

Hungary's attacks on human dignity: Article 2 TEU and the foundations of democracy in the European Union

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Abstract

While in Poland the October 2023 elections led to a government halting the rule of law crisis, in Hungary the political situation continues to deteriorate. Focusing on European Parliament resolutions, this article analyses Hungarian developments from the prism of human dignity, the EU's first foundational value under Article 2 TEU. First the article discusses the key features of human dignity with reference to the original commitment to human dignity under the 1948 Universal Declaration of Human Rights and to the EU Charter. Secondly, it uses these key features as an analytical grid for evidencing the construction of a counter-model of human beings made to live in a society of inequality and exclusion. Finally, this paper outlines five reasons why human dignity as the first Article 2 value is breached by the Hungarian regime and why the EU Commission's decision not to trigger Article 7(2) is so problematic.

1 | INTRODUCTION

While the October 2023 general elections in Poland put an end to the PiS government and led to a coalition government halting the rule of law crisis, in Hungary the political situation continues to deteriorate.¹¹ The time for

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¹¹This paper was drafted (roughly) between the adoption of the Bill to establish a 'sovereignty protection office' on 12 December 2023 and the EU Parliament's Resolution of 24 April 2024. This period includes the following key events: adoption of European Parliament Resolution on 18 January 2024 'on the situation in Hungary and frozen EU funds' (P9-TA (2024)0053); Justice Commissioner Didier Reynders's decision not to proceed with Article 7 against Hungary (29 January 2024); EU agreement on activating the €50 billion fund of aid promised to Ukraine (1 Feb 2024) against expectation of Hungary's refusal; the EU Commission's letter of formal notice on 7 February 2024 triggering infringement proceedings against Hungary following the EP Resolution of January; the annual commemoration of the 'Day of Honour' by far-right and neo-Nazi parties in Budapest (8 February 2024); the resignation of the President of the Republic, Katalin Novak, for having pardoned a man convicted for having helped cover up a case of sex abuse at a children's home followed by the resignation of Judit Varga (minister of justice at the time of the pardon) (10 February 2024); the election of former president of the Constitutional Court, Tamás Sulyok by the Hungarian President (24 February/5 March 2024); and the mass demonstration in Budapest against corruption on 6 April 2024. This paper reflects on developments up to May 2024, including the visit of Chinese President Xi Jinping to Hungary on 9 May 2024. At the time of submitting this paper for publication, key developments include: judgment of the Court of Justice in Case C-123/22, *EU Commission v. Hungary* (13 June 2024); beginning of the Hungarian presidency of the Council of the European Union (1 July 2024); establishment by Viktor Orbán of the 'Patriots for Europe', a new political grouping in the European Parliament (10 July 2024); controversial visits of Viktor Orbán to Kyiv, Moscow and Beijing in July 2024; and adoption of a law restricting state support for Ukrainians to those who come from parts of Ukraine directly affected by the fighting caused by Russia's invasion (21 August 2024).

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discussing the European Union's pluralist approach to democracy is definitely gone. The rule of law framework, devised to address the crisis in Hungary and in Poland,² is no longer sufficient for addressing Hungary's unprecedented situation. In its Resolution of 12 September 2018, the European Parliament triggered Article 7(1) against Hungary.³ In its Resolution of 15 September 2022,⁴ the European Parliament noted that 'Hungary is no longer a democracy' with reference to the authoritative V-Dem Democracy Report of 2019 and to the 2020 Freedom House Nations in Transit Report. In June 2023, the European Parliament repeated its concerns and called again on the EU Commission to trigger the procedure under Article 7(1) of the Treaty on the European Union (TEU) to address breaches of EU values.⁵ A particularly pressing question raised in the 2023 Resolution was whether Hungary should exercise the rotating presidency of the EU from July 2024 considering 'its non-compliance with EU law and the values enshrined in Article 2 TEU as well as the principle of sincere cooperation'.⁶ In the absence of any response from the EU Commission, the European Parliament repeated its concerns in its Resolution of 18 January 2024.⁷ As Justice Commissioner, Didier Reynders, indicated that the EU Commission will not trigger Article 7 following the European Parliament January Resolution,⁸ the European Parliament adopted another Resolution about the 'further erosion of democracy, of the rule of law and fundamental rights' on 24 April 2024.⁹ Considering the persistent reluctance of the EU Commission and Council to engage further with the 'Hungarian situation' under Article 7 TEU, in its April Resolution, the Parliament noted that the 'credibility of the EU with respect of the values enshrined under Article 2 TEU' is now at stake.¹⁰ The General Affairs Council of 25 June 2024 held a hearing on Article 7(1) TEU 'to provide the Council an up-to-date picture of the situation in Hungary' and noted that 'important concerns still existed'. However, it did not find it necessary to take the procedure further.¹¹ Neither did the Council discuss Hungary's imminent presidency of the EU nor explored possibilities for its suspension or postponement raised by some scholars.¹² Upon taking up the presidency, the slogan of which 'Make Europe Great Again' echoes Donald Trump's motto,¹³ Viktor Orbán went on a series of visits to Kyiv, Beijing and Moscow. While it condemned those visits, the EU response has so far focused on diplomacy, without engaging with its Article 2 values.¹⁴

The first, and arguably most important, value under Article 2 TEU is human dignity. While the European Parliament mentioned it three times in its Resolution of 15 September 2022,¹⁵ once in the 2023 Resolution¹⁶ and in its April 2024 Resolution in a now standard opening paragraph,¹⁷ it did not elaborate on the first value's meaning or

²EU Commission Country Chapter on the Rule of Law Situation in Hungary of 5 July 2023 (SWD (2023) 817 final).

³EP Resolution of 12 September 2018 (P8-TA (2018)0340). This resolution was challenged by Hungary before the Court of Justice in Case C-650/18, *Hungary v. European Parliament*, which dismissed Hungary's claim on 3 June 2021.

⁴P9-TA (2022)0324, 15 September 2022 (Y) and (2).

⁵P9-TA (2023)0216 of 1 June 2023 (1) and (10).

⁶P9-TA (2023)0216 of 1 June 2023 (11) and EP Resolution of 24 April 2024 (5). Pierre Buhler (former French ambassador in Poland) calls on the EU Commission to activate Article 7 TEU in *Le Monde*, 10 January 2024.

⁷EP Resolution of 18 January 2024 on the situation in Hungary and frozen EU funds (P9-TA (2024)0053).

⁸<<https://www.euronews.com/my-europe/2024/01/29/eu-commission-wont-trigger-nuclear-option-against-hungary-until-theres-clear-majority-in-f->>.

⁹EP Resolution of 24 April 2024 on ongoing hearings under Article 7(1) TEU regarding Hungary to strengthen the rule of law and its budgetary implications (P9-TA (2024)0367).

¹⁰EP Resolution of 24 April 2024 (5). See, also, M. Smith, 'Staring into the Abyss: A Crisis of the Rule of Law in the EU', (2019) 25 *European Law Journal*, 561; G. Halmay, 'The Fall of the Rule of Law in Hungary and the Complicity of the EU', (2020) 2 *Italian Journal of Public Law*, 215.

¹¹<<https://www.consilium.europa.eu/en/meetings/gac/2024/06/25/>>.

¹²Virgilio Dastoli and Emilio De Capitani, 'Why an EU Country under the Surveillance Procedure (Article 7.1 TEU) Should Not Chair the Council Presidency in this issue. For example, Professor Alberto Alemanno set out a range of options to prevent Hungary from taking over the EU presidency (<<https://www.politico.eu/article/suspend-hungary-eu-presidency-sanction-precaution/>>); see, also, B. Safradin, K. Groenendijk and J. Morijn, 'An Honest Broker? Three Avenues for Postponing Hungary's and Poland's Presidency of the Council of Ministers', *Verfassungsblog*, 1 June 2023, <<https://verfassungsblog.de/an-honest-broker/>>.

¹³Official website of the Presidency: <https://hungarian-presidency.consilium.europa.eu/en/news/make-europe-great-again-the-official-priorities-social-media-pages-and-visuals-of-the-hungarian-presidency-unveiled/>.

¹⁴J. Ranking, 'Top EU Diplomat Calls Rival Meeting in Response to Hungary's Rogue Diplomacy', *The Guardian*, 22 July 2024: <https://www.theguardian.com/world/article/2024/jul/22/top-eu-diplomat-calls-rival-meeting-in-response-to-hungarys-rogue-diplomacy>.

¹⁵By reference to Article 2 TEU (A), by reference to Article 1 EU Charter (CG), and by reference to the UN Committee on the Rights of Persons with Disabilities (CR).

¹⁶By reference to Article 2 TEU (A).

¹⁷Whereas the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities, as set out in Article 2 TEU, and as reflected in the Charter and embedded in international human rights treaties' (A).

significance. Indeed, human dignity's significance as the EU's first foundational value seems to have gone almost completely unnoticed by the EU itself.¹⁸ This silence is particularly odd considering that human dignity is also codified in the EU Charter of Fundamental Rights in a similarly prominent place and as being 'inviolable' under Article 1, with the whole first chapter of the EU Charter dedicated to it.¹⁹ Moreover, if 'human dignity' is new to the Treaty of Lisbon,²⁰ references to this idea go back to the early foundations of the European project, notably with the Manifesto of Ventotene drafted by anti-fascist activists Ernesto Rossi and Altiero Spinelli.²¹ Building on a small body of scholarly studies,²² this article addresses the gap in understanding the first EU foundational value at a time when it is arguably challenged in an unprecedented manner by one of its Member States and invisible to the EU Commission. It is all the more important to understand the first foundational value of the EU given that the Hungarian Fundamental Law, in force since 2012 (that is only three years after the TEU came into force), codified 'human dignity' under its Article II. The whole construction of this value by the Fundamental Law prompted early criticism.²³ Since then and, in particular with the 9th Constitutional Amendment that came into force in December 2021,²⁴ that criticism appears to have been wholly warranted.²⁵ Indeed, and in essence, the Fundamental Law's codification of 'human dignity' has been part of a wider project of re-purposing the EU first foundational value so as to embed in Hungary's self-proclaimed 'illiberal democracy' a counter-model of what it means to be a human being. As a result, Hungary has broken away from the post-1945 human rights paradigm founded in human dignity.

The argument develops in three stages. Firstly, the key features of human dignity as the first foundational value of the EU are set out and discussed with reference to the original commitment to human dignity under the 1948 Universal Declaration of Human Rights which propelled this concept into the field of international human rights law,²⁶ and to the EU Charter which arguably substantiates it further under its chapter 1. Referred to here as the post-1945 *imago hominis* paradigm, the commitment to human dignity involves a commitment to value all human beings equally on the sole basis of their shared humanity. Crucial for understanding this idea more fully is to position this particular construction of human beings in the wider societal context that arises out of their mutual relationships based on equality and reciprocity. Secondly, using these key features of human dignity under Article 2 TEU as an analytical grid

¹⁸For example, it is not included in the EU Action Plan on Human Rights and Democracy 2020–2024, Brussels 25.03.2020, JOIN (2020) 5 final, nor in the New Strategic Agenda 2019–2024. No mention of human dignity is made in the human rights strategies of the EU, including the Anti-racism Action Plan, the Gender Equality Strategy and the LGBTIQ Strategy. The president of the Commission, Ursula von der Leyen, did use this term, but in a very generic way, in her short introduction to the 2020 EU Strategic Framework. Neither is human dignity considered in the 2023 *EU Rule of Law Report on Hungary*. Finally, the 2023 Communication on EU enlargement policy refers to 'the Copenhagen criteria' but not to 'human dignity': COM (2023) 690 final.

¹⁹S. Heselhaus, 'Human Dignity in the EU', in P. Becchi and K. Mathis (eds.), *Handbook of Human Dignity in Europe* (Edward Elgar Publishing, 2019), 943; C. Dupré, 'Article 1', in T. Hervey et al. (eds.), *A Commentary on the European Union Charter of Fundamental Rights* (Hart/Bloomsbury, 2021), 3.

²⁰It was not mentioned in the 1973 Declaration of European Identity (which referred to democracy, rule of law, social justice, economic progress and human rights). Neither is human dignity included in the 1993 Copenhagen Declaration as one of the conditionality criteria for accession. The first references to human dignity are to be found in the EU Charter adopted in 2002 and in (draft) EU primary law can be found in the Treaty establishing a constitution for Europe, 2004 under its formulation of the current Art. 2 TEU.

²¹<https://www.cvce.eu/en/obj/the_manifesto_of_ventotene_1941-en-316aa96c-e7ff-4b9e-b43a-958e96afbecc.html>. It opens with 'Modern civilization has taken as its specific foundation the principle of liberty which says that man is not a mere instrument to be used by others but that every man must be an autonomous life centre' (emphasis added), which echoes the Kantian categorical imperative on dignity. The 'Spinelli draft' (the draft treaty establishing a European Union of 14 February 1984) refers to dignity under Article 4.1: 'The Union shall protect the dignity of the individual and grant every person coming within its jurisdiction the fundamental rights and freedoms derived in particular from the common principles of the Constitutions of the Member States and from the European Convention for the Protection of Human Rights and Fundamental Freedoms.'

