12

The EU Family

Surviving Ideological Familism in Times of Illiberalism

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12.1 INTRODUCTION

Reflections around European Union (EU) family law start off by noting that the EU has no exclusive or shared power to regulate substantive family law.[1] This might induce one to think that the family is not a privileged object of regulation for EU law.[2] However, the family is not absent from the EU legal framework.[3]

The legal regulation of the family is currently dispersed across the extensive body of EU laws. We can find fragments in legal acts that result from the EU power to harmonise private international law rules applying to such families as enshrined in Article 81(3) of the Treaty on the Functioning of the EU (TFEU), the only Treaty provision granting an explicit EU competence over

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1 The term 'EU Family Law' refers to relevant provisions in primary and secondary EU law as well as initiatives of the EU in the area of family. See C. McGlynn, *Families and the European Union – Law, Politics and Pluralism* (Cambridge University Press 2006) 152; E. Caracciolo di Torella and A. Masselot, 'Under construction: EU Family Law' (2004) 29 European Law Review 32. The European Convention of Human Rights and constitutional traditions common to the Member States should also be included amongst such sources under Article 6 (3) TEU.

2 M. Antokolskaia, *Harmonisation of Family Law in Europe: A Historical Perspective* (Intersentia 2006) 3–5.

3 See also Chapter 4 by Ségolène Barbou des Places.

family law.[4] Yet, the current 'architecture' of EU family law is more complex than that.[5]

Particularly, the development of the case law in the area of family-related discrimination[6] and fundamental rights attests to the growing constitutional relevance of the family in the Union.[7] The regulation of the family can be found in a series of documents of constitutional significance, such as the Charter of Fundamental Rights of the European Union (the Charter). However, its constitutional status should be taken to refer to a larger notion of constitutional relevance that certain EU legal provisions possess. As De Baere and Gutman put it:

> it is remarkable the extent to which European family law is a constitutional topic par excellence, taking into account its linkage to the subjects of Union citizenship, discrimination and fundamental rights, as well as to recent

[4] Such a power has been exercised in a series of regulations on divorce, property, and registered partnerships, as well as in matters of matrimonial property regimes. Council Regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility [2003] OJ L338/1; Council Regulation (EU) No 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law, and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships [2016] OJ L183/30; Council Regulation (EU) No 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law, and the recognition and enforcement of decisions in matters of matrimonial property regimes [2016] OJ L183/1.

[5] C. Kilpatrick, 'The Court of Justice and Labour Law in 2010: A new EU discrimination law architecture' (2011) 40 Industrial Law Journal 280.

[6] The examples are numerous. They include the Court's intervention in the area of employment benefits for same-sex couples, the free movement of same-sex spouses and cohabitants, to mention but a few. See A. Tryfonidou, 'Law and sexual minority rights in the EU: Navigating a political minefield' in P. Cardwell and M.-P. Granger (eds), *Research Handbook on the Politics of EU Law* (Edward Elgar Publishing 2020); N. Palazzo, 'The EU family: Is marital status emerging as a prohibited ground of discrimination?' in E. Bernard, M. Cresp, and M. Ho-Dac (eds), *La famille dans l'ordre juridique de l'Union européenne: Family within the legal order of the European Union* (Bruylant 2020); J. Rijpma and N. Koffeman, 'Free movement rights for same-sex couples under EU law: What role to play for the CJEU?' in D. Gallo, L. Paladini, and P. Pustorino (eds), *Same-Sex Couples before National, Supranational and International Jurisdictions* (Springer 2014); D. Kochenov, 'Gay rights in the EU: A long way forward for the Union of 27' (2007) 3 Croatian Yearbook of European Law and Policy 469. A seminar decision in the area of free movement is the *Coman* decision (Case C-673/16 *Coman and others* EU:C:2018:385). See also Chapter 7 by Michael Bogdan and Chapter 9 by Geoffrey Willems. In the context of discrimination in employment, see Case C-267/06 *Maruko* EU:C:2008:179; Case C-147/08 *Römer* EU:C:2011:286; Case C-267/12 *Hay* EU:C:2013:823.

[7] D. Martiny, 'Is unification of family law feasible or even desirable?' in A. S. Hartkamp and others (eds), *Towards a European Civil Code* (Kluwer 2011) 435. On the limited relevance of human rights protection acquired within the EU, see B. de Witte, 'The past and future of the European Court of Justice in the protection of human rights' in P. Alston (ed), *The EU and Human Rights* (Oxford University Press 1999).

institutional developments that are of 'constitutional' importance to the EU, such as the recourse to enhanced cooperation for the first time in connection with the 'Rome III Regulation' on divorce . . .[8]

This doctrinal circle lies further from the 'centre' of family law[9] in the sense that for historical reasons it is less intuitive to think of the legal regulation of the family as falling under the purview of constitutional law.[10] This chapter contributes to the literature on this larger circle, commenting on recent developments that point to a growing constitutional relevance of the family. As they started to attract the (LGBTQ) family in the controversial area of the EU's common values, these developments could not easily be predicted.[11] This shift, as will be shown, is manifesting itself in conjunction with the rise of illiberalism across the Union. In the same way in which, in illiberal regimes in Europe, the traditional family is becoming a focal point in the construction of national identity,[12] the EU is prepared to mobilise the protection of LGBTQ people and families from discrimination as a matter of 'identity' and common

[8] G. De Baere and K. Gutman, 'The impact of the European Union and the European Court of Justice on European Family Law' in J. M. Scherpe (ed), *European Family Law Vol. I – The Impact of Institutions and Organisations on European Family Law* (Edward Elgar Publishing 2016) 10–11 [citations omitted].

[9] One could think of family law as a series of concentric circles. The first, narrower, circle is the core of family law or family law *stricto sensu*, and encompasses issues relating to marital relationships and parent–child relationships. These two categories have a broad material scope that spans issues such as entry into and exit from marriage, registered partnerships, cohabitation, the legal recognition of same-sex or other non-traditional families, and matters concerning parental responsibility, adoption, child custody and support, and so on. This definition aligns with the scope of major works in EU family law, which cover matrimonial issues or issues related to parent–child relationships. See, for example, K. Boele-Woelki, 'Cross-border family relations in Europe: Towards a common European matrimonial property law based upon cooperation between private international law and substantive law' in A. L. M. Keirse and M. B. M. Loos (eds), *Alternative Ways to Ius Commune – The Europeanisation of Private Law* (Intersentia 2012) 33.

[10] Foregrounding the family into this area requires gradually overcoming ingrained assumptions in civil law systems around family law as an object of private law. On this point, see É. Millard, *Famille et droit public. Recherches sur la construction d'un objet juridique*, Tome 182 (LGDJ 1995). See also Editors' introduction (referring to an idea of the family as a 'traditionally private-law governed institution').

[11] For a criticism of introducing values into Treaties, see J. Lacroix, 'Does Europe need common values?' (2009) 8 European Journal of Political Theory 141.

[12] K. Lane Scheppele, D. Kochenov, and B. Grabowska-Moroz, 'EU values are law, after all: Enforcing EU values through systemic infringement actions by the European Commission and the Member States of the European Union' (2020) 39 Yearbook of European Law 3, 21 (arguing that 'sometimes claims of constitutional identity constitute rejections of European values in the name of a conflicting ideology that poses a much more fundamental challenge to European unity as well as the survival of liberal democratic constitutionalism in the Member State in question').

values. Looking at the role of family in similar European culture wars and how it reflects on the constitutional relevance of the family in EU law is essential to understand the contemporary moment.

