misinterpretation.

The CJEU's 2018 ruling in the *Coman* case has made clearer the boundaries of interpretations and characteristics of these directives. It stated that same-sex partners are allowed to freely move to another member state if they are legally married in another member state that provides some form of civil union for same-sex people. The ruling was justified on the grounds of four articles of the Charter of Fundamental Rights: Article 45 (freedom of movement and of residence), Article 7 (respect for private and family life), Article 9 (right to marry and right to found a family) and Article 21 (non-discrimination). It made clear that spouses need to be recognized in every member state regardless of their partnership and sexual orientation. Refusing family reunification and non-recognition of same-sex partnerships are thus violations of the principle of free movement in the EU.[16] Pointing out clearly the equality of same-sex partnerships to opposite-sex partnerships indicates that the principle of freedom of movement applies equally to same-sex partners.[17]

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[16] Alina Tryfonidu, 'The EU Top Court Rules that Married Same-Sex Couples Can Move Freely Between EU Member States as "Spouses"', Feminist Legal Studies, 27, 2019, https://idp.springer.com/authorize?response_type=cookie&client_id=springerlink&redirect_uri=https%3A%2F%2Flink.springer.com%2Farticle%2F10.1007%2Fs10691-019-09397-z

[17] European Union for Fundamental Rights, Making EU citizens' rights a reality: national courts enforcing freedom of movement, 28 August 2018, https://fra.europa.eu/en/publication/2018/making-eu-citizens-rights-reality-national-courts-enforcing-freedom-movement-and

The recognition of same-sex partnerships and of parent-child relationships depends very much on the member state where citizens decide to move to and on its courts. Since family law remains subject to national jurisdiction, the issues thrown up by such cross-border cases show that it is necessary to lay out a much more substantial legal structure to safeguard the giving and receiving of care for all EU citizens.

Conclusion

Differences in family law across member states threaten the rights bestowed on EU citizens by the Charter of Fundamental Rights, especially those not living in a nuclear family, classic marriage or legally recognized partnership. What is needed is a legal framework that depicts the lived realities of individuals, families and communities across the EU, and therefore aids in securing fundamental rights for everybody. Below are outlined three key elements essential to the establishment of an inclusive and pluralistic understanding of care and partnership across the whole of the EU.

1. **Establishing care communities as a legal partnership model that embodies pluralism and the understanding of a community-driven society**

The freedom of democratic societies can no longer just depend on the invocation of European values stipulated in, for example, the Charter of Fundamental Rights, especially in times of continued upheaval caused by the Covid-19 pandemic, climate crisis, military aggression and nationalist movements. The EU has to establish a structural and legal framework that ensures full support for all its citizens, no matter the model of family or community they chose.

One path to this end is the establishment of a new partnership model of care communities in which individuals can officially commit to each other as care givers and receivers, unrestricted by factors of number, gender, origin or age. This model would provide legal status to the commitment between individuals based on their preference of engagement. A modular system, built on increasing levels of legal responsibility towards each other, is recommended for this to ensure legal and operational transparency and flexibility. Care communities embody the democratic objective of tolerating and including each citizen in their right to freely choose and design their private and family life.

2. **The EU should work towards the legal recognition of relationships beyond classical conventions**

The CJEU can start a process of recognition of the different abovementioned care constellations by creating precedents through its rulings. With such use of the primacy of EU jurisdiction over national jurisdiction, it can establish an overarching framework through which laws and structures can change in member states. While this might not be the case for every policy field, it is

nonetheless important to strengthen the role of CJEU and for member states to accept its jurisprudence. Individual member states can also take a pioneering role in implementing EU jurisprudence into their national law and advocating for this with other member states; for example, through the European Commission or the European Parliament.

3. **Fostering a common EU understanding of care work as a prerequisite to a pluralistic and solidary society**

As discussed, the EU has limited competence in the field of family law and ideas of what constitutes a family are ingrained in national contexts (and often also national identity). In addition, family life and consequently care work is often considered a private matter and changes in this sphere can be considered as destabilizing for member states. But they are inherently public too since family matters are also a question of equality and of individual freedom that in the issues discussed here are limited by EU member states.

In this regard, recognizing care work as the backbone to societal structures is necessary to shape and impact public policy. The EU needs to commit to a shift of competencies within its policymaking to have further regulatory power in regard to family law in order to introduce a broader notion of who constitutes a family, and also in consideration of care work within community structures, to ensure that everybody is included and embraced as an equal member of a pluralistic society.

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