²²F. Foret and O. Calligaro (eds.), *European Values: Challenges and Opportunities of EU Governance* (Routledge, 2018); F. Schorkopf, 'Value Constitutionalism in the European Union', (2020) 21 *German Law Journal*, 956; A. Facchi and N. Riva (eds.), 'European Values in the Charter of Fundamental Rights' (2021) 34 *Ratio Juris*, special issue; R. Polak and P. Rohs (eds.), *Values - Politics - Religion: The European Values Study* (Springer, 2023); A. Guazzarotti, 'Tutela dei valori e democrazia illiberali nell' UE: lo strabismo di una narrazione "costituzionalizzante"', (2022) 2 *Costituzionalismo.it*, 1; and T.L. Boekestein, 'Making Do with What We Have: On the Interpretation and Enforcement of the EU's Founding Values', (2022) 23 *German Law Journal*, 431.

²³C. Dupré, 'Human Dignity: Rhetoric, Protection and Instrumentalisation', in G.A. Tóth (ed.), *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law* (CEU Press, 2012), 145.

²⁴Discussed by the Venice Commission Opinion 1035/2021 of 2 July 2021.

²⁵A.L. Pap, *Democratic Decline in Hungary: Law and Society in an Illiberal Democracy* (Routledge, 2018), 126; G. Deli and I. Kukorelli, 'Human Dignity in Hungary', in P. Becchi and K. Mathis (eds.), *Handbook of Human Dignity in Europe* (Springer, 2019), 393; and G. Halmái and N. Chronowski, 'The Decline of Human Dignity and Solidarity through the Misuse of Constitutional Identity: The Case of Hungary since 2010', in D. Bedford et al. (eds.), *Human Dignity and Democracy in Europe: Synergies, Tensions and Crises* (Edward Elgar Publishing, 2022), 177.

²⁶J. Morsink, *Article by Article: The UDHR for a New Generation* (University of Pennsylvania Press, 2022), 20; E. Daly and J. May, *Advanced Introduction to Human Dignity Law* (Edward Elgar Publishing, 2020), 18.

for assessing the Hungarian constitutional developments, the paper demonstrates that the numerous human rights violations documented in the Resolutions of the European Parliament since 2011, and especially since 2018, point to the construction of a counter-model of human beings that will be labelled here ‘*imago Urbanis*’ (by reference to the Prime Minister) living in a society of inequality and exclusion. Finally, this paper therefore argues that the numerous violations of human rights documented in the European Parliament’s resolutions amount to much more than the sum of their parts and outlines five key reasons why human dignity as the first Article 2 value is breached by the Hungarian regime and why the EU Commission’s decision not to engage fully with Article 7 is so problematic.

2 | HUMAN DIGNITY UNDER ARTICLE 2 TEU: VALUING ALL HUMAN BEINGS EQUALLY

While the use of ‘values’ rather than ‘principles’ has generated a fair amount of commentary,²⁷ the meaning and significance of ‘human dignity’ codified as the first of these values has attracted less academic attention. Scholarly approaches to human dignity as an EU value seem to oscillate between noting human dignity’s ‘emptiness’²⁸ due to an ‘absence of a moral content’²⁹ on the one hand, and, on the other hand, bunching together human dignity with ‘respect for human rights’.³⁰ In many ways, commitment to ‘human dignity’ is also a commitment to human rights protection. But the two are not interchangeable. This section unravels their connections in three complementary ways by bringing together scholarship on human dignity and human rights with scholarship on EU values.

Firstly, it is suggested that for its terse formulation to take a fuller meaning and significance, the codification of ‘human dignity’ needs to be positioned in the wider context of the post-1945 human rights paradigm in which it took place, with the 1948 Universal Declaration of Human Rights (UDHR) as its emblem and foundation.³¹ Secondly, according to this paradigm, dignity is intertwined with humanity under Article 1 UDHR stating that ‘all human beings are born free and equal in dignity and in rights’. Therefore, understanding human dignity requires understanding what it means to be a human being (rather than seeking to identify all the possible rights that may be related to dignity). Thirdly, and often forgotten, is the significance of human relationships (i.e., ‘the spirit of brotherhood’) which is designed to foster a society of equality and inclusion within which all human beings can be equally valued on the sole basis of their shared humanity.

2.1 | Endorsing the post-war human rights paradigm

As noted in scholarship, it makes good sense to connect the two values of ‘human dignity’ and ‘respect for human rights’ as this builds a useful hermeneutic bridge with the EU Charter.³² Admittedly, Article 1 of the EU Charter provides limited indication on possible ‘content’ for human dignity. There is, however, more to human dignity than Article 1. Indeed, the EU Charter provides unprecedentedly rich ‘content’ for this value under its first chapter ‘Dignity’ which groups, for the first time in an international human rights text, a set of absolute prohibitions on the death penalty (Article 2), on human reproductive cloning (Article 3), on inhuman and degrading treatment and punishment and on

²⁷Foret and Calligaro, above, n. 22, at 3–13; Boekestein, above, n. 22.

²⁸A. Plomer, ‘The Duality of Human Dignity in Europe’, in Foret and Calligaro (eds.), *European Values: Challenges and Opportunities of EU Governance* (Routledge, 2018), at 32.

²⁹Ibid., at 37.

³⁰Boekestein, above, n. 22; M. Klamert and D. Kochenov, ‘Article 2 TEU’, in M. Kellerbauer, M. Klamert, and J. Tomkin (eds.), *The EU Treaties and The Charter of Fundamental Rights* (Oxford University Press, 2019), 22–30.

³¹C. Tomuschat, *Human Rights: Between Idealism and Realism* (Oxford University Press, 3rd edn, 2014), 87; M. McManus, *Making Human Dignity Central to International Human Rights Law: A Critical Legal Argument* (University of Wales Press, 2019); J. Morsink, *The Universal Declaration of Human Rights and the Holocaust: An Endangered Connection* (Georgetown University Press, 2019); A. Gattini, R. Garciandia and P. Webb (eds.), *Human Dignity and International Law* (Brill, 2020); and E. Scarffe, ‘Towards a Dignity-Based Account of International Law’, (2022) 4 *Jus Cogens*, 207.

³²TBoekestein, above, n. 22, at 431–451.

torture (Article 4), and on servitude, forced labour, slavery and human trafficking (Article 5). As many of these prohibitions are also to be found in the European Convention on Human Rights (ECHR), related ECHR case law contributes to substantiate what human dignity under the TEU might entail.³³ In addition to EU Charter rights, the other Article 2 values might usefully be seen as providing a broad constellation of meaning for human dignity. That is, respecting this first value involves respecting ‘human rights’ and ‘the rights of persons belonging to minorities’. Furthermore, human dignity is closely related to ‘equality’ and to the ‘rule of law’.³⁴ Crucially, they also relate to ‘democracy’ in a mutually defining manner whereby respect for all these values can only be possible in a democracy and, conversely, the sort of democracy on which the EU is founded under Article 2 is characterised by commitment to and respect for these values.

As Article 2 TEU further notes, these values are ‘common to the Member States’.³⁵ Chronologically, and in relation to human dignity, the EU’s is in fact the last codification of this value. With it, the EU ‘catches up’ with developments in Member States, most (if not all) of which have given ‘human dignity’ similar prominence in their constitutions as the foundation of the constitutional order and/or the foundation of human rights.³⁶ The codification of Article 2 values does not only mark the EU’s turn to ‘value constitutionalism’.³⁷ With its specific codification of human dignity in very similar ways to those of Member States, the EU has (eventually) endorsed the post-1945 human rights paradigm arising out of the 1948 UDHR. In Europe, this paradigm has shaped the constitutional developments of human rights in Member States after (civil) wars and dictatorial and totalitarian regimes,³⁸ as well as triggered the adoption of the ECHR (despite the fact that it makes no reference to human dignity).³⁹ While it is always possible to glean clarification for human dignity by fine-combing EU secondary legislation which contains many references to it,⁴⁰ understanding the fuller significance of human dignity as the first foundational value requires considering this much broader picture.

Bearing this in mind, the absolute prohibitions on dehumanising people encompassed in the ‘Dignity’ chapter of the EU Charter can be read as an echo of the ‘barbarous acts that have outraged the conscience of mankind’, acknowledged by the Preamble of the UDHR. The ‘inviolable’ characteristic of human dignity under Article 1 of the EU Charter is an indication of the strength of the EU’s commitment to keep these ‘barbarous acts’ at bay. While the ‘Dignity’ chapter refers to a range of specific ‘barbarous acts’, it should, however, not be read as an exhaustive list as each category of these acts has been interpreted in an evolutive manner by the European Court of Human Rights. Similarly, what ‘barbarous acts’ might have entailed in 1948 is not specified in the UDHR. Considering the context of its drafting, it is difficult not to think that it does (partly) refer to the Holocaust.⁴¹ What ‘barbarism’ entails has varied over times and places, shaping the history of Europe.⁴² In the EU context today, it can, in very broad terms, be understood as referring to what might be the opposite of ‘human dignity’, thus providing a vivid sense of the meaning and significance of human dignity, albeit in a negative manner. The EU’s commitment to human dignity as its first foundational value can therefore be understood as a commitment to retain the memory of ‘barbarous acts’ and to keep barbarism at bay by constructing its own ‘civilisation’.⁴³ It is built in at the heart of the EU’s

³³Article 6 TEU and Article 52.3 EU Charter. The 2023 Reykjavik Declaration ‘welcome[s] the unanimous provisional agreement on the revised draft accession instruments as an important accomplishment in the process of accession of the European Union to the Convention, and we express our commitment to its timely adoption’, 8.

³⁴K. Lenaerts and M. Desomer, ‘Bricks for a Constitutional Treaty of the EU: Values, Objectives and Means’, (2002) 27 *European Law Review*, 377.

³⁵W. Weymans, ‘A Critical History of the Use of “European Values”’, in R. Polak and P. Rohs (eds.), *Values – Politics – Religion: The European Values Study* (Springer, 2023) 95–123.

³⁶C. Dupré, *The Age of Dignity: Human Rights and Constitutionalism in Europe* (Hart/Bloomsbury, 2015), at 53.

³⁷Schorkopf, above, n. 22, at 956–967.

³⁸Becchi and Mathis, above, n. 19.

³⁹J.-P. Costa, ‘Human Dignity in the Jurisprudence of the ECHR’, in C. McCrudden (ed.), *Understanding Human Dignity* (Oxford University Press, 2013), at 393.

⁴⁰Dupré, above, n. 19.

⁴¹Morsink, above, n. 31, at 283–313.

⁴²B. Wasserstein, *Barbarism and Civilization: A History of Europe in our Time* (Oxford University Press, 2nd edn, 2009).

⁴³The reference to ‘civilisation’ was contained in the preamble of the Treaty establishing a Constitution for Europe: ‘Conscious that Europe is a continent that has brought forth *civilisation*; that its inhabitants, arriving in successive waves from earliest times, have gradually developed the *values underlying humanism*: equality of persons, freedom, respect for reason ... Drawing inspiration from the cultural, religious and humanist inheritance of Europe, the values of which, still present in its heritage, have embedded within the life of society *the central role of the human person and his or her inviolable and inalienable rights*, and respect for law’ (emphasis added).

constitutional identity.⁴⁴ As might be recalled, the current Article 2 values, most of which were first formulated as the Copenhagen conditionality criteria in 1993 explicitly with the aim of distinguishing between the ‘us’ (the then European Union’s Member States) and ‘them’, that is, candidate countries (broadly post-communist states from Central and Eastern Europe), are now embedded under the conditions for EU accession (Article 49 TEU) and the EU external relations (Article 21 TEU).

Considered together, Article 2 values can be read as a preliminary indication that this ‘civilisation’ entails ‘pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men’. Arising out of these apparently ‘abstract and minimalist values’⁴⁵ is a particular image of human beings who make up the ‘civilisation’ of the EU. The word ‘image’ is chosen here because it captures human beings as they are, as well as an ideal of humanity and human relationships.⁴⁶ These two dimensions are to be found under Article 1 UDHR: at the time of drafting, not all human beings around the world were ‘born equal and free in dignity and in rights’. A very small proportion of people (then and still today) were born like this. Similarly, few human beings acted (and act) ‘towards one another in a spirit of brotherhood’. The concept of human dignity therefore captures this particular image of humanity in two complementary ways: as a description of what human beings are in the complex reality of human life, and as what they should be like individually and collectively (often referred as the dignity promise). Indeed, the question of the nature and boundaries of humanity has been a key trigger in the increasing uses made of the concept of human dignity in the field of bioethics in the 1990s–2000s.⁴⁷ As discussed below, the significance of these developments has overshadowed the scholarship on the (apparently simpler) question of what a born human being is.

2.2 | Human beings as ‘*imago hominis*’: the freedom to be oneself in the EU ...

Behind the deceptively simple and apparently tautological formulation of Article 1 UDHR, ‘all human beings are born free and equal in dignity and in rights’, is the fundamental idea that people are free to be themselves.⁴⁸ In 1948, this statement might have been (partly) understood as a commitment to break away from ideological and racial constructions of human beings that had characterised the Nazi regime in particular. In its conceptualisation as a tool to free human beings from any kind of pre-determined identity imposed by a higher authority, the idea of human dignity has more ancient philosophical roots. A first attempt to define human beings by reference to their freedom to self-determine can be traced back to the Renaissance philosopher Pico della Mirandola and was captured in his famous oration posthumously entitled ‘*De hominis dignitate*’.⁴⁹ At the risk of oversimplifying the richness and sophistication of his reflection, this can be understood as an attempt to shift away from the (at the time) exclusive and dominating ‘*imago dei*’ paradigm, whereby (male) human beings were considered exclusively as God’s creatures. Made in the image of God, men were designed to pursue God’s will. In his writings, Pico endeavoured to claim a little freedom for men. That is men’s freedom to self-create and to evolve, even though, ultimately, they had to fulfil God’s will. The question of the nature of humanity has been central to the development of philosophy. Completing the philosophical break away from a religious (i.e., Christian) construction of human beings is Enlightenment philosopher Immanuel Kant. He formulated what is both a modern construction of human beings on the sole basis of their reason (i.e., with no reference to God) and a concept of human dignity, that still provides today a broad philosophical foundation for

⁴⁴Human dignity as a value has played a key role in the ‘constitutional identity’ judicial dialogue: see D. Fromage and B. De Witte, ‘National Constitutional Identity 10 Years On: State of Play and Future Perspectives’, (2021) 27 *European Public Law*, 411–426.

