Envisioning a Gender-Equal European Society

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Among the manifold analyses of *Commission v Hungary* and a flourishing debate on the realization of a European society based on values, the question of gender has been largely overlooked (for an exception, see Nosrati and Tomasselli). Yet, in the context of the alarming gender backlash and the rise of alt-right, misogynist ideologies, the European Commission appealed in its new Gender Equality Strategy from March 2026 for the mainstreaming of gender into "every aspect of life".

In the following contribution, we will first outline how the discussion on European society links to feminist approaches to EU law. Secondly, we analyse the Court's arguments and rethink them from a feminist perspective. Ultimately, we discuss how gender equality can be realized substantively in European society.

From Feminist Approaches to EU Law to an Anti-Patriarchal European Society

In contrast to other values listed in Art. 2 TEU, gender equality is not a recent addition to the Union's corpus of values. Starting from Art. 119 of the Treaty of Rome, the principle of equal pay for equal work has set an early standard for pursuing gender equality objectives also in its economic dimension, a move that has been considered highly "exceptional" for its time. Since then, gender equality has been enshrined in European Treaties, including Art. 2 and 3(3) of the TEU and the Charter for Fundamental Rights, transferred into EU legislation, and progressively developed by the CJEU (European Parliament). Social scientists have studied the successful Europeanization of gender equality, even in its external dimension, arguing that commitment to "gender equality" is a shared value across the Union. Importantly, in the CJEU's current practice, the understanding of "gender equality" as "equality between women and men" has been expanded to include non-binary and transgender understandings of gender and gender expression, too.

Gender equality as a value in Art. 2 TEU is not the only link to the discussion of European society. As Jo Shaw has already observed in 2000, feminist analysis of EU law has the potential to go beyond a case law-focused promotion of gender equality norms and instead challenge the central concepts underlying legal governance, such as the nation state. A feminist legal approach to the EU must focus on the way "(1) sovereignty and authority, (2) citizenship and membership, (3) representation, democracy and the public sphere, (4) political economy and (5) civil society" are reproduced. EU law, as such, becomes not only a sphere of struggle, but also of identity formation. More than 25 years later, recent feminist EU law scholarship, for instance on refugee law, competition law, democratic backsliding, and the political economy, has demonstrated what a feminist methodology can contribute. One of us has already argued elsewhere that for European society to become a meaningful concept, it has to be reoriented towards "seeing" the "everyday life of a society" – of which women make up roughly 51% in the EU.

Against this background, we argue that the understanding of a European society which aims to uphold the values of Art. 2 TEU has to be anti-patriarchal. An anti-patriarchal society is not anti-men but focuses on challenging interlocked systems of domination which provide disproportionate status and power to a specific definition of masculinity and enforce a gender binary. This anti-patriarchal perspective could be productively applied to several aspects of the decision in *Commission v Hungary*, for instance the different understandings of "pluralism" that are discussed in this symposium (see Zaleski, Gersternberg, Feisel, Höpner, and Tomasseli). Instead, we apply a feminist methodology – feminist re-writing/re-reading – to the Court's argu-

ments to carve out hypothetical future orientations for creating a non-patriarchal European society.

Re-reading the Court's Arguments from a Feminist Lens

Patriarchal understandings of society, in particular of a traditional, heteronormative family, have been at the centre of the decision in *Commission v Hungary*. The decision concerned anti-LGBTQI laws imposed by the then-Hungarian parliament, allegedly to protect children. Explicit discussions on gender and gender equality, however, are nearly absent in this case. The Court claims multiple breaches of the EU law that can give rise to a violation of Art. 2 TEU (para. 545), in particular the infringements of Articles 1 (human dignity), 7 (private and family life), 11 (freedom of expression) and 21 (non-discrimination) of the Charter of Fundamental Rights (para. 544). Besides the clear link to gender equality in the prohibition of non-discrimination under Art. 21, the judgment offers three further concrete openings for considering questions of gender and women's rights more explicitly.

First, the Court establishes human dignity under Art. 1 CFR as a non-derogable maxim of Art. 2 TEU, "it must therefore be respected, even where a right is restricted" (para. 486). There exists a long-standing debate in feminist scholarship about the uneasy relationship between human dignity and gender (in)equality. For instance, according to Martha Nussbaum, "human dignity is frequently violated on grounds of sex" (p. 227). The Court provides a helpful guidepost in this regard by highlighting in its findings regarding Art. 1 CFR that the "dignity of a human person is part of the substance of the rights laid down therein" (para. 486), which means that every right of the CFR must be read in light thereof (however, see critically Plucis on the missing collective dimension in the Court's reasoning). Even as the Court acknowledges divergencies, for example in "moral or cultural attitudes" (para. 127) that exist in all Member States, human dignity cannot be breached.