After exploring the notions of illiberalism and familism in Section 12.1, the chapter proceeds to explore the case studies of Hungary and Poland to assess how an ideological usage of the family is mobilised within illiberal discourse (Sections 12.2 and 12.3). In Section 12.4, the chapter explores the reaction that similar developments have triggered on the part of the EU and assesses the actual and likely repercussions of such developments on the ways in which the EU treats the 'family' as an object of EU constitutional law. The central claim of the chapter is that similar developments attest to a tentative yet discernible expansion of the constitutional relevance of the family in the space of the EU which occurs as a result of increased protection of LGBTQ families.[13]

12.2 ILLIBERALISM, FAMILISM, AND THE EUROPEAN FAMILY

The family as a social formation continues to attract much attention by illiberal actors and assumes special relevance in European-style culture wars. In these ongoing culture wars, a certain 'fatigue' of some Member States towards the EU is becoming increasingly visible,[14] and the family is one of the areas that illiberal political actors focus on to catalyse an anti-European sentiment. Hence, the role of the family within illiberal political agendas deserves more sustained reflection in socio-legal scholarship and EU law scholarship.[15]

[13] See Section 12.5.

[14] Z. Hesová, 'Three types of culture wars and the populist strategies in Central Europe' (2021) 28 Czech Journal of Political Science/Politologick 130; K. Stöckl, 'The European culture wars' (*ZOiS Spotlight* 13/19, 3 April 2019) <https://en.zois-berlin.de/publications/zois-spotlight/archiv-2019/the-european-culture-wars>. Other features of European culture wars include historical revisionism and civilizationism overtones (Hesová (n 14) 137).

[15] For instance, the *magnum opus* on illiberalism, the *Routledge Handbook on Illiberalism*, contains sixty-one chapters. Amongst them there are two chapters covering the role of 'gender' within illiberal agendas, while the family is not the object of a separate chapter. A. Sajó, R. Uitz, and S. Holmes (eds), *Routledge Handbook of Illiberalism* (Routledge 2021). The Oxford Handbook of Illiberalism, while not including a chapter explicitly focused on the role of the family, contains numerous chapters relevant to the topic. See especially, A. Graff, and E. Korolczuk, 'Gender and Illiberal Politics' in M. Laruelle (ed), Oxford Handbook of Illiberalism (Oxford University Press 2023). The topic is, however, drawing growing attention, as attested by important works recently published. See K. Linnamäki, 'Not in front of the child: Illiberal familism and the Hungarian anti-LGBTQ+ "Child Protective Law"'(2022) 10 Politics and Governance 16; L. Balogh, A. László Pap, and E. Pásztor, 'Hungary: The concept of family within the framework of "illiberal democracy"' in N. Yassari and M.-C. Foblets (eds), *Normativity and Diversity in Family Law* (Springer 2022).

'Illiberal democracy' is the tag that Hungarian Prime Minister Viktor Orbán attached to his plan to dismantle liberal democracy as we know it.[16] After he publicly committed to building an illiberal democracy in 2015, Jarosław Kaczyński, the leader of the Polish populist party Law and Justice winked at him and pledged to build a 'Budapest in Warsaw'.[17] It was straightforward for Kaczyński to deliver on his promise: meanwhile, he had been waging a war on 'gender' in 2012–2014 and spreading seeds of gender conservativism throughout the country.[18]

In academic usage, 'illiberalism' refers to a political movement that rejects the key traits of liberal democracy.[19] It is a specific sceptical posture that accuses liberal democracies of failing on several fronts, including the political, the cultural, and the economic.[20] At present, there are contrasting views regarding whether illiberalism has a core ideology or whether it constitutes an empty signifier in semiotic terms. However, in the area of human rights, it displays a clearer *ex negativo* content across illiberal agendas (in their rejecting certain specific features of political liberalism), and in this sense it could be seen as a thin-centred ideology. Specifically, illiberalism displays a revulsion for pluralism and individualism.[21] These traits are supposedly atomising society and disrupting meaningful social bonds by replacing the communal order with a 'chilly, egoistical, and morally hollow one'.[22]

As illiberals rally around conservative understandings of gender and family and partake in that kind of 'gender policy backsliding',[23] or 'war on gender',[24] the family becomes the stage where critical, almost eschatological, identity

[16] M. Laruelle, 'Illiberalism: A conceptual introduction' (2022) 38 East European Politics 306.

[17] N. Buckley and H. Foy, 'Poland's new government finds a model in Orban's Hungary' *Financial Times* (6 January 2016) <www.ft.com/content/0a3c7d44-b48e-11e5-8358-9a82b43f6b2f>.

[18] On which, see W. Grzebalska, 'Poland', in E. Kováts and M. Põim (eds), *Gender as Symbolic Glue: The Position and Role of Conservative and Far Right Parties in the Anti-gender Mobilizations in Europe* (FEPS – Foundation for European Progressive Studies 2015).

[19] See Laruelle (n 16) 303. See also J. Dawson and S. Hanley, 'What's wrong with East-Central Europe? The fading mirage of the "liberal consensus"' (2016) 27 Journal of Democracy 21.

[20] A. Jakab and D. Kochenov, 'Introductory remarks' in A. Jakab and D. Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017), describing a 'spectrum of non-compliance'.

[21] See generally, M.-L. Frick, 'Illiberalims and human rights' in Sajó, Uitz, and Holmes (n 15) 861.

[22] S. Holmes, 'The antiliberal idea' in Sajó, Uitz, and Holmes (n 15) 3–15.

[23] A. Krizsan and C. Roggeband, 'Towards a conceptual framework for struggles over democracy in backsliding states: Gender equality policy in Central Eastern Europe' (2018) 6 Politics and Governance 90.

[24] E. Korolczuk, '"The war on gender" from a transnational perspective: Lessons for feminist strategising' in *Anti-gender Movements on the Rise? Strategising for Gender Equality in Central*

struggles are waged.[25] The illiberal script explicitly attributes the collapse of national identity to the collapse of traditional gender and family norms.[26] It flatly rejects interpretations of family and women's roles in society that allegedly contradict nature.[27] It is to these distorted and 'unnatural' understandings of family, gender, and sexual orientation that, for example, Polish illiberal actors refer to as the 'ebola from Brussels'.[28]

Similar discourses derive nourishment from opposition to Brussels. More broadly, they tend to stress the existence of an external power that seeks to impose exotic legal reforms which clash with local *mores*. Such external powers are dubbed differently depending on the geographical context and the aim that the invoked opposition is seeking to achieve. They are variously labelled as 'the West', 'the Communist regime', 'the European Union', and 'liberal élites'.[29] A recurring criticism is, for instance, that these powerful elites are carrying out a global 'sexual revolution' to reduce population growth and destroy traditional societies.[30]

To assess the role of the family within illiberal agendas, one also has to look at how illiberalism welds together with the notion of familism. Familism is a polysemous term that inter alia refers to an ideology that values the family over other social bonds.[31] It furthermore refers to discursive construction of an abstract family model that acts as an ideal for other social institutions,

and Eastern Europe (Heinrich Böll Stiftung 2014) <https://pl.boell.org/sites/default/files/uploads/2014/10/war_on_gender_korolczuk.pdf>.