⁴⁵Weymans, above, n. 35.

⁴⁶J. Komarek (ed.), *European Constitutional Imaginaries: Between Ideology and Utopia* (Oxford University Press, 2023).

⁴⁷In the Council of Europe, ‘human dignity’ was first codified in the so-called 1997 Oviedo Convention for the protection of human rights and dignity of the human being with regard to the application of biology and medicine adopted by the Council of Europe. See B. Edelman, *La Personne en Danger* (Presses Universitaires de France, 1999).

⁴⁸Daly and May, above, n. 26, at 18–30.

⁴⁹E. Cassirer, ‘Giovanni Pico della Mirandola: A Study in the History of Renaissance Ideas’, (1942) 2 *Journal of History of Ideas*, 123.

human rights law in Europe.⁵⁰ The two ideas are tightly intertwined: humanity is a dignity, Kant writes, and human relationships are based on reciprocity and equality among fellow human beings as formulated in his categorical imperative to never treat the other merely as a means to one's end.

This brief philosophical detour is important as it sheds light on human rights as being part of a century-long secularisation process of constructing human beings as free to be themselves, that is, without having to conform with any kind of identity pre-determined and imposed by a higher authority. The phrase '*imago hominis*' is used here to capture this process and ideal of freedom, and to distinguish it from the '*imago dei*' paradigm. Seen in this light, the absence of reference to 'Christian values' from the TEU preamble⁵¹ takes its full significance as the latest stage in constructing this '*imago hominis*' and letting people 'free to be themselves' as the EU LGBTIQ 2020–2025 strategy emphasises.⁵² So, while individuals might choose to define themselves by reference to Christianity, the codification of 'human dignity', with no reference to a higher authority or type of values, means that human beings are only defined in and by themselves.⁵³

So, what is a human being? As the UDHR indicates, it is enough to be born to be a human being and to be treated as such.⁵⁴ Sexual identity appears irrelevant and the UDHR makes no reference to sex at birth. While the issue of intersex babies might not have been on the drafters' mind in 1948, in 2000 the Charter made no reference to this either, neither does Article 2 TEU. However, what is important to note is that while under the UDHR, birth was the only criterion for humanity, there is no reference to the time before birth. Nor does the EU Charter refer to 'conception' as a moment (or process) from which humanity is constituted and protected under the Charter. Finally, this provision on human reproduction makes no reference to parents being of specific genders and/or of specific sexual orientations. The only restriction to acquiring human status – for beings who are genetically human and presumably would be born from a human being – contained in the EU Charter concerns human clones under Article 3 which prohibits 'reproductive human cloning'.⁵⁵ Aside from this, human beings are free to reproduce as they choose. Any other criteria of, for example, race, gender or ability are irrelevant. Indeed, equal treatment is deeply embedded in EU law as reflected by the codification of equality as another foundational value under Article 2, as well as under the EU Charter with an entire chapter on 'Equality'.

2.3 | ... and to belong to a society of equality and inclusion

While human status arises out of the biological fact of being born, biology on its own is not enough under the post-1945 human rights paradigm. The commitment to human dignity is therefore also about protecting people from being treated as less than human, from being dehumanised even though they may not die or be killed in the process. In other words, it is not enough to live what Agamben calls a 'bare life',⁵⁶ and in a condition that Arendt calls 'abstract nakedness'.⁵⁷ Being human under the post-1945 human rights paradigm is also about interacting with fellow human beings. This relational dimension of human dignity complements the individual dimension discussed above. It has been formulated in a range of ways with a common emphasis being put on relationships of a particular quality. Article 1 UDHR notoriously encourages human beings to 'act towards one another in a spirit of brotherhood [sic]'. This idea of

⁵⁰In the many writings about this, the work of Andrew Clapham stands out for its concision and clarity: *Human Rights and Non-State Actors* (Edward Elgar Publishing, 2013), at 533–559.

⁵¹The TEU preamble refers to religion as being only one inspiration for the current EU values: 'drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law'. A.J. Menéndez, 'A Pious Europe? Why Europe Should Not Define Itself as Christian', (2005) 30 *European Law Review*, 133.

⁵²'Union of Equality: LGBTIQ strategy 2020–2025', COM (2020) 698 final, 11 December 2020: 'Because being yourself is not your ideology. It's your identity. And no-one can ever take it away' (Ursula von der Leyen).

⁵³'La dignité, en tant qu'universel inaliénable, est un concept libérateur, autonome, "autoporté" dans la mesure où il ne vaut que par lui-même.' C. Fleury, *La Clinique de la Dignité* (Seuil, 2023), at 103.

⁵⁴Daly and May, above, n. 26, at 42–43.

⁵⁵E.D. Protopapadakis, *Creating Unique Copies: Human Reproductive Cloning, Uniqueness and Dignity* (Logos Verlag, 2023).

⁵⁶G. Agamben, *Homo Sacer: Sovereign Power and Bare Life* (trans. D. Heller-Roazen, Stanford University Press, 1998).

⁵⁷H. Arendt, *The Origins of Totalitarianism* (Harcourt, 1973), 145–155.

'brotherhood' brings in a societal dimension of human dignity, which has perhaps most persuasively been captured by Pierre Rosanvallon with what he calls the 'society of equals'.⁵⁸ That is, a society where all human beings are equally valued on the sole basis of their shared humanity. Reciprocity is therefore at the heart of human relationships despite all the differences that make each human being unique.⁵⁹ As recently noted by former president of the European Court of Human Rights (ECtHR), Róbert Spanó, this ideal of society is also at the heart of what he calls 'inclusive democracy' that was developed by the ECtHR.⁶⁰ Under Article 2 TEU, this dimension is captured by the values of dignity and of solidarity. As in the aftermath of the 2008 financial crisis, 'social Europe' became a less 'credible promise' on the part of the EU, the discourse on 'European values' has arisen as a way for the EU to self-identify in a more credible way.⁶¹ According to Philippe Van Parijs, 'solidarity intrinsically involves a relationship of symmetry and hence of equality'.⁶² In this, he continues, solidarity fundamentally differs from charity. As Article 34 of the EU Charter ('Solidarity' chapter) states, a key function of solidarity is to 'combat social exclusion and poverty' and 'to ensure a decent existence for all those who lack sufficient resources'. Despite the many shortcomings of the EU in its approach to solidarity,⁶³ two points must be underlined: solidarity is one of the Article 2 values, and, as noted by Van Parijs, the ultimate reason for solidarity is 'the common identity [of] being a member of the human species'.⁶⁴ Solidarity is therefore not conditional upon a particular human identity. As discussed below, the quality of the society arising out of the collective of all human beings is particularly important regarding the problematic issues in the 'Hungarian situation'.

3 | HUMAN BEINGS IN FOCUS: FROM RULE OF LAW TO HUMAN DIGNITY CRISES

The European Parliament has been prompt and proactive in engaging with the constitutional and political changes in Hungary following the election of Viktor Orbán as prime minister in April 2010.⁶⁵ It has documented a wider range of breaches of Article 2 values beyond the rule of law.⁶⁶ Moreover, it has regularly referred to human dignity as the first of these values in its resolutions about 'the Hungarian situation' that have been adopted since 2013.⁶⁷ In its Resolution of 12 September 2018, the European Parliament triggered Article 7(1) and called on the EU Commission to take the

⁵⁸P. Rosanvallon, *The Society of Equals* (trans. Arthur Goldhammer, Harvard University Press, 2013), 255–301. See also the 'Du-Bezug' of Peter Häberle, *Europäische Verfassungslehre* (Nomos, 6th edn, 2009), at 288; and Fleury, above, n. 53, at 109.

⁵⁹Pierre Rosanvallon uses three core concepts to understand 'equality': 'singularity', 'reciprocity' and 'commonality', see above, n. 58, at 260–277.

⁶⁰R. Spanó, 'Inclusive Democracy and the European Convention on Human Rights', (2023) 2 *European Human Rights Law Review*, 1, 3: 'The inclusive democratic concept under the Convention manifests itself in many different ways. [...] This is because the Convention requires that the interests of all human beings be the subject of good faith democratic action and not subjected to disproportionate and unreasonable majoritarian stigma and oppression. This is the only way that the three major moral principles of peaceful democratic life are protected, namely human dignity, equality and liberty. This is not a counter-majoritarian approach but simply the enforcement of the true scope and purpose of an inclusive concept of democracy' (emphasis added).

⁶¹Weymans, above, n. 35, at 107–108.

⁶²P. Van Parijs, 'European Values: Solidarity', (2021) 34 *Ratio Juris*, 98.

⁶³A.-C. Hartzén, A. Iossa and E. Karageorgiou (eds.), *Law, Solidarity and the Limits of Social Europe: Constitutional Tensions for EU Integration* (Edward Elgar Publishing, 2022).

⁶⁴Van Parijs, above, n. 62, at 99.

⁶⁵P7-TA (2011)0315 on the revised Hungarian constitution of 5 July 2011, adopted soon after Resolution P7-TA (2011)0094 Media law in Hungary, 10 March 2011.

⁶⁶In addition to the above, EP resolutions include: P7-TA (2012)0226 on the recent political developments in Hungary (16 February 2012); P8-TA (2015)0227 on the situation in Hungary (10 June 2015); P8-TA (2015)0461 on the situation in Hungary: follow up to the European Parliament resolution of 10 June 2015 (16 December 2015); P8-TA (2017)0216 on the situation in Hungary (17 May 2017); P9-TA (2020)0014 on ongoing hearings under Article 7(1) TEU regarding Poland and Hungary (16 January 2020); P9-TA (2021)0362 on breaches of EU law and of the rights of LGBTIQ citizens in Hungary (8 July 2021); P9-TA (2022)0204 on ongoing hearings under Article 7(1) TEU regarding Poland and Hungary (5 May 2022); P9-TA (2022)0422 on the existence of a clear risk of a serious breach by Hungary on the values on which the Union is founded (15 September 2022); P9-TA (2022)0324 on assessment of Hungary's compliance with the rule of law conditions under the Conditionality Regulation and state of play of the Hungarian RRP (24 November 2022); P9-TA (2023)0216 on breaches of the rule of law and fundamental rights in Hungary and frozen EU funds (1 June 2023); P9-TA (2024)0053 on the situation in Hungary and frozen EU funds (18 January 2024); and P9-TA (2024)0367 on ongoing hearings under Article 7(1) TEU regarding Hungary to strengthen Rule of Law and its budgetary implications (24 April 2024).

⁶⁷P7-TA (2013)0315 Situation of fundamental rights: standards and practices in Hungary (3 July 2013) (pursuant to the European Parliament resolution of 16 February 2012, P7-TA (2012)0053).

next step.⁶⁸ In its last resolution, of 24 April 2024, the Parliament noted that ‘over the past decade, Hungary has turned into a hybrid regime of electoral autocracy according to the relevant indices’.⁶⁹ It further noted that it ‘is strongly concerned about the further erosion of democracy, as well as the deterioration of the rule of law and fundamental rights and the situation in Hungary since the adoption of Parliament’s adoption of its Resolution of 15 September 2022’.⁷⁰

This section primarily draws on the Resolution of 15 September 2022 on the ‘existence of a clear risk of breach by Hungary of the values on which the EU is founded’, which updates and develops that of 12 September 2018.⁷¹ The 2022 resolution is the longest and most detailed of all resolutions adopted by the EU Parliament on Hungary since the coming into force of the Hungarian Fundamental Law in January 2012.⁷² The problematic issues identified in the 2022 Resolution are grouped under twelve headings: (i) functioning of the constitutional and electoral system, (ii) independence of the judiciary and of other institutions and the rights of judges, (iii) corruption and conflicts of interest, (iv) privacy and data protection, (v) freedom of expression including media pluralism, (vi) academic freedom, (vii) freedom of religion, (viii) freedom of association, (ix) the right to equal treatment including LGBTIQ rights, (x) the rights of persons belonging to minorities, including Roma and Jews, and protection against hateful comments against such minorities, (xi) the fundamental rights of migrants, asylum seekers and refugees, and (xii) economic and social rights. Out of this list, breaches of the rule of law value are easily identifiable under points (ii) and (iii); dysfunctions of (procedural/representative) democracy are noted under point (i).