Second, the Court held that Art. 7 CFR, the right to private and family life, also "encompasses the right of each person to establish details of his or her identity as an individual human being, which include the right of transgender persons to personal development and physical and moral integrity" (para. 435). Those considerations are equally relevant to personal development in the private life for instance by exercising reproductive rights for family planning. Family planning includes not only regulations on contraception options and pregnancy termination, but also access to fertility services, medical-assisted reproduction, and legal recognition, for instance, also for families that do not adhere to the heteronormative tradition. Those rights are granted very unequally across Europe. For instance, 20 Member States still criminalize abortion, and more than 15 states do not allow lesbian couples and single women equal access to assisted reproduction. According to the Court, Art. 7 CFR also imposes "positive obligations on Member States, in addition to negative obligations [...] which also entails the establishment of effective and accessible procedures guaranteeing effective respect for those rights" (para. 436). This could impose a clear duty to enable access to the full range of reproductive rights, legally and materially.

Third, gender-related concerns can also be found in Art. 11 CFR on the right of freedom of expression and information. As stated above, access to information is a fundamental necessity to realize the protective rights awarded in the CFR. But when it comes to women's health, information on gender-related healthcare issues is scarce. Throughout Europe, we can observe a transnationally coordinated anti-gender movement pushing back and actively restricting information about reproductive health, gender-affirmative care, or sexual education. According to the Court, freedom of information should not be only granted to "information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference but also those that shock and disturb" (para. 460). One could argue that such information, for instance about pregnancy termination options or gendered pay transparency, must also be included in the demands of "pluralism, tolerance, and broadmindedness" that a "democratic society" must guarantee.

Not every violation of (gender) equality amounts to such a serious breach of Art. 2 TEU (para. 547). The Court concluded that the Hungarian law poses an infringement that is "both manifest and particularly serious, of the rights of non-cisgender persons – including transgender persons – or non-heterosexual persons" (para. 556) by effectively causing their "stigmatisation and marginalisation, which is tantamount to establishing, maintaining or reinforcing the social 'invisibility' of some members of society" (para. 555). Again, this legal reasoning invites us to reflect on the way law not only reproduces, but might actively foster societal marginalisation, (gendered) stereotypes and prejudice.

Realizing Gender Equality with Art. 2 TEU

Our feminist re-reading of the Court's arguments in the judgment demonstrated that there are clear links to several dimensions of gender equality that a non-patriarchal society must maintain and promote. What does this mean for the realization of gender equality in Art. 2 TEU going further?

Does the self-standing invocation of Art. 2 TEU now open the way for the Commission to bring an infringement action against every EU Member State that has not achieved full gender equality in 2025, which is, in fact, all 27 of them? As full gender equality is projected to be realized only in around 50 years, violations might be persistent, but which actions would amount to a "manifest and serious breach" of Art. 2 TEU? Does it require the active criminalization or the restriction of rights, for instance, a near-total abortion ban as in Malta, or is the lack of funding, access, or simply non-action of a Member State enough to suggest a breach? With the rate of femicides in the EU remaining at a shocking 4.1 women per million women (almost double that of male victims of intentional homicide by family members or (ex-)partners), inadequate protection from domestic violence might equally amount to a matter of life or death – not just "mere" stigmatization.

From the decision, we could imagine two potential visions for realizing a non-patriarchal European society: On the one hand, in a minimalist vision, we could follow the Court's approach to look for "red lines", to demand action only in clearly identifiable "serious and manifest" breaches. An example could be severe restrictions to reproductive rights in situations of questionable rule of law or democracy practices (see also recent case law of the ECtHR on Poland). Pursuing this course of action, either by an infringement proceeding or a preliminary ruling, would most likely be accompanied by allegations of judicial activism or potential competence creep. Yet, the history of women's liberation has demonstrated the crucial role of litigating rights before apex courts, even when the decision might trigger political backlash. The CJEU's current line of jurisprudence on the recognition of trans rights and same-sex marriages (Mirin, Coman, Trojan) suggests that the Court is not afraid to walk a fine line also in highly politicized questions.

On the other hand, in a maximalist vision, attempting to realize gender equality through judicial action seems to be doubtful, too. While Art. 19(1) and (2) TEU and Art. 47 CFR should provide for effective remedies and legal protection, existing proceedings against EU institutions or Member States solely grant ex post remedies with restricted locus standi rules for private actors to launch action (see proposals for ex-ante review). When designing new legislative acts, policies, or budgets, gender-related implications are often absent. Many gaps in the protection of the rights of women and gender non-conforming people are also caused by a lack of funding. While the EU aims to remedy this through targeted campaigns, for instance, on gender-related healthcare research, budgeting issues are mostly not legally contestable for injured private actors and thus, ultimately, depend on political will and actions.

Applying a feminist reading to the discussion of EU value enforcement via Art. 2 TEU, we have shown the potential and limitations this approach has for the creation of a gender-equal and anti-patriarchal European society. Gender equality, while more established and embedded than other values listed in Art. 2 TEU, faces similar challenges in its concretization, application, and potential judicial enforcement. Yet, it also provides an essential connection to envision how a

non-patriarchal European society might look like; a society in which everyone can fully benefit from the values named in Art. 2 TEU, if they are indeed an "integral part of the very identity of the Union as a common legal order" (para. 508).

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