[25] A. Pető, 'Gender and illiberalism' in Sajó, Uitz, and Holmes (n 15) 313–325. Interestingly, some authors point to the replacement of the rights of the individual with the rights of a narrowly defined family as part and parcel of a larger systematic attempt to weaken democracy through anti-gender policies. See, for example, E. Lombardo, J. Kantola, and R. Rubio-Marin, 'De-democratization and opposition to gender equality politics in Europe' (2021) 28 Social Politics 521.

[26] See, for example, N. Yuval-Davis, 'Gender and nation' (1997) 16 Ethnic and Racial Studies 621.

[27] By now it is becoming established that 'gender' is integral to illiberal projects although the centrality of these norms slipped under the radar of research for many years. See R. Kuhar and D. Paternotte, *Anti-Gender Campaigns in Europe: Mobilizing against Equality* (Rowman & Littlefield 2017); S. Mancini and N. Palazzo, 'The body of the nation: Illiberalism and gender' in Sajó, Uitz, and Holmes (n 15) 406.

[28] E. Korolczuk and A. Graff, 'Gender as "Ebola from Brussels": The anticolonial frame and the rise of illiberal populism' (2018) 43 Signs: Journal of Women in Culture and Society 797.

[29] Ibid.

[30] G. Kuby, *The Global Sexual Revolution: Destruction of Freedom in the Name of Freedom* (James Patrick Kirchner tr, Angelico Press 2015).

[31] E. Ochiai, 'Introduction: Reconstruction of intimate and public spheres in Asian modernity' in E. Ochiai and L. Aoi Hosoya (eds), *Transformation of the Intimate and the Public in Asian Modernity* (Kyoto University Press 2013) (describing how it simply refers to policies that emphasise family obligations, such as care work). But see Linnamäki (n 15) 18 on the different nuances of the term.

including the state.[32] Familism per se is not necessarily problematic. Illiberal actors across Europe, however, seem to be appropriating the ideology of familism to achieve objectives that often transcend family politics – and are more connected to those majoritarian aspirations that characterise illiberalism. Diluting the rights of family members therein, especially women, is one of such aspirations. As Korolczuk and Graff put it, illiberalism is 'constructing a new universalism . . . that replaces individual rights with rights of the family as a basic societal unit'.[33] An instrumental recourse to familism is evidenced by the fact that this family-centred ideology does not always translate into actual family policies. By and large, it 'acts as an ideological base to which states and policy makers can refer to, to justify their decisions in matters that often exceed the scope of family politics'.[34]

Illiberal ideological familism[35] is detrimental to non-traditional families, particularly LGBTQ families. For example, research shows how ideological familism was discursively mobilised in the debate preceding the enactment of the new Hungarian law on 'paedophilia' targeting the LGBTQ community.[36] On that occasion, through this strategic embrace, Hungary's ruling Fidesz–KDNP Party Alliance sought to demonise the LGBTQ community by depicting it as a threat to innocent children and LGBTQ families as more prone to child abuse.[37] It is also potentially detrimental to families that align with the illiberal model of family to the extent that illiberal attitudes are reproduced *within* this type of traditional family and can prove harmful to women and children.

A second analytically useful notion to understand the illiberal enterprise is that of familialism. If familism emphasises the centrality of the family in rights talk, this second notion – 'familialism' – links the family to national demographics and reproductive needs. German sociologist Andreas Kemper refers

[32] O. Tóth and C. Dupcsik, 'Trust in people and conservatism of family and gender roles in Hungary and in some other European countries' (2011) 1 Journal of Intimate and Public Spheres 152, 153.

[33] Korolczuk and Graff (n 28) 789.

[34] Linnamäki (n 15) 16, citing D. Szikra and D. Szelewa, 'Do Central and Eastern European countries fit the "Western" picture? The example of family policies in Hungary and Poland' in C. Klenner and S. Leiber (eds), *Welfare States and Gender Inequality in Central and Eastern Europe: Continuity and Post-socialist Transformation in the EU Member States* (European Trade Union Institute 2010).

[35] By the term, I refer to the strategic embrace of ideological familism by illiberal actors.

[36] LXXIX Act of 2021 on stricter measures against paedophile offenders and amending certain laws to protect children, entered into force in January 2022.

[37] For a description of the political background that led to the adoption of the law, see A. Pető, 'Three readings of one law: Reregulating sexuality in Hungary' (*LSE EUROPP blog*, 8 July 2021) <https://blogs.lse.ac.uk/europpblog/2021/07/06/three-readings-of-one-law-reregulating-sexuality-in-hungary/>.

to familialism as a form of biopolitics that takes 'a strictly standardised image of a 'functioning family'' as a foundational unit of the nation.[38] This ideology simultaneously subordinates individual choice to the normative demands of the reproduction of the nation. It comes across as a new form of gender conservativism that singles out a 'limited, population-biological-national, and normative idea of the family' to pursue national population policy.[39]

Below I offer an overview of the ideological usage of the family in the two textbook cases of Hungary and Poland. As it will be noted, these developments pose a direct challenge to the EU and its attempt to uphold in its *acquis* more progressive understandings of family that include protection of LGBTQ couples.

12.3 HUNGARY

With Fidesz's 2010 Manifesto (*Nemzeti ügyek politikája*), the family gained a new centrality in the illiberal discourse in Hungary.[40] The Manifesto suggests that past liberal governments neglected families, giving in to the allure of the sirens of modernity, progressivism, and neoliberalism. According to Orbán, who repeatedly referred to a failure of the state to prevent families from 'falling into debt slavery', the collapse of the family is visible both at the conceptual and the financial level.[41] Its conceptual and financial breakdown contributed to the weakening of the nation.[42] The restoration of the centrality of families and family policies hence goes hand in hand with a conviction that working families contribute to the well-functioning of the nation, so policies 'should be directed there'.[43] It furthermore operates within the larger project of 'symbolic-constitutive rejection of the liberal left as illegitimate to rule or participate in (defining "real") democracy'.[44]

Fidesz's discourse around gender and family has evolved over time. Scholarship has identified two phases, 2010–2014 and 2014–2018, in which

[38] A. Kemper, 'Foundation of the nation. How political parties and movements are radicalising others in favour of conservative family values and against tolerance, diversity, and progressive gender politics in Europe' (Friedrich Ebert Stiftung 2016) <http://library.fes.de/pdf-files/dialog/12503.pdf>.

[39] Ibid 60.

[40] See, for example, Fidesz, *Nemzeti ügyek politikája* (2010) <www.langzsolt.hu/upl/files/nemzeti_ugyek_politikaja_8481.pdf>, 10, 12, 20, 74.

[41] N. V. T. Lugosi, 'Radical right framing of social policy in Hungary: Between nationalism and populism' (2018) 34 Journal of International and Comparative Social Policy 224.

[42] Ibid.

[43] Ibid 223, citing Fidesz's 2010 Manifesto (n 40) 76.