The other points, however, are not related by the Parliament to any specific Article 2 values and most of these are about the ways in which certain people are treated by the Hungarian regime just because of who they are (rather than what they do). These attacks on certain people’s rights have been noted by the EU Parliament since (at least) 2013.⁷³ They have also been well documented and analysed in scholarship.⁷⁴ It is submitted that these attacks on certain people’s rights and identity engage human dignity as the EU’s first foundational value. The EU Parliament, however, does not connect its numerous ‘concerns’ with human dignity under Article 2. By reading the resolutions through the prism of human dignity as set out above, this section demonstrates that the concerns identified by the European Parliament correspond to attacks on key features of the first foundational value. This brings to light a new characteristic of the Orbán regime in addition to its systemic breaches of the rule of law, namely that it also involves a deliberate and systematic construction of a particular model of what it means to be a human being in ‘illiberal’ Hungary.

3.1 | Human beings as ‘*imago Orbánis*’

Analysing the European Parliament’s resolutions through the prism of human dignity as the first Article 2 value reveals that the Orbán regime has consistently and relentlessly pursued its own version of what it means to be a

⁶⁸Resolution P8-TA (2018)0340 on a proposal calling on the Council to determine, pursuant to Article7(1) of the Treaty on the European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131 (INL)) (12 September 2018). The reasoned proposal (Interinstitutional File: 2018/0902 (NLE), 12.266/18) submitted by the Parliament to the Council of the European Union, based on that resolution, is available on: <<https://data.consilium.europa.eu/doc/document/ST-12266-2018-INIT/en/pdf>>.

⁶⁹EP Resolution of 18 January 2024 (M) and EP Resolution of 24 April 2024 (2).

⁷⁰EP Resolution of 18 January 2024 (1). The Parliament ‘is appalled by the persistent systemic and deliberate breach of democracy’: EP Resolution of 24 April 2024 (1).

⁷¹Resolution of 12 September 2018 (P8-TA-PROV (2018)0340) listed the following concerns: (i) Functioning of the constitutional and electoral system; (ii) independence of the judiciary and of other institutions and rights of judges; (iii) corruption and conflicts of interests; (iv) privacy and data protection; (v) freedom of expression; (vi) academic freedom; (vii) freedom of religion; (viii) freedom of association; (ix) right to equal treatment; (x) rights of persons belonging to minorities, including Roma and Jews, and the protection against hateful statements against such minorities; (xi) fundamental rights of migrants, asylum seekers and refugees; and (xii) economic and social rights. Complemented by Resolutions of 3 July 2023, of 18 January 2024 and of 24 April 2024. Where relevant, these resolutions are analysed with reference to the Fundamental Law as it results from its 9th Amendment of 2021.

⁷²EP Resolution of 15 September 2022 (P9-TA (2022)0324).

⁷³Resolution of 3 July 2013 noted concerns about the rights of minorities, including Roma people and LGBTIQ as well as the criminalisation of homeless people.

⁷⁴For example: T. Drinóczi and A. Bień-Kacala (eds.), *Rule of Law, Common Values and Illiberal Constitutionalism: Poland and Hungary Within the European Union* (Routledge, 2021); R. Csehi, *The Politics of Populism in Hungary* (Routledge, 2023); and B. Bakó, *Challenges to EU Values in Hungary. How The European Union Misunderstood the Government of Viktor Orbán* (Routledge, 2023).

human being at the heart of Hungary's self-proclaimed 'illiberal democracy', that is, an autocracy according to the European Parliament. Unlike democracy's human beings, who are free to self-identify as *imago hominis*, those living in autocratic Hungary (and arguably in all autocracies) must conform with the model of humanity constructed and imposed by the autocrat. The key features of this Hungarian *homo autocraticus* have been well reported in the media: binary and heterosexual (against LGBTIQ people), ethnically Magyar (against 'mixed race'⁷⁵), and Christian (against Jews and Muslims). As Hungary is the first of the EU Member States to develop this sort of counter-model to the *imago hominis*, it will be referred to here as the *imago Orbanis* model. Identifying its origin at the heart of the Hungarian 'illiberal democracy', this choice of words is also meant to underline the possibility of the *imago Orbanis* model becoming a prototype for the construction of human beings in other similarly 'illiberal' and 'autocratic'⁷⁶ EU Member States.⁷⁷ As discussed below, the features of this new model of what it means to be a human being have been developed, and made constitutionally binding on all those living in Hungary, by way of three complementary strategies: pre-determination of human identities along mutually reinforcing criteria of Christian values and biology; disappearance of LGBTIQ people from the Fundamental Law; and instrumentalization of women as existing primarily (if not exclusively) to ensure 'the survival of the [Hungarian] nation'.

3.1.1 | Pre-determination of human beings: 'Christian values' and biology

In its September 2022 Resolution, the European Parliament noted three types of concerns in relation to 'freedom of religion': (i) the incomplete execution of an ECHR judgment against Hungary triggered by the 2011 Church Act; (ii) the 2021 Venice Commission's recommendation that the public school system must provide an objective and pluralist curriculum, avoiding indoctrination and discrimination on all grounds, while respecting parental convictions and their freedom to choose between religious and non-religious classes; and (iii) the continued pressure on civil society as noted by the EU Commission 2022 Rule of Law Report.⁷⁸ The European Parliament has also recurrently noted a broad lack of equal protection of human rights regardless of religion.⁷⁹ In particular, the Parliament noted that 'antisemitism is a recurring problem manifesting itself in hate speech', including by the Prime Minister 'using polemic attacks including clearly anti-Semitic stereotypes against George Soros'.⁸⁰ These ongoing issues point to the use of 'Christian values' for shaping the *imago Orbanis* model of human beings. The preamble of the Fundamental Law is replete with references to Christianity and Christian values and gives prominence to Saint Stephen and his crown in Hungary's constitutional narrative of self-identity. In the absence of reference to other religions or indeed to non-religious beliefs or worldviews, the assumption is that all people living in Hungary are Christian and live in accordance with these 'Christian values'. What is more problematic is that this particular version of Hungarian history and emphasis on 'Christian values' are explicitly binding on 'every organ of the state' under Article R (3) and (4) of the Fundamental Law.⁸¹ So, the concept of human dignity, which captures what it means to be a human being enshrined under Article II of the Fundamental Law, is not value-neutral and conceptually open: its meaning is pre-determined by these values.⁸² Concretely, making such an exclusionary worldview constitutionally binding for all has given rise to a particular model of human beings. Emblematic of the *imago Orbanis* model, and noted by the European

⁷⁵Orbán has made it clear that he wants 'no race mixing in Hungary', reported in *The Guardian*, 24 July 22.

⁷⁶Terminology used by respectively Viktor Orbán and the European Parliament. The question of whether a difference between the two might also correspond (or appear) in a more complete construction of the *homo autocraticus* will need to be addressed elsewhere.

⁷⁷See Polish developments under the PiS party until October 2023 and Bulgaria's adoption of anti-LGBTIQ legislation on 7 August 2024 that 'prohibits promotion and LGBT+ propaganda' in schools. *Le Monde*, 13 August 2024.

⁷⁸EP Resolution of 15 September 2022 (BU-BW).

⁷⁹Noted since EP Resolution of 5 July 2011 (1.c)

⁸⁰EP Resolution of 12 September 2018 (51) and (58).

⁸¹Article R: (3) 'The provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievements of our historic constitution. (4) The protection of the constitutional identity and Christian culture of Hungary shall be an obligation of every organ of the State.'

⁸²Dupré, above, n. 23, 145–169; and G. Deli and I. Kukorelli, above, n. 25, 393–414.

Parliament, is that the foetus's right to life is protected 'from the moment of conception' (Article II Fundamental Law), and that heterosexual couples are expected to marry, with the Fundamental Law enshrining a very narrow model of the family unit (Article L).⁸³ According to the National Avowal, emphasis on this particular set of values is designed to address decades of 'moral decay' in the twentieth century. Orbán has made no secret that his distaste for the EU crystallises around its values.⁸⁴ In so doing, he appears to have forgotten that Hungary 'played an active role in the work of the Convention and the Intergovernmental Conference in 2003 and 2004 in, among other issues, the drafting of Art. 2 TEU'.⁸⁵ So, if there is a 'culture war', it is not just against the EU, but also against Hungary itself, namely in its 1989–2011 incarnation under the previous constitution revised in 1989,⁸⁶ as well as against all those Hungarians who do not define themselves by reference to 'Christian values', including Jews, Muslims and atheists.⁸⁷ As noted by Kim Lane Scheppele, those 'Christian values', together with the nature and role ascribed to the Crown of Saint Stephen by the National Avowal, are themselves a particularly questionable construction of Hungarian history.⁸⁸ In addition, the 'Christian values' à la Orbán are a narrow interpretation of what Christianity entails. Pope Francis himself, who is not unauthoritative on this matter, has publicly called for much more tolerance and inclusion on the part of the Hungarian government, particularly in relation to migrants and LGBTIQ people.⁸⁹ Rather than reflecting a genuine commitment to 'Christian values', what arguably matters therefore is the instrumentalization of a particular conception of what they involve,⁹⁰ in order to legitimate a conservative and selective model of what it means to be a human being in Hungary. As noted by the Resolution of 18 January 2024, the Act on the national sovereignty protection 'provides the [Hungarian] executive with even more opportunities to silence and stigmatise independent voices and opponents'.⁹¹

Finally, the religious (Christian) pre-determination built into the *imago Orbani*s model is compounded (and sometimes conflated with) a biological pre-determination in the constitutional construction of human beings, whereby biology takes precedence over freedom and autonomy. This biological pre-determination stems from the Fundamental Law and has shaped the construction of human beings in three stages, gradually embedding biological determinism more deeply in the constitutional order. Chronologically, the first problematic feature is that 'the life of the foetus shall be protected from the moment of conception' codified in the 2011 version of the Fundamental Law, the 'unclear wording' of which was noted by the Parliament.⁹² Adopted 10 years later, the 9th Constitutional Amendment has added two features to this construction of human beings as *imago Orbani*s.⁹³ Firstly, at birth, babies' sexual identity is either male or female (Article XVI Fundamental Law). This binary approach is presented as a 'biological principle' by the explanatory memorandum to the 9th Amendment,⁹⁴ and simply denies the existence of intersex babies.⁹⁵

⁸³Noted since EP Resolution of 5 July 2011 at H. EP Resolution of 3 July 2013: 'when reviewing the definition of "family", to take into account the legislative trend in Europe to broaden the scope of the definition of family and the negative impact of a restricted definition of family on the fundamental rights of those who will be excluded by the new and more restrictive definition.'

⁸⁴M. Bonelli and M. Claes, 'Crossing the Rubicon? The Commission's Use of Article 2 TEU in the Infringement Action on LGBTIQ+ Rights in Hungary', (2023) 30 *Maastricht Journal of European and Comparative Law*, 9; and A.L. Pap, above, n. 25, at 60. See also the "'stop Brussels" national consultation' noted in EP Resolution of 17 May 2017 (K).

⁸⁵EP Resolution of 3 July 2013 (S). This is also an oversimplification of what these EU values entail.

⁸⁶Between 1989 and 1998, human dignity was a key argument used by the constitutional court to move away from the communist ideology and to lay the foundations of a liberal concept of human rights in line with the post-1945 paradigm. C. Dupré, *Importing the Law in Post-Communist Transitions: The Hungarian Constitutional Court and the Right to Human Dignity* (Hart, 2003).

⁸⁷This was made explicit under the System of National Cooperation promoted in the early years of the regime: A.L. Pap, above, n. 25, at 69–79. Orbán made it clear that he intends to 'protect the EU Christian culture by rejecting the ideology of multiculturalism' (*Le Monde*, 31 July 2018).

⁸⁸Kim Lane Scheppele demonstrates this eloquently in 'The Life and Death of Constitutions' (2023) 57 *Law Society Review*, 423–443.

⁸⁹<<https://www.reuters.com/world/pope-says-church-open-everyone-including-lgbt-people-has-rules-2023-08-06/>> and <<https://www.vaticannews.va/en/pope/news/2023-12/pope-message-global-refugee-forum-geneva-rights-dignity.html>>.

⁹⁰This is re-enforced and implemented by tight and discriminatory control over what constitutes a 'Church' under the Act CCVI of 2011 as noted by EP Resolution of 12 September 2018 (37–39).

⁹¹EP Resolution of 18 January 2024 (E) and (1).

⁹²EP Resolution of 5 July 2011 (H).

⁹³See Venice Commission Opinion 1035/2021 on Hungary of 2 July 2021, quoted by EP Resolution of 8 July 2021 (11).

⁹⁴As quoted by the above Opinion of the Venice Commission: 'sex at birth is a gift or a factor that cannot be changed: it is a biological principle. Human dignity thus includes the right of every child to self-identity according to their sex at birth, part of which is to be protected against mental or biological interference affecting their physical and mental integrity'; see above, n. 93 (29/31).

⁹⁵1.7% babies are born with "intersex traits", comparable to the number of people born with red hair' according to Amnesty International, 2018 Intersex Awareness Day: <<https://www.amnesty.org/en/latest/news/2018/10/its-intersex-awareness-day-here-are-5-myths-we-need-to-shatter/>>. See, also, E.M. Horowitz, 'Intersex Children: Who Are We Really Treating?' (2017) *Medical Law International*, 183.

Secondly, under the revised Article L (1) on family and marriage, the Fundamental Law pre-determines parental identities by exclusive reference to their respective biological sex: ‘The mother shall be a woman and the father shall be a man.’ As such this is not an entirely inaccurate statement. However, as the European Parliament noted with reference to the Venice Commission Opinion of 2 July 2021, constitutional amendments should ensure that ‘the principle of non-discrimination [...] including on the basis of sexual orientation and gender identity, is thoroughly implemented’.⁹⁶ Why include such a ‘facts of life’ statement in the Fundamental Law? As discussed below, this is part of a strategy for disappearing LGBTIQ people through constitutional amendment.

