Culture and Law in European Society after Commission v Hungary

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The judgment of the CJEU in Case C-769/22 *Commission v Hungary* presents multiple cultural implications: The case itself is not only about cultural services and their regulation but also features several arguments regarding both Hungarian Christian culture and the culture of gender and sexually diverse individuals – what could be called LGBTQI+ culture in general. Yet, these aspects have so far been given little attention in scholarship.

In this blog, I want to reflect on three cultural implications emerging from the case: the societal implication of cultural content, the role of EU law in accommodating national preferences and the limitations of EU law in interacting with cultural practices. I do so relying on two understandings of culture. First, I look at culture as the product of cultural creation, which takes the form of audiovisual media services that are part of the cultural sector. Second, I discuss culture as the traditions, beliefs, and practices of a group, especially the Christian culture of Hungary and gender and sexually diverse culture.

The Societal Implications of Cultural Content and the Role of Law

Commission v Hungary relates, first and foremost, to a cultural service. The Hungarian law concerns the diffusion of television programs, which are audiovisual media services. Such services have been regulated by EU law since 1989 in a Directive nowadays called the Audiovisual Media Services Directive (AVMSD). According to Article 6a(1) AVMSD, Member States shall take appropriate measures to ensure that audiovisual media services which may impair the physical, mental or moral development of minors are only made available in such a way as to ensure that minors will not normally hear or see them. Such measures shall be proportionate to the potential harm of the programme. Furthermore, in Article 6(1)(a), the Directive establishes that Member States shall make sure that programs do not contain incitement to hatred directed against a group of persons or members of a group based on any of the grounds referred to in Article 21 of the EU Charter.

The Hungarian measures that were at the centre of the decision define programs which promote or portray "deviation from the self-identity corresponding to the sex assigned at birth, of gender reassignment, or of homosexuality" as harmful content from which minors shall be protected under Article 6a(1) of the Directive (paras 134, 136). The Hungarian government argued that the definition and implementation of media content deemed to be harmful remains the exclusive competence of the Member States (para 110). In their view, Article 6 of the AVMSD does not harmonise what is deemed to be harmful media content nor the level of protection to be granted, therefore leaving this determination and interpretation to the Member States based on their values and cultural and moral perceptions (para 110).

The Court does not directly refer to competences in the judgment. It, however, starts its analysis with a fundamental preliminary remark: the regulation of audiovisual media services by the EU also concerns the content of such services (para 124). The Court recognises the *margin of appreciation* of the Member States when implementing the provisions on the protection of minors against harmful content, which must comply with proportionality and respect fundamental rights (paras 128 and 129). Still, the Court finds the measures discriminatory in light of Article 21(1) of the EU Charter (para 141).

This leads to the first cultural consideration that emerges from *Commission v Hungary*: The role of EU

law towards cultural content in European society. The case informs, firstly, that regulating content must comply with fundamental rights and cannot be a vector of discrimination or stigmatization "within a society in which pluralism prevails" (para 141). Establishing that the content targeted by the Hungarian measures cannot as such be qualified as harmful under the Directive and that the measures are discriminatory represents a considerable contribution of the case. It applies a normative standard to cultural content in European society.

Secondly, the relationship between law and cultural content is not fully left to the Member States. The regulation of cultural content by the Member States, where it falls under the scope of EU law, must be compatible with EU law and the normative framework it entails; in this sense, EU law also touches upon the regulation of content. By its approach to cultural content, the judgment paints EU law as a shield against discrimination and to a certain extent, misinformation. EU law therefore designs the contours and limits of content regulation by the Member States. As the Member States try to enforce a moral order through the regulation of content, so does the EU, when its laws condemn stigmatization and discrimination.

Cultural Conflicts within European Society and the Role of Law

Commission v Hungary also concerns the culture of the Member States which underlie their regulatory choices. The Hungarian Government argued extensively that the measures were necessary according to its culture. This highlights the second cultural consideration of the case: The challenge of reconciling coexisting yet diverging cultural views within society, and what the role of law is in this reconciliation.