[44] E. Palonen, 'Performing the nation: The Janus-faced populist foundations of illiberalism in Hungary' (2018) 26 Journal of Contemporary European Studies 316.

the party emphasised different aspects to create a structural link between the Hungarian national identity and the family.[45] From 2010 to 2014, a first connection was established between the people of Hungary and Christianity, seen as the origin of morals and social norms. According to Orbán, the economic crisis of 2008 was caused by a moral crisis, and addressing the former required first and foremost addressing the latter.[46] Noting a worrisome disentanglement of work, credit, family, and nation from the moral foundations of the 'Christian' nation, Orbán pledged to reconstruct the link between the two by foregrounding families as the central target of state policy. According to Robert Sata, a researcher who conducted a systematic discourse analysis of Orbán's speeches from 2010 to 2018:

> [u]sing this logic, the Fidesz government has not only enshrined 'the family' as a marriage between a man and a woman into the constitution but it also clearly defines the role of women in its vision for Hungary and the ideal Hungarian family – they should stay at home to rear enough children to form a strong Hungarian nation. This is because, for Orbán, the demographic downturn in Hungary is as important as fighting the economic crisis, because it threatens the future of the community, making Hungarians 'an endangered species'.[47]

Between 2014 and 2019, another aspect gained traction, namely the strong anti-immigration stance of the ruling Fidesz–KDNP Party Alliance. This posture was achieved by linking Christianity more closely with national identity – beyond a mere matter of personal faith. It was, furthermore, achieved by reconstructing the role of women within society. Women were notably called upon to restore their traditional function as the bearers of reproductive capacities.[48] They were reminded of their larger responsibility towards the continuation of the Hungarian nation. In the last few years, gender-related rights in the country suffered from a setback, as exemplified by the replacement of gender mainstreaming policies with family mainstreaming policies and by the reconceptualisation of the role of women in society into mere mothers. A setback was furthermore illustrated by the observed

[45] R. Sata, 'In the name of the family' (Gunda Werner Institut – Heinrich Böll Stiftung 2022) <www.gwi-boell.de/en/2022/01/31/im-namen-der-familie-wie-populistinnen-ungarn-gegen-geschlechtergleichstellung>.

[46] Ibid 7–8.

[47] Ibid 10, n 55.

[48] On the link between women and the biological reproduction of the nation, see A. McClintock, 'Family feuds: Gender, nationalism and the family' (1993) 44 Feminist Review 61.

decline in women's reporting of sexual violence, due to a hostile environment created through genderphobic policies.[49]

In this second phase, the opposition against Brussels elites also became more overt. The EU, feminism, and liberalism have been blamed for low birth rates, and for imposing a 'gender agenda' that blurs natural boundaries by 'creating a third gender, … ridiculing faith, and regard[ing] families as redundant, and nations as obsolete'.[50]

A key year in this phase is 2019. Fidesz dubbed 2019 as 'the year of the family'.[51] In 2019, Fidesz passed the Family Protection Action Plan.[52] The reform came as the outgrowth of the described centrality of family in the project of national reconstruction launched with the 2010 party's Manifesto. The Plan included a vast array of social welfare policies aimed at supporting families, spanning preferential housing loan or 'baby-expecting allowance' ('babaváró támogatás'), tax breaks for mothers of at least four children, crèche service, and childcare allowance for working grandparents.[53] While these policies pursue commendable goals, the European Commission, in its assessment of the measures, expressed some concerns. Especially, it pointed to the fact that the baby-expecting allowance was only available to married couples, and that in case of divorce the loan contract must be terminated (since marriage is an eligibility condition).[54]

By and large, whereas public spending on family policies has doubled since 2010,[55] it is targeted at very specific groups, such as large families. Roma families do not profit from the different family programmes, even though they are the group most affected by poverty.[56] Their exclusion is premised on the ruling party's aspiration to link family policies with anti-immigration policies. It also seems consistent with the state objective of boosting Hungarian demographic indicators. These exclusionary policies seem to dovetail with the notion of 'welfare chauvinism' under which welfare spending can be appropriated

[49] K. Parti, 'Illiberal and populist political narratives on gender and underreporting of sexual violence: A case study of Hungary' (2022) 10 Politics and Governance 26. For a description of the gender-phobic climate, see J. Takács, K. Fobear, and S. Schmitsek, 'Resisting genderphobia in Hungary' (2022) 10 Politics and Governance 38.

[50] See Sata (n 45) 16, n 99.

[51] E. Zimanyi, 'Family b/Orders: Hungary's campaign for the "family protection action plan"' (2020) 20 Feminist Media Studies 305.

[52] Ibid 305.

[53] See Sata (n 45) 16, n 99.

[54] Ibid 3.

[55] A. Irion, 'Family first: Exclusionary social policy in Orban's Hungary' (*Illiberalism.Org*, 31 March 2022) <www.illiberalism.org/family-first-exclusionary-social-policy-in-orbans-hungary/>.

[56] See Lugosi (n 41) 210.

to draw the boundaries of authentic citizens and exclude 'others'[57] – a posture that aligns with the idea of a 'ethno-exclusionary welfare state'.[58]

Even more than welfare law, it is constitutional law that has been at the heart of the illiberal promotion of the traditional family. The year 2021 marks the entry into force of major constitutional amendments aimed at entrenching traditional notions of family. The ideological context in which the amendments were passed made explicit the intent of relying on biological evidence in constructing family ties and not international trends or ideologies in relation to childbearing.[59] The 2011 text elevated the family and the nation to the status of 'cornerstones of co-existence, with loyalty, faith and love constituting the principal values of unity',[60] and attempted to recast the family as an institution of national relevance.[61] The 2020 Ninth Amendment of the Fundamental Law claims that '[t]he mother shall be a woman, the father shall be a man'[62] in an attempt to render the gender identity of the parents of a child immutably linked to their biological sex. Under Article XVI, 'Hungary shall protect the right of children to a self-identity corresponding to their sex at birth, and shall ensure an upbringing for them that is in accordance with the values based on the constitutional identity and Christian culture of our country'. Ultimately, the definition of family refers to the heteronormative relationship of two adults of different sex founded on marriage complemented by the nuclear component. The entrenchment of the traditional family is hence total and covers both the sexual orientation of the parents, the gender identity of family members, and the nuclear imperative.

These brief notes should explain the broader context of the emergence of the Hungarian child protective law that targets LGBTQ people equating them to paedophiles, recently challenged by the EU.[63] It furthermore illustrates the marked centrality of the family in the Hungarian illiberal discourse.

[57] J. Mewes and S. Mau, 'Unraveling working-class welfare chauvinism' in S. Svallfors (ed), *Contested Welfare States: Welfare Attitudes in Europe and Beyond* (Stanford University Press 2012) 136 (noting that this approach is consistent with generally held views amongst the population aimed at restricting benefits to Hungarians). See also N. Lendvai-Bainton and D. Szelewa, 'Governing new authoritarianism: Populism, nationalism and radical welfare reforms in Hungary and Poland' (2021) 55 Social Policy & Administration 559.

[58] Lendvai-Bainton and Szelewa (n 57) 563.

[59] At the same time, the amendment argued that the new definition is without prejudice to existing same-sex registered partnerships and the rights thereof, reaffirming as it does only a different conception of marriage that defies current ideological trends exogenous to the country's culture.

[60] Fundamental Law 25 April 2011 (Government of Hungary), 2&5.

[61] D. Szikra, 'Democracy and welfare in hard times: The social policy of the Orbán Government in Hungary between 2010 and 2014' (2014) 24 Journal of European Social Policy 486.