3.1.2 | Constitutional disappearance of LGBTIQ people

Article XVI of the Fundamental Law (introduced with the 9th Constitutional Amendment) entails much more than discrimination on the ground of sex and gender identity. It is arguably about constructing another feature of human beings as ‘*imago Orbansis*’ as exclusively binary and heterosexual through engineering the disappearance of LGBTIQ people from the Fundamental Law.⁹⁷ The first stage of this process involved the ‘omission’ of a reference to gender and sexual identity in the Fundamental Law when it was initially adopted in 2011.⁹⁸ The second stage, undertaken 10 years later, involves reliance on biological pre-determinism to deny the mere existence of intersex babies through the 9th Constitutional Amendment. The consequence of that amendment is not ‘just’ that intersex babies and transgender people are denied a constitutional right to self-identity,⁹⁹ which is problematic enough on its own. With an implacable logic, this provision denies the fact that (some) transgender people can even have been born. Someone who was not born cannot exist. In terms of the *imago hominis* image, this biological fact means that whoever was not born is not a human being. As a result, transgender people are denied human status under the Fundamental Law. The third stage in the process of constitutional disappearance takes place with the amendment of Article L on marriage and family, which, while being biologically specific, makes no reference to LGBTIQ people.¹⁰⁰ Their existence is denied by the choice of wording, and so they are disappeared from the text. We must assume that this wording was deliberate on the part of drafters, as the close monitoring of the constitutional amendment by lawyers inside and outside Hungary was to be expected. This constitutional status of LGBTIQ people as being non-existent recalls the ‘social death’ of slaves in antiquity, and more recently.¹⁰¹ In the Hungarian context, the process of disappearing LGBTIQ people hits at the heart of the *imago hominis* paradigm, which grants human status solely through birth. In practice, LGBTIQ people might still be able to form stable relationships and raise children.¹⁰² This might be more difficult for them, but not impossible. However, as marriage under Article L is the only constitutional framework for human reproduction, this provision denies LGBTIQ people the constitutional possibility of reproducing. The significance of this phrasing for the construction of an *imago Orbansis* model becomes chilling when one recalls that slaves are ‘beings without parents’. As French anthropologist Claude Meillassoux explained ‘he who was never born, cannot transmit life; deprived of ascendants, he cannot have descendance’.¹⁰³ On this basis, (revised) Articles L and XV of the Fundamental Law can be understood as a reverse definition of the non-human: they who cannot transmit life,

⁹⁶EP Resolution of 15 September 2022 (CN).

⁹⁷The term ‘disappearance’ is explicitly chosen for its echo to the disappearances of political opponents in dictatorial regimes, such as, infamously, Chile.

⁹⁸Article XV of the Fundamental Law (in 2011). EP Resolution of 3 July 2013 (54). K. Kovács, ‘Equality: The Missing Link’, in G.A. Tóth (ed.), *Constitution for a Disunited Nation: On Hungary’s 2011 Fundamental Law* (CEU Press, 2012), 171–196.

⁹⁹EP Resolution of 8 July 2021 (14).

¹⁰⁰Article L (1): Hungary shall protect the institution of marriage as the union of one man and one woman established by voluntary decision, and the family as the basis of the survival of the nation. Family ties shall be based on marriage or the relationship between parents and children. The mother shall be a woman, the father shall be a man. (2) Hungary shall support the commitment to have children.’ The changes introduced by the 9th Amendment are underlined.

¹⁰¹O. Patterson, *Slavery and Social Death: A Comparative Study* (Harvard University Press, 2018).

¹⁰²Opinion of the Venice Commission 1035/2021 of 1 July 2021, at point 24.

¹⁰³C. Meillassoux, *Anthropologie de l’esclavage: Le Ventre de Fer et d’Argent* (1986), quoted in P. Ismard, *Le Miroir d’Oedipe: Penser l’Esclavage* (Seuil, 2023), 133. Author’s translation.

cannot be born. Deprived of their capacity to transmit life by the Fundamental Law, LGBTIQ people have been turned into ‘non-people’¹⁰⁴ by the 9th Constitutional Amendment in 2021.

3.1.3 | Instrumentalising women for the ‘survival of the nation’

The deteriorating situation of women in Hungary has been documented in detail by the EP since 2011.¹⁰⁵ While it has been constructed as an issue of (un)equal treatment under EU law since 2018,¹⁰⁶ it is also a human dignity issue under Article 2 TEU. That is, the ‘situation in Hungary’ is reaching the point where women are instrumentalised for achieving the constitutional aim of ‘survival of the [Hungarian] nation’ (Article L). The first step in this strategy consisted in codifying the foetus’s right to be born under the dignity provision (Article II), a rather atypical formulation by international comparison,¹⁰⁷ and one not necessary to protect foetal life under ECHR law.¹⁰⁸ This provision has been rightly read as preparing the ground for constitutional restriction of the right to abortion as happened in Poland where the dignity provision is phrased in a similar way.¹⁰⁹ In Hungary, abortion has not been (so far) prohibited, but pregnant women now have to listen to their foetus’s ‘heartbeat’ as part of the ‘counselling’ when seeking an abortion.¹¹⁰ These developments, together with Article II, can be read with reference to Hungary’s support for the commitment to have children (Article L.2). The second step is taken with the 9th Constitutional Amendment discussed above with its explicit declaration that ‘the mother shall be a woman’. To be clear, men are also constructed as ‘fathers’ in that provision, and the Fundamental Law’s concern with ‘survival of the nation’ and emphasis on human reproduction also affects them. However, women’s identity tends to be reduced to their biological function of human reproduction, while men’s is not. Biology is used not just to pre-determine what it means to be a woman, but also to over-determine women’s identity, in the sense that they are mostly (if not exclusively) constructed as ‘mothers’.¹¹¹ Despite the Fundamental Law’s emphasis on women being mothers, the 2018 Resolution notes that ‘maternal mortality rate’ needs to be reduced,¹¹² raising questions about how much women as mothers are valued by the Hungarian regime compared to ‘the survival of the nation’. Moreover, this identity is constructed as being inferior to that of ‘men as fathers’ as exemplified by new schoolbooks ‘depicting women as primarily mothers and wives, and in some cases, depicting mothers as less intelligent than fathers’.¹¹³ This positioning of women as inferior to men is not limited to schoolbooks. It is evidenced in the ‘patriarchal stereotyped attitudes [that] still prevail in Hungary’ where the Istanbul Convention on preventing and combatting violence against women and domestic violence ‘has not yet been ratified’.¹¹⁴ Women tend to be confined to the family sphere and, as a result, ‘the political representation of women is strikingly low [...] and there are no legal requirements to promote gender equality in elections’.¹¹⁵ So, overall, while the Fundamental Law stipulates that ‘women and men shall have equal rights’ (Article XV), the picture arising out of the European Parliament’s resolutions is one of a patriarchal and paternalistic

¹⁰⁴In a quote cited by the Venice Commission, Viktor Orbán is clear that they are not ‘Hungarian’: ‘Hungarians are very tolerant in relation to this phenomenon. In fact, Hungarians are so patient that we even accept provocations of this kind with patience—although not without comment. So, we can safely say that as regards homosexuality Hungary is a patient, tolerant country. But there is a red line that must not be crossed, and this is how I would sum up my opinion: “Leave our children alone”.’ (Opinion 1035/2021 of 1 July, point 29).

¹⁰⁵EP Resolution of 5 July 2011 (H).

¹⁰⁶EP Resolution of 12 September 2018 (46–50).

¹⁰⁷L. Hocror, ‘Abortion’, in C. Binder et al. (eds.), *Edward Elgar Encyclopaedia of Human Rights* (Edward Elgar Publishing, 2022) 3–8.

¹⁰⁸ECHR, *Vo v. France* of 8 July 2004. See also the European Court of Human Rights, ‘Factsheet on Reproductive Rights’ (December 2023): <https://www.echr.coe.int/documents/d/echr/FS_Reproductive_ENG>.

¹⁰⁹A. Gliszczyńska-Grabias and W. Sadurski, ‘The Judgment That Wasn’t (but which nearly Brought Poland to a Standstill): “Judgment” of the Polish Constitutional Tribunal of 22 October 2020, K1/20’, (2021) 17 *European Constitutional Law Review*, 130–153.

¹¹⁰O. Dyer, ‘Hungary Requires Doctors to Present Women with Fetal Vital Signs Before Abortion’, (2022) *British Medical Journal*, 378.

¹¹¹EP Resolution of 24 April 2024 (X).

¹¹²EP Resolution of 12 September 2018 (74).

¹¹³EP Resolution of 12 September 2018 (46), with reference to UN Working group on discrimination against women in law and in practice.

¹¹⁴EP Resolution of 12 September 2018 (47).

¹¹⁵EP Resolution of 12 September 2018 (46); EP Resolution of 15 September 2022 (CH) and (CQ).

society.¹¹⁶ As discussed below, the construction of women's identity is emblematic of a wider construction of a society of inequality and exclusion.

3.2 | A society of inequality and exclusion

The European Parliament has expressed concerns about minorities' rights and social rights since 2011,¹¹⁷ and since 2013 these have been phrased in terms of 'respect of the rights of persons belonging to minorities'.¹¹⁸ The European Parliament has also regularly expressed concerns about the situation of 'migrants, asylum-seekers and refugees' since 2015,¹¹⁹ including in the 2024 Resolutions.¹²⁰ It is argued that these concerns bring to light the Hungarian regime's strategy of systematic attacks on the 'spirit of brotherhood' at the heart of the human dignity paradigm. Replacing it is what can be referred to as a society of inequality and exclusion. That is, a society, in which, contrary to the dignity paradigm and to the EU commitments to equal treatment and social inclusion, not all human beings are equally welcomed and valued. Arising out of the European Parliament's Resolutions are three constitutive features of this society: physical exclusion of certain groups of people; restriction of social and economic rights to those who deserve them; and a consequent disempowerment of civil society.

3.2.1 | Physical exclusion: migrants, asylum-seekers, refugees, Roma, homeless people

As noted above, through constitutional amendments, the Hungarian regime has pursued a strategy of exclusion from society of certain people on the sole basis of who they are. LGBTIQ people are disappeared from and by the Fundamental Law, and they are excluded from the family unit. Heterosexual women are included in the 'family', their instrumentalization, however, means that they are excluded from the work sphere and political sphere. Emblematic of this strategy of exclusion has been the physical exclusion of migrants, asylum seekers and refugees from the territory of Hungary. This is due to Hungary's breaching of the principle of non-refoulement,¹²¹ including automatic removal to transit zones regardless of their personal circumstances.¹²² Moreover, and with reference to the Special Representative of the Secretary General of the Council of Europe, the European Parliament further noted 'violent pushbacks' resulting in 'injuries and bodily harm' at the border with Serbia and reported that no action had been taken by the Hungarian government.¹²³ With reference to the UN Special Rapporteur on the human rights of migrants, the Parliament underlined that qualifying the Hungarian situation as a 'crisis' 'does not correspond to the reality and has had a severe negative impact on the human rights of migrants [and] asylum seekers'. The Parliament further noted with the Strasbourg court that 'collective expulsions' without assessing migrants' individual situations

¹¹⁶L. di Meco and S. Hesterman (eds.), 'A Perfect Propaganda Machine: A #ShePersisted Analysis of Gendered Disinformation and Online Abuse Against Women in Politics in Hungary', *Social Europe*, March 2023 <https://she-persisted.org/wp-content/uploads/2023/03/ShePersisted_Hungary.pdf>; Csehi, above, n. 74.

¹¹⁷EP Resolution of 5 July 2011 (f) and (g).

¹¹⁸EP Resolution of 3 July 2013 (CC) and Annex (72). EP Resolution of 12 September 2018: 'Rights of persons belonging to minorities including Roma and Jews, and protection against hateful statements against such minorities' (Annex 51–61) and 'Fundamental rights of migrants, asylum seekers and refugees' (62–73) and 'Economic and social rights' (73–77). EP Resolution of 15 September 2022: 'Rights of persons belonging to minorities including Roma and Jews, and protection against hateful statements against such minorities' (CS–CY) and 'The fundamental rights of migrants, asylum seekers and refugees' (CZ–DO) and 'Economic and social rights' (DP–DS).

¹¹⁹EP Resolution 10 June 2015 (5 and 7) and 16 December 2015 (2). EP Resolution of 12 September 2018 (62–72) and EP Resolution of 15 September 2022 (CZ–DO).

¹²⁰EP Resolution of 18 January 2024 (C) and (J). EP Resolution of 24 April 2024 (Q) and (W).

¹²¹EP Resolution of 15 September 2022 (DH) and (DI).

¹²²EP Resolution of 12 September 2018 (72).

