A Queer(er) European Society?

Commission v Hungary from a Queer Materialist Perspective

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The CJEU's judgment in C-769/22 *Commission v Hungary* undeniably marked a monumental advancement of EU law, sanctioning both the judicialisation of fundamental values and the legal existence of European society. While acknowledging the magnitude of the case seems unproblematic, identifying its impact and its beneficiaries is a less straightforward task. In this contribution, rather than looking for answers in EU law's own grammar and language, I raise questions from a critical queer perspective while centering on the concept of a value-based European society (see here, here, and here). In this respect, I argue that the Court's underdeveloped elaboration on the politics of values eschews material structures of oppression and exploitation and thus risks foreclosing actual transformative legal interventions, particularly in light of the assumption that the liberal promise of diversity and plurality will deliver full equality.

Pinpointing Queer Materialism

Approaching *Commission v Hungary* from a critical queer perspective (see here and here) means committing to foregrounding the ways in which gender and sexuality substantiate hierarchies, distribute power, and condition life possibilities (see also Steininger and Kim's feminist perspective in this symposium) while sustaining the ensuing analysis radically – that is, not discounting its premises or results in the name of law's own constrictions.

In this contribution, I adopt a queer materialist approach (see, for reference, here and here). While a queer materialist approach commits to centering gender and sexuality as the main axes of analysis, it does not do so in the terms of LGBTIQ+ people's institutional claims to recognition and inclusion – that is, LGBTIQ+ rights – but rather based on the questioning of the structures through which exploitative and oppressive social relations are (re)produced along gendered and sexual faultlines.

In *Commission v Hungary*, the CJEU stated that European society is one in which "pluralism prevails" (para 551; on pluralism, see Zaleski in this symposium). The Court also insisted that "stigmatisation and marginalisation, which [are] tantamount to establishing, maintaining or reinforcing the social 'invisibility' of some members of society, [run] counter to the values of respect for human dignity, equality, and respect for human rights" (para 555). On her part, Advocate General Ćapeta interpreted the "vision of a good society" (para 157) enshrined in Article 2 TEU as one in which "disrespect and marginalisation of a group in society are the 'red lines' imposed by the values of equality, human dignity and respect for human rights" (para 262).

Building on the conceptions of stigmatisation, marginalisation, and "social 'invisibility'" (para 555) emerging from this judgment, I will proceed in two moves. First, I will assess the vision of European society adopted in *Commission v Hungary* by reference to queer subjects' own struggle for freedom, equality, and life possibilities. Second, moving through the mobilisation of LGBTIQ+ emancipation and towards the politics of values at play in this case, I will discuss the value-driven construction of European society in the context of the broader CJEU case law, paying specific attention to dissonant instances that taint the normative appeal of a good European society.

Queerness for Queers

Formally, the mistreatment of LGBTIQ+ people in Hungary presented the Court with the "perfect case" to act on Article 2 TEU. Any analysis foregrounding the

material life conditions of queer subjects living in the EU will, nonetheless, invite caution in at least two respects.

On the one hand, as the aftermath of *Coman*, i.e., persistent disregard of the Court's decision with respect to EU citizens' same-sex spouses' residence rights, shows, the gap between grand judicial conclusions in Luxembourg and concrete realities on the ground risks being dangerously widened along the road of implementation. In this sense, AG Ćapeta herself noted in her Opinion that "the judgment of the Court is only part of the solution for achieving equality and human dignity for LGBTI persons" (para. 217). On the other hand, the momentous doctrinal impact of the judgment, coupled with the unprecedented extent of Member States' participation in the proceedings, stand to support a rather dangerous optical illusion: One reinforcing the ostensible divide between Western and Eastern Member States when it comes to the protection of LGBTIQ+ rights and sidelining queer subjects' struggles in other Member States, both within and beyond existing legal frameworks (see here and here). Looking forward, such a cautionary remark seems all the more relevant in light of the – yet to be investigated – mismatch between the test adopted by the Court ("manifest and particularly serious breaches of one or more values'" para 551) and the one proposed by AG Ćapeta ("the negation of a value which is the root cause of other breaches of EU law'" para 247, see also paras 237, 241).

I argue that a queer materialist perspective invites a more radical questioning of the terms of this win for LGTBIQ+ inclusion. Undoubtedly, it is still necessary to understand the extent to which the judicialisation of Article 2 TEU values successfully includes LGBTIQ+ people in the EU legal order (see on this, for instance, here and here). It is also certainly good that the CJEU identified stigmatisation, marginalisation, and social invisibility as running counter to the founding values of the EU legal order. From an anti-discrimination law perspective, such a focus on stigmatisation possibly invites a finer attunement to the social contexts that produce inequality, and supports a broader scope of protection (see, for example, the Court in *CHEZ* and Iyiola Solanke's theory of discrimination as stigma).