[62] Article 1, Ninth Amendment to the Fundamental Law (Magyarország Alaptörvényének kilencedik módosítása) 15 December 2020 (Government of Hungary).

[63] See Section 12.5.

12.4 POLAND

The Polish tradition, the Polish republican tradition, the Polish tradition of freedom, so Poland is an island of freedom, because this freedom in Western Europe today is retreating. Today, for saying the obvious, that there can be no children from a homosexual couple, you can face a criminal trial in some countries. This will not be accepted in Poland under any circumstances, as they say in Podhale.[64]

Podhale is a conservative region in the South Polish mountains where the Górale population live. By referring to it, Kaczynski suggests that something will never be accepted due to the conservativism of the region. In a series of statements delivered in September 2019, Kaczynski foregrounded the family as the centrepiece of Polish society. In his view, families should be understood to refer to a self-evident entity comprising 'one man, one woman, in a lasting relationship, and their children. This is a family'.[65]

The rhetoric employed by the ruling party in Poland follows a script similar to that employed in Hungary. First, the welfare system is crucial for re-establishing the lost centrality of the family. Its rediscovered centrality is best exemplified by the so-called 500+ Policy. The program is the 'the most expensive and wide-scale redistribution policy in post-1989 Poland'[66] and was introduced to reverse negative trends in demographics.[67] Under the program, every family receives a 500 Zloty (around 105 euro) tax-free monthly payout per each second and subsequent children under eighteen, independent of the family income. Under certain conditions, non-citizen residents can join the program.[68] The program received generally positive reviews due to its contribution to increasing fertility and combating poverty. At the same time,

[64] 'Jarosław Kaczyński uzupełnił definicję rodziny i przyznał, co w Polsce się nie przyjmie' (*Ofeminin*, 9 September 2019) <www.ofeminin.pl/swiat-kobiet/zycie-rodzinne/jaroslaw-kaczynski-uzupelnil-definicje-rodziny-na-konwencji-w-krakowie/5y1crvr>.

[65] It was reported that, after receiving criticism, Kaczynski responded by extending his definition of family to include single parents and families with adopted children with adoption being accepted as a gracious and selfless act. 'Jarosław Kaczyński o Rodzinie: Kobieta,Mężczyzna i Ich Dzieci' *Politika* (7 September 2019) <https://wpolityce.pl/polityka/462852-jaroslaw-kaczynski-o-rodziniekobietamezczyzna-i-ich-dzieci>. See E. Korolczuk and A. Graff, '"Worse than Communism and Nazism put together": War on gender in Poland' in Kuhar and Paternotte (n 27).

[66] W. Grzebalska and A. Pető, 'The gendered modus operandi of the illiberal transformation in Hungary and Poland' (2018) 68 Women's Studies International Forum 164.

[67] Ibid 167.

[68] 'Rodzina 500 plus – Ministerstwo Rodziny i Polityki Społecznej' (*Portal Gov.pl*, 22 March 2023) <www.gov.pl/web/rodzina/rodzina-500-plus>; '500+ Child Benefit in Poland | Kids in the City' (*Kidsinthecity.pl*, 6 February 2022) <https://kidsinthecity.pl/500-plus-child-benefit-in-poland/>.

however, the EU Commission expressed concerns over the effects an additional non-work income can yield on the participation in the labour market. The Commission noticed that, according to the most recent statistics, the program incentivised workers with low wages to stay at home,[69] and that women find themselves at higher risk of dropout from the labour force as they bear the highest burden of caregiving duties.[70]

A second common trait between Poland and Hungary is the idea that families are entrusted with a host of communitarian goals, including the goal of transmitting the 'culture of civilization, for the sustainability of larger communities'.[71] Notwithstanding their important social function, family units are seen as being systematically under attack.[72]

Recasting the family as the central target of state policy first entails a reconceptualisation of the role of women in society. A recent report of the United Nations (UN) notes the 'pervasive and flagrant stereotyping of women, including by some political leaders, as unsuited to political power and the insistence on a woman's role as primarily wife and mother' ensuing from similar policies.[73] It secondly leads to a new emphasis on family mainstreaming, similarly to what occurred in Hungary, and to erasing the term 'gender' from the government agenda. Grzebalska and Petö describe 'family mainstreaming and anti-gender policies [as] one of the main pillars on which the illiberal state has been erected, and through which security, equality and human rights have been redefined'.[74] The Family 500 Plus policy described above can also be interpreted through a similar lens.

A key battle of illiberal actors in the area of sexuality and reproduction is also waged on the scholastic front.[75] In Poland, a new school subject called 'History and the Present' was recently introduced. The subject aims at better portraying Polish history and society and will soon be taught in schools all over Poland with a (controversial) mandatory handbook.[76] One specific section in

[69] European Commission, 'First results of Poland's Family 500+ programme released' (16 May 2018) <https://ec.europa.eu/social/main.jsp?langId=en&catId=1246&newsId=9104&furtherNews=yes>.

[70] Ibid.

[71] Ibid.

[72] See also 'Jarosław Kaczyński: dla PiS najważniejsze są rodzina oraz naród' (*PR24 Portal – polskieradio24.pl*, 7 September 2019) <https://polskieradio24.pl/5/1222/artykul/2365079,jaroslaw-kaczynski-dla-pis-najwazniejsze-sa-rodzina-oraz-narod>.

[73] UN Working Group on the issue of discrimination against women in law and in practice, 'Mission report' (United Nations 2016) <www.ohchr.org/EN/NewsEvents>.

[74] See Grzebalska and Pető (n 66) 164 (abstract).

[75] See N. Palazzo and M. Tomasi, 'I referendum in materia di diritti delle coppie omosessuali: Minoranze e vox populi' (2016) 1 GenIUS 89.

[76] The handbook is authored by historian Wojciech Roszkowski.

the book drew the criticism of the opposition parties and civil society, since it frames in-vitro fertilisation as human breeding. The contested passages refer to 'the creation of arbitrary groups of people sometimes of the same sex, who will bring children into the world separately from the natural union of man and woman, most preferably in a laboratory'.[77] The book voices a larger criticism to Western ideology and its embedded trends affecting family relationships. The main targets of criticism are the contemporary separation of sex from love and fertility (i.e. reproduction), and the degrading of sex to a mere leisure activity. These trends are in turn described as damaging for children who are, as a consequence, left stranded and deprived of the love of parents.[78]

Ultimately, constitutional discourse is also mobilised by Polish illiberal actors. The concept of family appears in numerous provisions of the Constitution. Relevant provisions state that the family is under the protection and guardianship of the Republic of Poland. The family is constructed narrowly as comprising a man and a woman who are married,[79] as well as their children and relatives on both sides. Furthermore, the Constitution enshrines the right of parents to raise their children according to their personal convictions,[80] and the right of the child to be protected against demoralisation.[81]

With conservative family norms being entrenched at the constitutional level, regressive policies are mostly advocated for at the local level, where a form of 'regressive' experimentation occurs. The main example in this regard is the Charter of Family Rights drafted by the influential far-right, Catholic think tank Ordo Iuris Institute for Legal Culture.[82] The Charter of Family Rights supplies a model law for local governments to enact local policies aimed at combating fake news informed by an 'LGBT ideology' – as well as the 'political correctness' of the EU. According to Ordo Iuris, similar deplorable ideas are spread by the EU and other international organisations, such as OSCE.[83] In the aftermath of the European Parliament resolution

[77] J. Dobrosz-Oracz, '"Jest świetny, bo niepolscy Polacy się denerwują". Jak Rydzyk wychwalał HiT, a Czarnek kiwał głową' (*wyborcza.pl*, 8 December 2022, <https://wyborcza.pl/7,82983,28784865,jest-swietny-bo-niepolscy-polacy-jak-sie-denerwuja-jak-rydzyk.html>.