¹²³EP Resolution of 12 September 2018 (66). Recall also the border fences that were hastily built in 2015: *The Guardian*, 22 June 2015, at <<https://www.theguardian.com/world/2015/jun/22/migrants-hungary-border-fence-wall-serbia>>; and in 2017 'Hungary built new high tech border fence with few migrants in sight' <<https://www.reuters.com/article/idUSKBN1692NF/>>.

breach the ECHR.¹²⁴ When on Hungarian territory, ‘foreign nationals’ reported considerable instances of ‘ill-treatment by police officers and armed guards working in immigration or asylum detention facilities’. This included concerns about the right to life and the prohibition on torture arising in the transit zones¹²⁵; and about asylum-seekers challenging judicial decisions of inadmissibility being refused food by the immigration authorities in mid-August 2018.¹²⁶

Moreover, as documented by the European Parliament since 2013,¹²⁷ policies of exclusion have disproportionately affected Roma people who represent about 7% of the total population according to EU Commission data.¹²⁸ Mistreatment of Roma people is not new in Hungary,¹²⁹ but what seems new, at least since the pre-1945 totalitarian regimes, is its systematic nature. In 2018, the European Parliament noted that Roma people continued to suffer from ‘systemic discrimination and inequalities in all fields’.¹³⁰ In 2022 it highlighted their ‘structural difficulties in all spheres of public and private life’,¹³¹ as well as their ongoing ‘segregation and extreme poverty’.¹³² Roma children in particular are subjected to harsh measures of exclusion. Due to poverty, they are taken away from their families,¹³³ they tend to leave school early and to be excluded from mainstream schooling on the basis of special needs misdiagnosis.¹³⁴ Roma families also suffer from forced eviction from their homes,¹³⁵ and they tend to be excluded from the national health system.¹³⁶ They are the frequent targets of ‘distinctively harsh violence’ with ‘paramilitary marches and patrolling of Roma-populated villages’.¹³⁷ Finally, a distinctive feature of this exclusion strategy has infamously affected homeless people following the 4th Amendment of the Fundamental Law in 2013,¹³⁸ and the 7th Amendment of 20 June 2018.¹³⁹ The European Parliament’s Resolution of 15 September 2022 noted that the Constitutional Court rejected ‘all the petitions [challenging criminalisation of homelessness] submitted by the ordinary courts on all grounds and refused to take into account any submissions that did not support the government’s reasoning’.¹⁴⁰ Homeless people have long suffered a range of exclusion and discrimination, but what is new under the Orbán regime is the use of the Fundamental Law as a weapon against them and their belonging to the ‘human family’ and ‘the society of equals’.

¹²⁴EP Resolution of 15 September 2022 (DK) and (DL).

¹²⁵EP Resolution of 12 September 2018 (64–65).

¹²⁶EP Resolution of 12 September 2018 (67).

¹²⁷EP Resolution of 3 July 2013 (53).

¹²⁸<https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combating-discrimination/roma-eu/roma-equality-inclusion-and-participation-eu-country/hungary_en>.

¹²⁹I. Pogany, *Roma Café: Human Rights and the Plight of Romani People* (Pluto Press, 2004); and L. Kürti, ‘Anti-minority Prejudice in Hungary: Gypsy Business, Roma Politics’, in S.P. Ramet and L. Kürti (eds.), *Civic and Uncivic Values in Hungary: Value Transformation, Politics and Religion* (CEU Press, 2024).

¹³⁰EP Resolution of 12 September 2018 (52).

¹³¹EP Resolution of 15 September 2022 (CV).

¹³²EP Resolution of 15 September 2022 (CU).

¹³³EP Resolution of 12 September 2018 (76).

¹³⁴EP Resolution of 12 September 2018 (52).

¹³⁵EP Resolution of 12 September 2018 (56).

¹³⁶EP Resolution of 12 September 2018 (52).

¹³⁷EP Resolution of 12 September 2018 (51).

¹³⁸EP Resolution of 15 September 2022 (DS). The 4th Amendment of the Fundamental Law introduced a new version of Article XXII, which read: ‘(1) Hungary shall strive to provide every person with decent housing and access to public services. (2) The State and local governments shall also contribute to creating the conditions of decent housing by striving to provide accommodation to all homeless people. (3) In order to protect public order, public security, public health and cultural values, an Act of Parliament or a local ordinance may declare illegal staying in a public area as a permanent abode with respect to a specific part of such public area.’

¹³⁹Following the 7th Amendment of 20 June 2018, Article XXII (3): ‘Using a public space as a habitual dwelling shall be prohibited.’ EP Resolution 2018 point 73. Migrants were accused of ‘terrorist acts’. Emblematic of the intention to attack the ‘spirit of brotherhood’ has been the case of ‘Ahmed H., a Syrian resident in Cyprus who had tried to help his family flee Syria and cross the Serbian–Hungarian border in September 2015, was sentenced by a Hungarian court to 7 years’ imprisonment and 10 years expulsion from the country on the basis of charges of “terrorist acts”’ (EP Resolution of 12 September 2018 (69)).

¹⁴⁰EP Resolution of 15 September 2022 (DS).

3.2.2 | Social and economic rights for the 'good Hungarian' only¹⁴¹

Concerns about social and economic rights have been raised by the European Parliament since 2017, primarily in relation to Roma people.¹⁴² The following year, in the Resolution of 12 September 2018, 'social and economic rights' issues are grouped under a separate heading.¹⁴³ The Resolution of 15 September 2022 notes recurring issues about 'economic and social rights',¹⁴⁴ including access to the labour market for the most vulnerable groups, access to essential services for all (housing, education and primary care), lesser status of children especially Roma and LGBTIQ children (with reference to the 2020 UN Committee of the Rights of Children recommendations), drastic restriction to the right to strike making it impossible, and reference to the Constitutional Court's case confirming criminalisation of homelessness.¹⁴⁵ It is suggested that these concerns engage the 'spirit of brotherhood' dimension of the dignity paradigm and that they do so in two distinct ways. Firstly, as is obvious from the resolutions, the whole fabric of society is being affected rather than specific and isolated issues. It is also clear that some people suffer more than others from poor provisions of social and economic rights, typically these are Roma people and children, the elderly due to limited old age pension,¹⁴⁶ and homeless people.¹⁴⁷ This limited provision of support contributes to embedding further the process of exclusion and inequality discussed above. Secondly, the lack of state welfare and social assistance challenges the 'spirit of brotherhood' by dismantling the relationships of reciprocity that are at the heart of the society of equals. Overall, these issues point to dignity-based social justice¹⁴⁸ being gradually replaced by charity, whereby basic support has to be earned or deserved on grounds other than the simple fact of shared humanity.¹⁴⁹ Finally, despite the European Parliament's apparent efforts to document a wide range of issues, a key point is missed from its resolutions. The provision of social assistance to 'good Hungarians only'¹⁵⁰ is not just the result of the political majority's dislike for some people (typically the Roma). Rather it is embedded in the Fundamental Law under Article XIX (3), which provides that 'the nature and extent of social measures may be determined in an Act in accordance with *'the usefulness to the community of the beneficiary's activity'* (emphasis added). The conditionality of 'social measures' on 'usefulness' completely reverses the post-1945 dignity paradigm, which is about ensuring that all human beings can belong to 'the human family' regardless of who they are. As might be recalled, under that paradigm, human dignity is an intrinsic quality that all human beings possess inherently from birth. This quality is enough, on its own, for all human beings to be equally valued and welcomed in the society in which they live. Article XIX (3) of the Fundamental Law is revealing of a wider utilitarian vision of human beings, who are valued only to the extent that they may be 'useful to the community'. What this 'usefulness' entails is not specified by the Fundamental Law, giving the government complete discretion to exclude certain human beings from the 'community' on the ground of their (alleged) uselessness. Even more concerning than this wide discretion is the mere possibility for the government to set criteria for assessing people's 'usefulness to the community'. This provision of the Fundamental Law brings to light a communitarian dimension of dignity, whereby the individual dignity of people depends primarily on that of the community.¹⁵¹ This community-focused dignity goes against the post-1945 human dignity paradigm endorsed under Article 2 TEU which focuses on individuals. Potentially, it makes it possible to reverse the Enlightenment heritage that underpins the current *imago hominis* paradigm and liberal human rights in the EU.

¹⁴¹N. Chronowski and G. Halmai, 'Human Dignity for Good Hungarians Only: The Constitutional Court's Decision on the Criminalization of Homelessness', *Verfassungsblog*, 11 June 2019, <<https://verfassungsblog.de/human-dignity-for-good-hungarians-only/>>.

¹⁴²EP Resolution of 17 May 2017 (J) and (3).

¹⁴³EP Resolution of 12 September 2018 (73–77).

¹⁴⁴EP Resolution of 15 September 2022 (DP–DS).

¹⁴⁵Constitutional Court Decision 19/2019 (VI.18) AB.

¹⁴⁶EP Resolution of 12 September 2018 (74).

¹⁴⁷EP Resolution of 12 September 2018 (73).

¹⁴⁸P. Gilibert, *Human Dignity and Social Justice* (Oxford University Press, 2023).

¹⁴⁹Van Parijs, above, n. 62.

¹⁵⁰Chronowski and Halmai, above, n. 25, at 184.

¹⁵¹Pap, above, n. 25, 126–163. Note the reference to 'the dignity of the Hungarian nation' under Article IX (5) of the Fundamental Law.

3.2.3 | Disempowering civil society

The Resolutions of 12 September 2018 and of 15 September 2022 contain a last group of issues involving freedom of expression including media pluralism, academic freedom and freedom of association, which are key civil and political rights for a democracy. While they engage democracy as an Article 2 TEU value (an argument not developed by the European Parliament), it is suggested here they also engage human dignity by pointing to the civil configuration of the society of equality and inclusion. In other words, for the society of equality and inclusion to operate democratically as a civil society, a range of civil and political rights must be available to all. Without these rights,¹⁵² society cannot contribute to democracy and to collective decision-making by (for instance) offering alternative views to those of the government. Conversely, if it is not inclusive and based on equality, civil society can only contribute to a narrow range of opinions, mostly those promoted by the government in power.

As documented by the European Parliament, attacks on the civil configuration of the society of equality and inclusion started even before the Fundamental Law came into force, infamously with the 2010 Media Law Package.¹⁵³ As noted in the 2018 and 2022 Resolutions and repeated in the Resolution of April 2024, attacks on all components of free speech have considerably increased so that it is now almost impossible to voice or cultivate alternative views to those promoted by the Orbán regime.¹⁵⁴ The latest step in this strategy of disempowering civil society is the National Sovereignty Protection legislative package, adopted in December 2023.¹⁵⁵ Moreover, as noted by the Parliament, freedom of association has also been systematically targeted by new laws adopted in 2017 (Transparency of Organisations Receiving Support from Abroad),¹⁵⁶ and in 2018 (legislation against 'illegal migration').¹⁵⁷ In 2018, the European Parliament noted that the Venice Commission, the Council of Europe Commissioner for Human Rights, the UN Human Rights Committee strongly criticised the legislation. It also noted that the EU Commission had initiated proceedings against Hungary on 7 December 2017. In 2022, taking stock of developments and, in particular, of the Court of Justice ruling of 18 June 2020 in Case C-78/18, *Commission v. Hungary*, the European Parliament emphasised its concern that '*pressure remained on civil society organisations critical towards the government; whereas the systematic dismantling of the rule of law, democracy and fundamental rights has restricted the space for opposition parties and civil society organisations, trade unions and interest groups, leaving no room for social dialogue and consultation*'.¹⁵⁸ The Parliament further underlined 'the continuous chilling effect on NGOs' reported by the Commissioner for Human Rights of the Council of Europe in 2019.¹⁵⁹ Finally, referring to the 2020 report of the UN special rapporteur on the human rights of migrants, the European Parliament noted that 'civil society organisations working on the rights of migrants in Hungary had *experienced multiple obstacles in carrying out their legitimate and important work* as a consequence of legislative amendments'.¹⁶⁰ This last observation highlights the Hungarian regime's cohesive and targeted attacks on the *imago hominis* paradigm: not only are migrants treated as less than human, but people are also prevented from acting in a 'spirit of brotherhood' towards them. In its January 2024 resolution, the European Parliament 'underlines that the Hungarian authorities *must guarantee equal opportunities to access EU funding for individuals, companies, civil society, NGOs and local and regional authorities*, and must ensure independent judicial oversight, as well as impartial and effective complaints mechanisms; condemns the

¹⁵²EP Resolution of 24 April 2024 (N) and (Y).

¹⁵³EP Resolution of 10 March 2011.

¹⁵⁴EP Resolution of 24 April 2024: 'a picture arises of a systemic approach in which some voices do not enjoy the same basic conditions to be heard' (Y).

¹⁵⁵EP Resolution of 18 January 2024 (1); and EP Resolution of 24 April 2024 (R). See also the Venice Commission's Opinion of 18 March 2024 on Act LXXXVIII on the protection of national sovereignty. Those concerns have proved to be justified: L. Bayer, 'Somewhere between Orwell and Kafka: Hungary closes in on its media', *The Guardian*, 6 August 2024: <<https://www.theguardian.com/world/article/2024/aug/06/somewhere-between-orwell-and-kafka-hungary-closes-in-on-its-media>>.

¹⁵⁶EP Resolution of 12 September 2018 (41–43).

¹⁵⁷EP Resolution of 12 September 2018 (44–45).

¹⁵⁸EP Resolution of 15 September 2022 (BX), emphasis added.

¹⁵⁹EP Resolution of 15 September 2022 (CB); and EP Resolution of 24 April 2024 (N).