At the same time, the actual transformative potential of the promise of equality – expressed in terms of inclusion in a plural society respectful of human dignity – should not be taken for granted. From a queer materialist perspective, pluralism is normatively sustained by a naturalisation of social relations that are not, in truth, produced in the terms of equality. In other words, as materialist feminists argue, the liberal promise of pluralism obfuscates the material underpinnings of stigmatisation, marginalisation, and social invisibility suffered by queer subjects. It does so by naturalising and thus neutralising social hierarchies (see Zappino and Ardilli here). Relatedly, if one accepts that equality can only be achieved by subverting the very causes of inequality, that is, the production of unequal, hierarchical social relations, then the EU promise of a pluralist society risks not materialising equality. If this is true, it is fair to ask: in the aftermath of *Commission v Hungary*, are we dealing with inclusion or assimilation (see here and here)?

To clarify the extent to which the EU promise of equality in plurality does not per se subvert the causes of inequality, it is helpful to reflect on how the CJEU ties stigmatisation and marginalisation to social invisibility and, overall, to the violation of the founding values of European society. The dichotomy between visibility and invisibility constitutes a topos of queer theory that would be worth exploring further in this judicial context. More importantly, any recognition of the liberatory potential of visibility cannot but come to terms with the realisation that the promise of equality in terms of visibility continues to serve the (re)production of capitalist social relations inasmuch as gendered and sexual differences themselves are put to profit (see, for instance, here and here).

While this simple observation does not exhaust discussions on whether the promise of equality can ever be fulfilled under capitalism, it questions the prices and costs of legal victories such as *Commission v Hungary*. It is in this sense that a radical reconsideration of the promise of pluralism, when launched from a queer materialist perspective, can proceed beyond

the "internal" forum of queer subjects' own struggle for liberation and encompass society and social relations in general.

Queerness for European Society

In *Commission v Hungary*, European society is presented in ideal terms on the basis of values (on the difference between idealist and realist approaches to European society, see van de Beeten in this symposium). Inasmuch as both the Court and the AG made express references to the *constitutional* nature of the case (see paras 520 of the judgment and paras 155, 157, 177 of the AG Opinion), the CJEU leveraged the politics of fundamental values in order to give constitutional substance to European society.

True enough, AG Ćapeta admitted that "the Court of Justice is a constitutional court, and basic constitutional principles are often, at the same time, political and legal" (para 215). Where does the point of contention stand then? As it was already argued, the constitutional engagement with fundamental values is rather devoid of any reflection, on the Court's part, on the political dimension of such a mobilisation. This appears problematic not only insofar as a necessary and legitimate component of the constitutional reasoning is not elaborated upon, but also because it seriously obscures how politics is already being done, through values, in other judicial contexts. In this regard, one should ask: Is the same progressive value politics advanced in *Commission v Hungary* actually applied throughout the whole EU legal order, for the whole EU social body? Two related streams of CJEU case law seem to answer in the negative.

Both for the so-called veil cases (from *Achbita* to *WABE* and *OP v Commune d'Ans*) and "feminist" asylum cases (*WS*, *K and L*, and *AH and FH*), EU values were strategically avoided or (mis)used in order to legally justify the sustainment of social relations that seriously diverge from the vision of a good European society. In the veil cases, the formal distinction between direct and indirect discrimination was deployed to eschew employers' claims under their freedom to conduct a business via so-called "neutrality policies" from a thicker fundamental rights and fundamental values-based review. Accordingly, commentators not only underlined how the comparator-based analysis under anti-discrimination law conceals non-neutral legal interventions and how direct and indirect discrimination rely on different normative choices affecting the distribution of the costs of equality across social actors, but they also showed that an analysis of the political economy of these cases cannot but acknowledge their role in reproducing racial capitalism within the EU. In the asylum cases, the normative background provided by the EU fundamental value of gender equality not only ended up distorting the very rules of international protection by policing accessibility to asylum based on genuine affiliation and belief in gender equality, but it also contributed, beyond the progressive outlook of a seemingly feminist win, to reinforcing othering in EU law.

Interestingly, the tools that eventually allow for the inscription of exploitation and oppression in law remain the same. In her Shadow Opinion in the *WABE* case, AG Sharpston expressed extreme scepticism:

> *"[A]s to whether an approach that would consist of moving any hijab-, dastar- or kippah-wearing employee of enterprise X who is not simply dismissed into a back office, safely locked away from any contact with customers (and probably also, given most corporate promotion structures, thereby placed at a significant and continuing disadvantage in terms of career path) is what the EU legislature had in mind when formulating Directive 2000/78" (para. 243, emphases mine).*

Attending to the material impacts of marginalisation, stigmatisation, and social invisibility, and thus proceeding in the analysis from the perspective of the material reproduction of exploitative and oppressive social relations, the closet does not look so different from the back office.

Critical, queer materialist insights suggest that the analysis of *Commission v Hungary* as an EU law victory is not straightforward. That is not only because the judicialisation of Article 2 TEU values raises multiple issues, but especially since the underlying politics driving the interpretation and application of values

still need to be challenged. In this sense, the aftermath of *Commission v Hungary* reveals the urgent need for an analytical framework that allows for a thicker apprehension of this turn of EU law: A framework that proceeds beyond the judicialisation of values and towards an attunement to structures of exploitation and oppression traversing European society.

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