[78] Ibid.

[79] Article 18 of the Constitution of the Republic of Poland (Konstytucja Rzeczypospolitej Polskiej) of 1997 (Constitution of Poland).

[80] Article 48(1) of the Constitution of Poland.

[81] Article 72(1) of the Constitution of Poland.

[82] O. Iuris, 'Local government charter of the rights of the family' (*ordoiuris.pl*, 29 March 2019) <https://en.ordoiuris.pl/family-and-marriage/local-government-charter-rights-family>.

[83] See, for example, O. Iuris, 'Fake news about "LGBT-free zones" results in a proliferation of lies about Poland. Ordo Iuris Steps In' (*ordoiuris.pl*, 22 July 2020) <https://en.ordoiuris.pl/family-and-marriage/fake-news-about-lgbt-free-zones-results-proliferation-lies-about-poland-ordo>.

condemning the Charter and the creation of LGBT-free zones – outlined in the section below – the Deputy Director of Ordo Iuris Center of International Law firmly defended this model law placing emphasis on familism, and on the Charter's ability to foster 'family-friendly law'.[84]

12.5 THE EU'S RESPONSE TO ILLIBERAL EROSION

In recent years, the Commission has taken legal action to protect the rights of the LGBTQ community in Hungary and Poland.[85] In Poland, the mentioned creation of 'zones free from LGBT ideology' has been at the centre of the EU's criticism. The problem was successfully linked to the possibility for Poland to receive European Structural and Investment Funds. In March 2021, the European Parliament voted in favour of a second resolution declaring the EU an 'LGBTIQ Freedom Zone',[86] and called upon the Polish government to revoke those local discriminatory declarations patterned after the Charter of Family Rights.[87] The Commission, furthermore, initiated talks with Polish local authorities expressing concerns for the adoption of similar declarations hostile to LGBTQ families. According to the Commission, these declarations especially run counter to the values enshrined in Article 2 of the Treaty on European Union (TEU) – 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 well as Article 7 of Regulation 1303/2013 on EU funding, prohibiting discrimination on several grounds, including sex and sexual orientation, 'during the preparation and implementation of programmes'.[88]

[84] M. Olek, 'Ideological document attacking Poland – Ordo Iuris comment on European Parliament Resolution' (*ordoiuris.pl*, 2 January 2020) <https://en.ordoiuris.pl/family-and-marriage/magdalena-olek-ideological-document-attacking-poland-ordo-iuris-comment>.

[85] European Commission, 'Commission takes legal action for discrimination LGBTIQ' Press release (July 2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3668>.

[86] European Parliament Resolution of 11 March 2021 on the declaration of the EU as an LGBTIQ Freedom Zone (2021/2557(RSP)). See also, European Parliament Resolution of 18 December 2019 on public discrimination and hate speech against LGBTI people, including LGBTI free zones (2019/2933(RSP)).

[87] Recitals C–H of European Parliament Resolution of 11 March 2021 (n 86).

[88] Article 7(2) of Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 [2013] OJ L347/320.

The Resolution of the European Parliament furthermore contains an important declaration of intent that points to the main advancements that the Union pledges to make in the forthcoming years. Recital X refers to 'the lack of legal provisions for the mutual recognition of a birth certificate with two same-sex parents' and a legislative initiative to close this legal gap, as well as 'a revision of the 2009 guidelines on free movement, both scheduled for 2022'.[89]

At the beginning of December 2022, the European Commission proposed new rules on the recognition of parenthood amongst Member States which would demand, inter alia, recognition of the parenthood of children of same-sex couples.[90] The proposal was submitted as part of the EU's strategy for the rights of the child as well as the EU's LGBTIQ Equality Strategy 2020–2025.[91] While the proposal does not explicitly link the reform to the deterioration of the rule of law in Poland and Hungary, its approval would inevitably limit the ability of the Member States to pass laws that adversely affect the legal status of children and parents in LGBTQ families by preventing the recognition of family ties established abroad.[92] For this reason, one can anticipate an obstruction of the proposal by countries like Poland and Hungary.[93] Given the requirement of unanimity in the Council, Poland and Hungary can exercise their veto power and prevent the proposal from ever becoming legally binding.[94]

[89] Recital X of EP Resolution of 11 March 2021 (n 86).

[90] European Commission, Proposal for a Council regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood, COM (2022) 695 final.

[91] Ibid 1 (Explanatory Memorandum). See European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. EU Strategy on the rights of the child, COM (2021) 142 final; European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Union of Equality: LGBTIQ Equality Strategy 2020–2025, COM (2020) 698 final.

[92] C. Bennett, 'European Commission seeks to enshrine same-sex parents' rights' *Politico* (7 December 2022) <www.politico.eu/article/european-commission-try-to-enshrine-same-sex-parental-right> (describing the regulation as an 'initiative [which] is particularly targeted at protecting the rights of same-sex parents who move through the EU with their children – a goal that could irk EU countries like Hungary and Poland, which have passed anti-LGBTQ+ resolutions in recent years').

[93] A legal obligation to mutually recognise the parenthood of a child by two persons of the same sex for the purpose of rights derived from EU law already derives from the case law of the CJEU. Case C-490/20 *V.M.A. v Stolichna obshtina, rayon 'Pancharevo'* EU:C:2021:1008. See also Chapter 9 by Geoffrey Willems.

[94] Article 81(3) TFEU.

A surprising development is the recent decision of the Commission to launch an infringement procedure against Hungary and its child protective anti-LGBTQ law. The reform introduced a prohibition to expose minors to content related to homosexuality and gender reassignment, restricted daytime display on TV on content related to these topics, and limited the ability to provide sex education in school to only certain listed organisations. The Children Protection Act's declared objective is to increase sanctions against paedophile offenders. At the time of the enactment of the law, the European Commission noted that '[t]he protection of children is an absolute priority for the EU and its Member States. However, the Hungarian law contains provisions which are not justified on the basis of promoting this fundamental interest or are disproportionate to achieve the stated objective'.[95] Similarly, Ursula von der Leyen expressed concerns in relation to the reform, noting that it 'clearly discriminates against people on the basis of their sexual orientation and ... goes against all the values, the fundamental values, of the European Union'.[96]

The most problematic aspect of the law is that it conflates paedophilia with homosexuality.[97] During the parliamentary discussion preceding its enactment, an analogy was drawn between exposing children to queer gender and the issue of child abuse by LGBTQ families, thereby 'evok[ing] the historically widespread myth that non-heteronormative sexualities and child abuse are inevitably connected'.[98] As argued by conservative member of the Hungarian National Assembly János Volner, 'the LGBTQ movement has more than once been involved in similar scandals'.[99]

A new law passed in April 2023 further corroborates the idea that the hidden objective of the reform is to harm the LGBTQ community, particularly LGBTQ families: the Whistleblowing Act would have allowed citizens to anonymously report to authorities gay and lesbian couples who raise children,

[95] 'Brussels Takes Hungary to Court on Anti-LGBT Law and Klubrádió' *Euronews* (15 July 2022) <www.euronews.com/my-europe/2022/07/15/european-commission-takes-hungary-to-court-over-anti-lgbt-law-and-klubradio-closure>.