¹⁶⁰EP Resolution of 15 September 2022 (CC), emphasis added.

reported systemic discriminatory practices against academia, journalists, political parties and civil society, as well as companies in certain sectors'.¹⁶¹

In conclusion, the Hungarian regime has systematically targeted all components of the post-1945 human dignity paradigm and, step by step for over 13 years, put in place a counter-model of what it means to be a human being in Hungary, constructed against every component of human dignity as the EU's first foundational value. Behind the commitment to 'human dignity' under Article II of the Hungarian Fundamental Law is a very different ideal of humanity, that is one according to which human beings are not all born free and equal in dignity and in rights. While early signs of this repurposing of the first value of the EU were already to be seen in the 2011 version of the Fundamental Law, subsequent constitutional amendments and legislation have confirmed this strategy and made it systematic. Almost all facets of what it means to be a human being in the EU have been demolished. In addition, and omitted by the European Parliament, workers' rights, particularly those of non-EU origin, and labour law have also been affected.¹⁶² Breaches of human dignity are connected to breaches of other Article 2 values and, in particular, of the rule of law. Indeed, many of the rule of law breaches can be seen as instrumentalising 'the law', and the Fundamental Law in particular, for the construction and enforcement of the *imago Orbani* model. While numerous actions have been taken by the EU (and by the Council of Europe) to stem and reverse this construction, they seem to have been of limited effect due to the nature of the remedy sought and/or to having been mostly ignored by the Orbán regime.¹⁶³ As the European Parliament noted early on, the 'Hungarian situation' cannot be addressed by seeking remedies to individual issues.

4 | HUMAN DIGNITY AND ARTICLE 7 TEU: TIME TO BE OUTRAGED!

Despite all its well-known design faults,¹⁶⁴ Article 7 TEU is the only Treaty framework within which to discuss and, eventually, sanction, the unprecedented systemic nature of Hungary's attack on EU values. As will be recalled, Article 7 TEU distinguishes between 'a clear risk of a serious breach' (Article 7(1)) and 'a serious and persistent breach' (Article 7(2)).¹⁶⁵ Article 7(1) was triggered by the European Parliament in its Resolution of 12 September 2018. This was followed by a meeting of the European Council on 16 September 2019 at the initiative of Finland. However, there seems to have been no more discussion by the Council or the Commission.¹⁶⁶ In particular, no 'reasoned proposal' appears to have been produced and discussed. In the meantime, 'the situation of Hungary' has evolved beyond the 'clear risk of a serious breach', and as the breaches are undoubtedly 'persistent', engaging Article 7 (2) has become relevant. In its Resolution of 18 January 2024, the EU Parliament therefore 'call[ed] on the European Council and the Member States to determine whether Hungary has committed serious and persistent breaches of EU values under Article 7(2)'.¹⁶⁷ Through its Commissioner for Justice, Didier Reynders, the EU Commission promptly indicated (on 29 January 2024) that 'there was no decision at this moment in time to trigger the next step

¹⁶¹EP Resolution of 18 January 2024 (7), emphasis added. See also EP Resolution of 24 April 2024 (N).

¹⁶²A. Artner, 'Inside Hungary's "Work-Based Society"', *Social Europe*, 22 April 2016 <<https://www.socialeurope.eu/inside-hungarys-work-based-society>>.

See F. Fubini, 'Operai come Schiavi con le Leggi di Orbán: In Ungheria I Lavoratori Senza Diritti', *Corriere Della Sera*, 20 January 2021 <https://www.corriere.it/economia/lavoro/21_gennaio_20/operai-come-schiavi-le-leggi-orban-ungheria-lavoratori-senza-diritti-dd0fb326-5b00-11eb-998b-12ca609f8cfa.shtml>.

See, also, J.-B. Chastand, 'Frictions en Hongrie sur les travailleurs étrangers', *Le Monde*, 2 December 2023. Reforms of labour law have also been a crucial tool for eliminating non-compliant members of the civil service. See K.L. Scheppelle, 'Autocratic legalism', (2018) 85 *University of Chicago Law Review*, 575 and n. 105 above.

¹⁶³See Viktor Orbán's immediate rejection of the June 2024 Court of Justice ruling on refugees as 'outrageous and unacceptable': <<https://www.theguardian.com/world/article/2024/jun/13/hungary-fined-over-treatment-of-asylum-seekers-in-unprecedented-breach-of-eu-law>>.

¹⁶⁴L. Besselink, 'The Bite, the Bark and the Howl: Article 7 TEU and the Rule of Law Initiatives', in A. Jakab and D. Kochenov (eds.), *Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press, 2017) 128.

¹⁶⁵In addition, a so-called 'pre-Article 7 proceeding' was developed by the EU as the 'mechanism on democracy, the rule of law and fundamental rights': see <<https://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-eu-mechanism-on-democracy-the-rule-of-law-and-fundamental-rights>> (accessed on 10 May 2024).

¹⁶⁶See 'Rule of Law Framework' page of the EU Commission website: <https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-framework_en> (accessed on 9 April 2024).

¹⁶⁷EP Resolution 18 January 2024 (2).

under Article 7'. Referring to the possible reservations of Slovakia (this was before the presidential election of pro-Orbán Peter Pellegrini on 6 April 2024) and of Italy, the Justice Commissioner set out his reasons by noting that 'there is nothing worse than submitting a proposal only to see this proposal rejected'.¹⁶⁸ Instead, on 7 February 2024, the EU Commission initiated another infringement proceeding against Hungary.¹⁶⁹ The European Parliament took the unusual step of acting against the EU Commission for having released funds to Hungary in December 2023¹⁷⁰ and has persisted with its request to trigger Article 7(2). In its Resolution of 24 April 2024, the European Parliament 'deplores the inability of the Council to make meaningful progress in the ongoing Article 7(1) TEU procedure' and 'calls on the Commission and on the European Council to determine whether Hungary has committed serious and persistent breaches of EU values under Article 7(2)'.¹⁷¹ As will be recalled, in June 2024 the General Affairs Council did not find it necessary to take the procedure further.¹⁷² This section outlines five reasons why the first of these values, human dignity, has been breached in a 'serious and persistent way' warranting full engagement with Article 7(2).

The first reason is to provide a timely reminder that the commitment to human dignity as the EU's first value may not be redefined to reflect the political majority's preferences for certain human beings. As many other EU Member States are experiencing growing racism, xenophobia, homophobia and transphobia, not to mention 'ordinary' sexism against women,¹⁷³ Orbán has been very skilled at surfing this EU and world-wide wave of hatred against the other. He has also been actively developing a network of political friends across the world as his warm welcome of the Chinese leader in May 2024 demonstrates.¹⁷⁴ It is therefore important to clarify that the EU commitment to human dignity may not be reconceptualised to legitimise some politicians' and heads of government's preference for some human beings, and hatred against others. As a foundational commitment under Article 2, human dignity constitutes the condition for democratic politics to unfold within the EU and across its Member States. Article 7 is designed to ensure that the EU foundational values can be clarified and complied with. Furthermore, it is noteworthy that the human beings targeted by the Orbán regime are the same people who, over and over, were targeted by European dictators, and that so many of them were exterminated during the Second World War. That experience was a tipping point in the historical development of the concept of human dignity and propelled it onto the field of international human rights law. So, the fact that attacks on 'minorities' by majorities in power are increasing across the EU cannot make them right under Article 2 TEU, ever. With its 'turn to value constitutionalism',¹⁷⁵ the EU has given itself a powerful compass for charting a course away from the majorities' temptation to deny an equally human status to those identified as the 'minorities' and as 'others'. The EU has therefore accepted that political majorities may not always be right, and that there is a limit to normative pluralism which is another key feature of the EU. In other words, there are different ways of, for example, accommodating asylum seekers, migrants and refugees; however, none of these possible treatments may dehumanise them. Pluralism may never justify shattering the post-1945 *imago hominis* paradigm and replacing it with the *imago Orbani* counter-model. If the EU Commission and the European Council, who are explicitly empowered by Article 7 TEU to do so, do not use this framework to openly

¹⁶⁸<<https://www.euronews.com/my-europe/2024/01/29/eu-commission-wont-trigger-nuclear-option-against-hungary-until-theres-clear-majority-in-f>>; and D. Hegedüs, 'How Article 7 Could Actually Defeat Orbán Already', *EU Observer*, 31 January 2024 <https://euobserver.com/*/arb1c186d2>.

¹⁶⁹M. Schuler, 'A Vague Response to a Vague Law: The Commission's Infringement Procedure against Hungary's Defence of Sovereignty Bill', *EU Law Live*, 16 February 2024 <<https://eulawlive.com/op-ed-a-vague-response-to-a-vague-law-the-commissions-infringement-procedure-against-hungarys-defence-of-sovereignty-bill-by-miriam-schuler/>>.

¹⁷⁰<<https://europeanconservative.com/articles/news/confirmed-european-parliament-sues-commission-over-hungarian-funds/>>. See, also, Bonelli and Claes, above, n. 84, at 3–14; M. Bonelli, 'Infringement Actions 2.0: How to Protect EU Values before the Court of Justice', (2022) 18 *European Constitutional Law Review*, 30–58.

¹⁷¹EP Resolution of 24 April 2024 (4).

¹⁷²See n. 11.

¹⁷³For instance: Giorgia Meloni, 'Défendre l'humanité, [...] c'est défendre les familles, défendre les nations, défendre l'identité, défendre Dieu et toutes les choses qui ont construit notre civilisation', (during her official visit to Viktor Orbán, Budapest, 14 September 2023), reported in *Le Monde*, 16 September 2023.

¹⁷⁴<<https://www.theguardian.com/world/article/2024/may/09/hungary-rolls-out-red-carpet-for-xi-in-final-leg-of-european-tour>>. See also: <<https://www.theguardian.com/world/2024/mar/07/viktor-orban-to-visit-donald-trump-in-florida-hungary>>.

¹⁷⁵Schorkopf, above, n. 22.

clarify that all people should be treated in ways that respect their equally shared humanity at a time when this commitment seems to be wavering across the EU and is being shattered in Hungary, when will they do so?

The second reason is about the disproportionate misuse of public power, and of constitutional amendments in particular, deployed against the smallest and least powerful minorities (emblematically intersex babies 'at birth'). That is, those human beings most unlikely to push back and to make their voices heard. Who is more dependent on fellow human beings for their survival and recognition as a human being than a new-born baby? A key reason for establishing the post-war human dignity paradigm was the imperative of including all human beings—in particular those with the highest degree of non-chosen dependency on others—in the 'human family' and of fostering their belonging to the community in which they live. A question therefore arises as to why the Orbán regime mobilised one of the mightiest strategies against such a small and powerless fraction of Hungary's population. Might it be precisely because they think that no one will speak up for them inside and outside Hungary? It is a distinct possibility that Hungary could just be testing the water before unleashing more of its might against more human beings. First, they excluded the homeless by making their existence a crime, then they denied the existence of intersex babies, then they disappeared LGBTIQ people from the constitutional order. The persistent refusal to engage fully with Article 7 by the Council and the Commission might be understood as tacit approval of the *imago Orbanis* model of humanity. Who else would need to be denied their human status of an equally valued member of society by the Hungarian regime for the EU Commission and the Council to fully engage with Article 7?

The third reason is that, although the Orbán regime's actions against minorities and women are not physical (yet), they are indicative of a dangerous new strategy. Intersex babies are not killed at birth, similarly LGBTIQ people are not arrested and beaten up under government order, political opponents are not sent to prison or assassinated, women are not denied physical access to contraception as was the practice under the Ceaușescu regime. In short, 'there are no tanks in the street'.¹⁷⁶ Instead, the Hungarian regime is implementing a new way of dehumanising people without physically destroying them. On its own, the unprecedented technique of engineering the disappearance of some human beings from the constitutional order calls for its scrutiny and sanction by the EU under Article 7.¹⁷⁷ Moreover, it is suggested that the EU Commission and the Council must not wait for breaches of human dignity documented in the European Parliament's resolutions to become physical and to reach the magnitude of those experienced during the Second World War and (communist) dictatorships in Europe. As Kim Lane Scheppele notes, Orbán does not need to annihilate his opponents.¹⁷⁸ Indeed, it is suggested here that the Hungarian regime is deliberately not pursuing a strategy of physically breaching the core dignity rights under Chapter 1 of the EU Charter in order to entertain confusion over the red lines and the limits of pluralism accepted by the EU. To be clear, as noted by the European Parliament, individual breaches of the prohibition of inhuman and degrading treatment were identified and sanctioned by both European courts. If the Orbán regime did breach those EU Charter dignity rights in a systematic physical manner, this would prompt instant condemnation by the EU (at least one would hope so). This is what happened with Orbán's indication that he wanted to bring back the death penalty in 2015.¹⁷⁹ The distinction between human dignity as an Article 2 value and as a set of absolute prohibitions under the EU Charter takes its fuller significance in that for dignity as a value to be 'seriously' breached, the dignity core rights need not be systematically and physically breached. Human dignity as a value can capture these new types of breaches, that is not physical but paradigmatic and not individual but systemic, that the individual dignity rights might not. The Hungarian regime's strategy has skilfully exploited the gaps and fuzziness of EU and constitutional law in relation to the lack of understanding of Article 2 values and of human dignity in particular. This is illustrated with the prohibition of slavery, servitude, forced and compulsory labour and human trafficking (Article 5 EU Charter). If the Orbán regime were to overtly rely on

¹⁷⁶Scheppele, above, n. 162, at 575.

¹⁷⁷It was criticised by the Venice Commission in its Opinion 1035/2021 of 2 July 2021.

¹⁷⁸Scheppele, above, n. 162, at 577.