[96] L. Hutchinson, 'EU Member States express 'grave concern' over Hungary's LGBTIQ discrimination' *The Parliament* (23 June 2021) <www.theparliamentmagazine.eu/news/article/eu-member-states-express-grave-concern-over-hungarys-lgbtiq-discrimination>.

[97] See n 36, 37 and accompanying text.

[98] See Linnamäki (n 16) 21.

[99] Government of Hungary, 'A pedofil bűnelkövetőkkel szembeni szigorúbb fellépésről, valamint a gyermekek védelme érdekében egyes törvények módosításáról szóló előterjesztés általános vitája a lezárásig' ['General Debate on the proposal for stricter measures against paedophile offenders and amending certain laws to protect children until its closure'], Parliamentary Diary, 206(1), 2021, 30309.

and any family arrangement that offends the traditional family as enshrined in the Constitution.[100] The law has then been vetoed by the president of Hungary, Katalin Novak.

What is relevant to the present analysis is that, for the first time, in February 2023, the Commission proposed a standalone plea based on Article 2 TEU, which lists the values of the Union, to challenge the Hungarian law. The toolkit aimed at countering rule of law deterioration is expanding. The nuclear option[101] under Article 7 TEU did not prove so nuclear in the end due to its burdensome and lengthy procedures, including the vote of the European Council by unanimity to establish 'the existence of a serious and persistent breach'. In the face of a failure to utilise this procedure, the EU has been seeking workarounds. Amongst them is the use of infringement actions,[102] and of Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget, which makes EU funds contingent on the respect of the rule of law.[103] The budget Conditionality Regulation has been 'validated' by the Court and – acting in tandem with a 'multitude' of other existing conditionality mechanisms – is likely to constitute an important tool for ensuring compliance with rule of law values through the powerful leverage of withholding EU funds.[104]

As to the infringement actions, these are proving the barycentre of the EU's response to illiberal erosion. In a first phase, the Commission brought 'indirect' infringement actions to counter democratic backsliding in Hungary – in the sense that it did not explicitly link these actions to the rule of law.[105]

[100] V. Gulyas and M. Kasnyik, 'Hungary's new law lets locals report on same-sex families' *Bloomberg* (13 April 2023) <www.bloomberg.com/news/articles/2023-04-13/hungary-s-new-law-allows-locals-to-report-on-same-sex-families>. The veto could have been overruled by Parliament. L. Kijewski, 'Hungarian president vetoes anti-LGBTQ law' *Politico* (22 April 2023) <www.politico.eu/article/hungary-president-katalin-novak-vetoes-viktor-orban-anti-lgbtq-law/>.

[101] Gulyas and Kasnyik (n 100). The law has recently been vetoed by the president of Hungary, Katalin Novak. The veto can be overruled by Parliament. Kijewski (n 100).

[102] M. Schmidt and P. Bogdanowicz, 'The infringement procedure in the rule of law crisis: How to make effective use of Article 258 TFEU' (2018) 55 Common Market Law Review 1061.

[103] Regulation (EU, Euratom) No 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget [2020] OJ L433/1.

[104] Case C-156/21 *Hungary v Parliament and Council* EU:C:2022:97; Case C-157/21 *Poland v Parliament and Council* EU:C:2022:98. On how the EU is effectively using a series of conditionality mechanisms in parallel to the conditionality regulation, see K. Lane Sheppele and J. Morijn, 'Frozen, how the EU is blocking funds to Hungary and Poland using a multitude of conditionalities' (*VerfBlog*, 4 April 2023) <https://verfassungsblog.de/frozen/>.

[105] M. Dawson and E. Muir, 'Hungary and the indirect protection of EU fundamental rights and the rule of law' (2013) 14 German Law Journal 1959. See also G. Halmai, 'The early retirement age of the Hungarian judges' in F. Nicola and B. Davis (eds), *EU Law Stories:*

Recently, however, the Commission has pursued 'direct' infringement actions that more explicitly counter rule of law deterioration,[106] based on the Charter or Article 19 TEU (protecting judicial independence).[107]

The use of a standalone plea based on Article 2 is a new move, described by commentators as nothing short of 'revolutionary'.[108] The move occurs against the backdrop of a lively scholarly debate on whether this plea was possible and, if so, normatively desirable.[109] The plea is included in a *prima facie* routine infringement proceeding against the child protective anti-LGBQT law. It points to Hungary's failure to comply with the Audiovisual Media Services Directive (AVMSD)[110] – protecting minors from inappropriate content in on-demand media audiovisual services – and certain EU law provisions on

Contextual and Critical Histories of European Jurisprudence (Cambridge University Press 2017) 471.

[106] European Commission, 'Strengthening the rule of law within the Union – A blueprint for action' COM (2019) 343 final.

[107] M. Bonelli, 'Infringement Actions 2.0: How to protect EU values before the Court of Justice' (2022) 18 European Constitutional Law Review 31. See Case C-619/18 *Commission v Poland* EU:C:2019:531; on which see L. Pech and D. Kochenov, 'Respect for the rule of law in the case law of the European Court of Justice: A casebook overview of key judgments since the Portuguese judges case' SIEPS 2021:3 <www.sieps.se/globalassets/publikationer/2021/sieps-2021_3-eng-web.pdf?>, 74; see also Case C-791/19 *Commission v Poland* EU C:2021:596.

[108] L. D. Spieker, 'Berlaymont is back: The Commission invokes Article 2 TEU as self-standing plea in infringement proceedings over Hungarian LGBTIQ rights violations' (*EU Law Live*, 22 February 2023) <https://eulawlive.com/op-ed-berlaymont-is-back-the-commission-invokes-article-2-teu-as-self-standing-plea-in-infringement-proceedings-over-hungarian-lgbtiq-rights-violations-by-luke-dimitrios-spieker/>. See also L. Kaiser, 'A new chapter in the European rule of law saga?' (*VerfBlog*, 4 March 2023) <https://verfassungsblog.de/a-new-chapter-in-the-european-rule-of-law-saga/>.

[109] As to scholars voicing support for bringing systemic infringement actions based on Article 2, see K. Lane Scheppele, 'Enforcing the basic principles of EU law through systemic infringement actions' in C. Closa and D. Kochenov (eds), *Reinforcing Rule of Law Oversight in The European Union* (Cambridge University Press 2021); A. von Bogdandy and L. D. Spieker, 'Countering the judicial silencing of critics: Article 2 TEU values, reverse Solange, and the responsibilities of national judges' (2019) 15 European Constitutional Law Review 391; Schmidt and Bogdanowicz (n 102). As to positions sceptical towards this option due to the indeterminacy of the provision, see Bonelli (n 107) 57; P. Pohjankoski, 'Rule of law with leverage: Policing structural obligations in EU law with the infringement procedure, fines, and set-off' (2021) 58 Common Market Law Review 1341; T. Boekestein, 'Making do with what we have: On the interpretation and enforcement of the EU's founding values' (2022) 23 German Law Journal 431; Editorial Comments, 'Safeguarding EU values in the Member States – Is something finally happening?' (2015) 52 Common Market Law Review 625.