¹⁷⁹See the condemnation by the EU Parliament on 10 June 2015: <<https://www.europarl.europa.eu/news/en/press-room/20150605IPR63112/hungary-meets-condemn-orban-s-death-penalty-statements-and-migration-survey>>. See also President of the EU Commission, Jean Claude Juncker's statement: <<https://www.reuters.com/article/idUSKBNONL16K/>>.

forced or compulsory labour for (say) developing public infrastructure, this would be picked up and condemned by the EU. However, it seems to have gone unnoticed by the EU that the Fundamental Law does not codify an equivalent to Article 5 EU Charter, nor even a reference to the prohibition of slavery. The European Parliament, which has otherwise been quite thorough and inclusive in its documentation of the 'Hungarian situation' did not include the issues of workers' rights (beyond the right to strike). Workers' rights and human dignity are still 'hidden in plain view' and tend not to be included in reflection on and promotion of European constitutionalism and democracy.¹⁸⁰ It is therefore crucial that *all* EU Charter dignity rights are systematically and transparently discussed for understanding the EU's commitment to human dignity as its first foundational value. Where else to conduct this discussion in a reasoned and transparent manner if not under the dedicated framework for protecting EU values?

Fourthly, it is important to note that the seriousness of the breach of human dignity (as well as whether there is a breach of human dignity in the first place) does not just depend on the 'barbarous acts' that triggered the adoption of the UDHR and its new dignity paradigm. As indicated by the UDHR Preamble, assessing these acts as 'barbarous' and as breaching human dignity also depends on the perception of these acts by those witnessing them. In the words of the UDHR, the 'conscience of mankind [must be] outraged'.¹⁸¹ Indeed, the line between 'barbarism' and 'civilisation' can sometimes be very thin and dependent on the willingness to see what is happening next door.¹⁸² It is judicial outrage that drove the first significant use of human dignity by the European Court of Human Rights in the 1995 so-called marital rape case confirming the UK House of Lords ruling.¹⁸³ Until then, immunity from prosecution for rapist husbands had been deeply embedded in the common law and not challenged by the UK Parliament. The ECHR Court made sanctioning this immunity a question of 'civilised marriage' and of dignity. Current civil society in Hungary might be similarly outraged. However, as indicated in the European Parliament's resolutions, it has been considerably disempowered by the Orbán regime. By contrast, the EU Commission and the Council have a strong voice through the framework of Article 7 TEU for expressing their outrage at the 'Hungarian situation' and at the imposition of the *imago Orbani* model of what it means to be a human being in the EU. Compounding the Justice Commissioner's explicit refusal to engage with Article 7 in January 2024, the General Affairs Council's June 2024 refusal to engage with developments in the 'Hungarian situation' therefore risks being interpreted as the EU Commission's and Council's endorsement of Hungary weaponising the EU first foundational value. The Justice Commissioner and the General Affairs Council might have their own pragmatic reasons for not pursuing the Article 7 pathway. In so doing, however, they appear to fail to be outraged by the constitutional disappearance of LGBTIQ people, by the denial of the existence of intersex babies, by the systemic exclusion and stigmatisation of migrants, asylum seekers, refugees and Roma people, and by promotion of women's identity and existence almost exclusively as mothers. All of which are clearly documented in the European Parliament's resolutions. Standing up for the EU's first foundational value was a small group of teenagers who introduced a European Citizen Initiative, entitled 'Dignity in Europe', asking the EU to consider migrants as human beings and to treat them accordingly. The teenagers had no chance of being heard and of succeeding with their initiative.¹⁸⁴ If Article 7 is not pursued in response to Hungary shattering the EU's first foundational value, what will it take for the EU Commission and Council to be 'outraged'?

Fifthly, the repeated, and unquestioned, acknowledgement by the European Parliament since September 2022 that Hungary is no longer a democracy should, even on its own, have moved the Justice Commissioner (and the new EU Commission) to trigger Article 7(2). How many autocracies (a softer word for dictatorship?) is the EU prepared to tolerate in its midst, and for how long? Engaging fully with Article 7 would provide a timely framework for understanding better the significance of 'democracy' as an Article 2 value and for protecting it more effectively across the

¹⁸⁰Dupré, above, n. 36, 113–141.

¹⁸¹S. Hessel, *Indignez Vous!* (Indigène Editions, 2010).

¹⁸²See, e.g., the review of the film *The Zone of Interest* by Naomi Klein in <<https://www.theguardian.com/commentisfree/2024/mar/14/the-zone-of-interest-auschwitz-gaza-genocide>>.

¹⁸³ECHR, *SW v. United Kingdom*, 22 November 1995 (application No 20166/92) discussed in Dupré, above, n. 36, at 99–102.

¹⁸⁴<https://citizens-initiative.europa.eu/initiatives/details/2023/000002_en>.

EU. Twenty years ago, as the EU welcomed 10 new Member States, eight of which had been communist dictatorships until the early 1990s, democracy was a key condition of accession under the 1993 Copenhagen criteria. At the time, human dignity was not one of the criteria for accession. Now it is under Article 2 and Article 49 TEU. It is suggested that democracy is too important for assessment on its meaning and scope to be merely subcontracted to 'relevant indices' (i.e., V-Dem Institute and of Freedom House) regardless of how authoritative they might be.¹⁸⁵ As the category of 'electoral autocracy' that the European Parliament uses to describe Hungary indicates, elections are a key component of democracy, however, they are not a sufficient criterion for assessing and safeguarding democracy.

The democratic question arises anew in the EU.¹⁸⁶ As demonstrated in this article, it is time to shift the analytical gaze away from a primary focus on either or both the type of leader of a given regime and the quality of elections for assessing its democratic credentials. While connections between human dignity and democracy are beginning to be unravelled by international scholarship,¹⁸⁷ three broad pathways for discussing it further might be opened here. Firstly, is the pathway towards humanity. As seen *a contrario* in the above analysis of 'the Hungarian situation', at the heart of democracy lies a particular image of human beings, the significance of which has so far been implicit or perhaps overshadowed by the mainstream focus on human beings *qua* voters and citizens. Such an image of human beings can be constructed in different ways, not all of which contribute to fostering democracy. While the EU Charter makes it explicit that the core prohibitions on dehumanising people are absolute, less is known and understood about how human beings may be further constructed and protected through (human rights) law, so as to constitute and safeguard democracy. Secondly, is the pathway towards civil society, which is an essential and multifaceted component of democracy. The European Parliament appropriately locates it at the intersection of key political rights such as freedom of speech, freedom of assembly and freedom of association. What is not so well understood and only appears as a dotted line in the 'Hungarian situation' is the connection between constructing a particular image of humanity and human beings' ability to get together and effectively operate as civil society. Discussing the interconnections among dignity, democracy and solidarity would shed much needed light on the type of democracy that the EU is committed to. Thirdly, the elephant in the room is the connection between economic liberalism, which lies at the heart of the EU, and (liberal) democracy. Is the EU democracy a mere facilitator for, or an unavoidable consequence of, a free market economy?¹⁸⁸ The post-communist transition was both a political and an economic transition. The 'Hungarian situation' has important economic dimensions too, which raise afresh the question of the connection between democracy and economy. The Rule of Law Conditionality Regulation at the heart of the 2024 Resolutions of the European Parliament is an attempt to use economic, that is, financial, pressure to encourage Hungary to comply with the rule of law. While the merits of such a financial conditionality approach have been discussed,¹⁸⁹ this leaves ample scope for exploring the more fundamental question of how the Article 2 values impact the (historically) primary economic identity of the EU and its commitment to free market ideology. This question of EU democracy, both as a project and a foundational value, should not be reduced to the need to address Hungary's wide-scale corruption and misuse of EU funds.

At a time when democracy is being challenged both across the EU and within the EU considering the increase of far- and hard-right MEPs since June 2024, a transparent discussion on the connections among Article 2 values, and particularly between dignity and democracy, would provide the EU with a valuable opportunity for reflecting on its own foundations and its ultimate aim. More attention needs to be dedicated to the reasons *why* democracy matters against non-democratic ways of shaping people's collective destiny. Indeed, the question 'why democracy' seems to have been raised mainly in the immediate post-war period, when 'liberal democracy' was challenged by the

¹⁸⁵EP Resolution of 18 January 2024 (M).

¹⁸⁶U. Rödel, G. Frankenberg and H. Dubiel, *Die Demokratische Frage* (Suhrkamp, 1989; 2nd edn, 2024 forthcoming).

¹⁸⁷Dupré, above, n. 32, at 182–193; Daly and May, above, n. 26, at 114–124; D. Bedford et al. (eds.), *Human Dignity and Democracy in Europe: Synergies, Tensions and Crises* (Edward Elgar, 2022).

¹⁸⁸G. Frankenberg, 'Preface' to Rödel, Frankenberg and Dubiel, above, n. 186.

¹⁸⁹A. Baraggia and M. Bonelli, 'Linking Money to Values: The New Rule of Law Conditionality Regulation and its Constitutional Challenges', (2022) 23 *German Law Journal*, 131–156.

‘democratic people’s republics’.¹⁹⁰ As demonstrated here, one preliminary but essential answer might be drawn from the ‘Hungarian situation’ albeit *a contrario*. That is, democracy matters because it is only in a democracy that all human beings can be born free and equal in dignity and in rights, and that they can form a society of equality and inclusion, which in turn provides the basis of civil society. Moreover, and crucially, it is only in a democracy that the ‘barbarous acts that have outraged the conscience of mankind’ (UDHR Preamble) might be remembered in order to be kept at bay.

The possibility of sanctions under Article 7 is of course important, especially considering the issues raised since the start of the Hungarian presidency. Of course, on its own, suspending Hungary from the presidency would not put the ‘Hungarian situation’ right. It would, however, provide a value-based and reasoned justification for why a Member State should (not) occupy the rotating presidency of the EU. It would also contribute to address the issues of ‘credibility’ of the EU and of its ‘complicity’ with the Hungarian regime.¹⁹¹ What is therefore key and well seen by the resolution of 14 April 2024 is the pedagogical significance of engaging fully with Article 7.¹⁹² While the rule of law has been discussed in depth since 2013 and the adoption of the Tavares report, the other Article 2 values have not been discussed to the same extent, either separately or in their interconnections.¹⁹³ A resounding clarification on the EU’s part that democracy entails valuing all human beings equally might provide much needed support to Hungarian civil society and opposition that the Orbán regime has persistently tried to silence. Such clarification also needs to be heard by Member States and EU citizens in the wake of the Parliamentary elections in June 2024, and by the nine candidate countries with troubled experience of democracy.¹⁹⁴ While Article 7 has been shaped by the 2004 wave of enlargement, engaging with it fully 20 years later might be an effective way of reflecting on past and current conditions for accession. Finally, bearing in mind that Article 2 values also provide a framework for the EU’s external relations, the EU has a compelling duty to stand up for it at a time when the post-war foundations of the world order are being challenged in an unprecedented manner.

5 | CONCLUSION

Noting that the Hungarian regime has occupied the space left open by the lack of understanding of the first of the EU’s new foundational values under Article 2, this paper has offered an analytical and detailed reflection on what human dignity entails. In particular, it has highlighted and discussed its significance as an intrinsic and inherent quality equally shared by all human beings, its anchorage in the set of absolute prohibitions under the EU Charter and its connections with democracy. Moreover, this paper has demonstrated that the many apparently separate issues documented by the European Parliament since 2011, and especially since 2018, amount to the first instantiation of a serious and persistent breach of human dignity resulting from the strategies deployed by the Orbán regime for repurposing the post-war human dignity paradigm. It is therefore hoped that this paper can contribute to a better understanding of the EU’s first value, which originates in the UDHR, and has carried forward the project of a democratic and free Europe since the time when Europe was neither democratic nor free. As human dignity is also codified in most constitutions around the world, and as many human beings and democracies are subjected to similar attacks to those experienced in Hungary, it is ultimately hoped that this paper’s Hungarian focus might contribute to a better understanding of this world-wide phenomenon.

¹⁹⁰H. Kelsen, ‘Foundations of Democracy’, (1955) 66 *Ethics*, 1–101.

¹⁹¹M. Smith and G. Halmay, above, n. 10.

¹⁹²EP Resolution of 14 April 2024 (4).

¹⁹³‘The problem in today’s Europe may not be that values are too vague and too much subject to debate but rather that they are still too much shielded from a proper political debate at a European level. If one sees values as principles that resist any final determination, it becomes easy to see why both European technocrats and their populist opponents misinterpret them, as both limit the options for debate by appropriating values that ultimately resist such appropriation.’ Weymans, above, n. 35, at 119.

¹⁹⁴2023 EU enlargement package adopted by the EU Commission in November 2023: <https://neighbourhood-enlargement.ec.europa.eu/news/commission-adopts-2023-enlargement-package-recommends-open-negotiations-ukraine-and-moldova-grant-2023-11-08_en>. Note the suspension of the accession process of Georgia in July 2024 in the wake of the adoption of a law on ‘foreign influence’ by an increasingly pro-Russia government.

ACKNOWLEDGEMENTS

The author would like to thank Erin Daly, Günter Frankenberg, Gábor Halmaj and Stephen Skinner for their comments and suggestions on earlier drafts.

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How to cite this article: Dupré C. Hungary's attacks on human dignity: Article 2 TEU and the foundations of democracy in the European Union. *Eur Law J.* 2024;30(3):260-283. doi:[10.1111/eulj.12526](https://doi.org/10.1111/eulj.12526)