[110] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) [2010] OJ L95/1.

services and e-commerce.[111] The pleas pivoting on the AVMSD also point to a violation of Articles 1, 7, 11, and 21 of the Charter, which protect the value of dignity, the respect for private and family life, the freedom of expression and information, and, ultimately, the right to non-discrimination inter alia based on sex and sexual orientation. Then, there is the mentioned succinct passage in the press statement according to which 'by adopting the legislation cited in the first paragraph, Hungary has infringed Article 2 TEU'.[112] It is unclear whether the Commission will link the Article 2 plea to the gravity of the Charter violations since the argument is not developed further. According to Bonelli, '[f]or the time being, it is sufficient to point out that the two formulations, taken at face value, seem to go in two slightly different directions: one where a violation of Article 2 TEU would result from a serious breach of several Charter rights; and one where the alleged infringement of the values of Article 2 TEU would constitute the actual alleged violation.'

This passage attests to the growing determination of the EU to tackle rule of law deterioration with a bite. The issue of protecting LGBTQ families as such looms over these developments, while failing to be openly foregrounded as central in the ongoing European culture wars. However, LGBTQ families seem to have gained enhanced constitutional relevance as a result of such developments. First, although the content of the Article 2 plea is not yet available, the infringement procedure summons the right to respect for private and family life and, hence, a negative sphere where LGBTQ people and, potentially, families should be protected. Second, the objective of the child protective law as one that seeks to 'shield' children from being exposed to LGBTQ populations is also flatly inconsistent with the ways in which the EU interprets the objective of protecting children as stated by Ursula von der Leyen.[113] Third, the move comes after the mentioned EU Parliament resolution discursively engaging Article 2 to discourage the adoption of the Charter of Family Rights in Poland, and previous attempts at using Article 2 as an interpretative device in the letter of formal notice against Hungary's child protective anti-LGBQT law.[114]

[111] Other invoked provisions include Article 3(2) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1; Articles 16 and 19 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L376/36; Article 56 TFEU.

[112] Action brought on 19 December 2022 in Case C-769/22 *Commission v Hungary* [2023] OJ C54/16.

[113] See n 95 and n 96.

[114] See Bonelli (n 107) 48.

The latest move of Orbán's government, allowing the reporting of LGBTQ couples with children and all families that offend the traditional model of family enshrined in the Constitution, as well as the emphasis placed during parliamentary debates on LGBTQ families being inherently abusive, could induce the Commission to lay focus on the delicate repercussions that the so-called child protective law has on LGBTQ relationships per se, not just on LGBTQ individuals. Put differently, the Commission is faced with the choice of either treating these parallel developments as mere background noise or as expression of a larger pattern pointing to systemic attempt to curtailing the rights of LGBTQ families as such.

In sum, recent moves by the EU, such as the ground-breaking utilisation of Article 2 TEU as a legally justiciable principle, may serve to reinforce the constitutional significance of LGBTQ families by sublimating the protection of an LGBTQ-friendly family at a higher level, so as to speak: the level of EU's common values.

At present, this sublimation will likely primarily affect such negative sphere of freedom. The described steps attest to the gradual expansion of an emerging EU constitutional family law as a consequence of the attraction of the negative liberties of LGBTQ families in the foundational values of the EU. A separate question is whether the area of common values will become a tool to expand the EU's competences and confer increased protection to LGBTQ families. For example, one may ask whether, in the future, the recognition of the legal ties of LGBTQ families through legal-regulatory regimes such as registered partnerships will also become a question that engages the EU's common values.[115] While illustrating this (now remote) possibility, the chapter does not take a position on the normative desirability of such an expansion.

[115] There is an established pattern in the protection of LGBTQ families that might point to an additional centrality of the LGBTQ family in this area named in legal scholarship the 'theory of small changes' or 'incrementalism'. K. Waaldijk, 'Small change: How the road to same-sex marriage got paved in the Netherlands' in R. Wintemute and M. Andenæs (eds), *Legal Recognition of Same-Sex Partnerships: A Study of National, European, and International Law* (Hart Publishing 2001) 437; W. N. Eskridge, Jr. *Equality Practice: Civil Unions and the Future of Gay Rights* (Routledge 2002); Y. Merin, *Equality for Same-Sex Couples: The Legal Recognition of Gay Partnerships in Europe and the United States* (Rowman & Littlefield 2002). According to this incremental pattern, the decriminalisation of homosexual behaviour is usually followed by the introduction of anti-discrimination laws protecting the LGBTQ community, and ultimately by the legalisation of same-sex legal partnerships. While this pattern concerns domestic jurisdictions, it is also observable in the framework of the European Convention on Human Rights, in which the European Court of Human Rights (ECtHR) recently released a ground-breaking decision identifying a Convention right to same-sex registered partnerships. *Fedotova and Others v Russia*, Application nos 40792/10, 30538/14 and 43439/10; *Buhuceanu and Others v Romania*, Application nos 20081/19 and 20 others.

12.6 CONCLUSION

As illiberal movements gain momentum across Europe, the EU faces new challenges that require an accelerated process of self-reflection. This chapter explored the ideological manipulation of the concept of family within illiberal regimes in Europe, and examined the Union's response to this erosion of liberal values. Surprisingly, the ongoing 'culture wars' over family norms between the EU, Hungary, and Poland have served as a catalyst for increasing the constitutional significance of the family within the EU.

Following the rise of illiberalism, the EU found itself in a prolonged state of confusion, struggling with a sense of uncertainty. Recently, the EU seems to be moving beyond this phase in an attempt to supply clearer answers as to 'what we are and what we want'.[116] It is noteworthy that family and child protection issues have become an integral part of this endeavour to define EU identity and its foundational values. The protection of the rights and freedoms of LGBTQ families and communities, in particular, has emerged as a key area that increasingly engages EU common values in both discourse and legal frameworks, as evidenced by the reactions to the declarations of the Polish Charter and Hungary's anti-LGBTQ child protection law. Recent developments provide an opportunity to pause and reflect on the unpredictable progress that has been made in recent years.

See also *Oliari and Others v Italy*, Application nos 18766/11 and 36030/11 (however, this judgement placed greater emphasis on the special circumstances of the Italian legal, social, and political context). The EU, of course, has a unique history and distinctive mission that might prevent this pattern from ever applying, but would it be completely unthinkable to have, ten years from now, a declaration to the effect that LGBTQ families as such are something that pertains to and deserve protection as a matter that engages European common values? The prediction of the attraction of LGBTQ legal partnerships in the area of the common values would not operate in a *vacuum*: it is corroborated by a linear progression in the EU's approach regarding the protection of LGBTQ families. The introduction of the EU Commission proposal on the cross-border recognition of parenthood also attests to this shift. The prediction is further strengthened by the concomitant shift in the case law of the ECtHR, whose *acquis* on fundamental rights 'constitute[s] general principles of the Union's law' under Article 6(3) TEU. It is ultimately corroborated by the growingly visible determination with which the Union is resolved to counter illiberal erosion.

[116] E. Montale, *Ossi di seppia* (Piero Gobetti 1925). This point does not engage with the issue of whether the EU will forge through its Article 2 plea a negative identity – whereby it draws lines against unwanted developments – or a more positive one. See Spieker (n 108).