In internal market law, the Court has often recognised that Member States have their own sociocultural characteristics that guide their regulatory choices, for example in cases relating to the opening hours of retail premises or the regulation of games of chance. The reasoning starts similarly in *Commission v Hungary* whereby the Court acknowledges that Member States adopt different regulatory choices according to their moral or cultural attitudes. The Court recalls that this diversity is part of the EU legal order and applies such a reasoning to the regulation of audiovisual media services (para 127), education grounded on Article 165 TFEU (para 272) and national constitutional identity based on Article 4(2) TEU (para 558). But after such preliminary statements, the Court does not engage with its usual balancing exercise: In cases concerning a cultural or identity aspect, the Court often relies on the principle of cultural diversity or carries out a detailed proportionality review in order to accommodate national cultural claims within the EU legal order (Villanueva, 2023).

In *Commission v Hungary*, the Court does not engage in cultural balancing because of the severity of the breaches of EU law that exclude the need for a legal or political compromise (see for a discussion on the lack of balancing here). The judgment goes further to establish that the limits to cultural diversity within the European society and its legal order are the values in Article 2 TEU. This represents a fundamental normative step for the European society. It sets a red line on what is acceptable or not within the societal order. The respect for the Member State's cultural diversity, as laid down in Article 167 TFEU, stops precisely where it restricts diversity in such serious terms or when the expression of cultural diversity leads to severe and manifest fundamental rights infringements. There is a strong affirmation in the finding of the Court that such breaches of EU law, which are also breaches of Article 2 TEU, are "incompatible with the very identity of the Union as a common legal order of a society in which pluralism prevails" (para 551).

There is a fundamental cultural challenge in the background of this case, a conflict at the heart of the Hungarian society, which actually exists within many national societies in Europe: The recognition and acceptance of gender and sexual diversity. This is an uncomfortable truth, yet this is the reality on the ground of European society (see here). What is the role of law in mitigating cultural differences? The judgment, limited by the procedure of Article 258 TFEU,

does not address this fundamental cultural dimension of the case, and does not engage into balancing, reconciling or mitigating diverging cultural meanings. The law remains within its confines, and does not touch upon the societal realities, dilemmas and cultural conflicts which underline such legal challenges.

A European Society of Rights or of Diverse Cultural Realities?

Commission v Hungary states that European society is a place of (fundamental) rights where gender and sexually diverse individuals are protected. Yet, what can we learn from the lived realities of Europeans with diverse cultural backgrounds within the European society? Or rather, how does law approach such cultural realities?

EU law protects gender and sexually diverse individuals through the EU Charter. Yet, the protection afforded to gender and sexually diverse individuals in *Commission v Hungary* is contextual: it is tied to the threats presented by the Hungarian measure. There are no references to overarching issues of such individuals within the European society, such as systemic discrimination, inequalities, or hatred. The reasoning does not address the societal structures of inequalities (see Davide Tomasseli in this symposium). Within the limitations of Article 258 TFEU, the legal reasoning does not account for the concrete everyday challenges of the individuals it is protecting. This creates a disconnection between EU law, a place of rights, and the lived reality of individuals who are part of minorities, which face systemic discrimination, every single day.

Culture is expressed through practices, behaviours or traditions, often called cultural expressions. They constitute the everyday life or groups and individuals. Yet, such practices are absent from the reasoning in the case. For example, the importance of the representation of diverse cultural expressions in cultural content is not expressly referred to. It could have been implied by the concept of pluralism relied on in the case, which is subject to diverging interpretations (see also here, here and here). This leads to an imbalance between rights – and their inviolable essence – and practices, which are invisible in the legal reasoning of the Court confined by the procedural requirements of the action for failure to fulfil obligations.

The distinction between rights and practices was already formulated in the context of the case law of the Court regarding religious communities (for example here or here). In such cases, the balancing exercise played a crucial role in negotiating the rights of religious communities, leading to arguments as to the invisibility of social practices (see here and here). Although there is no balancing exercise in *Commission v Hungary*, cultural practices are also hidden behind rights. This questions the role of law in constructing a societal order, and the particularity of the supranational nature of EU law and the Court in yielding a European society. The disconnection between cultural expressions, and the legal system, which embodies rights, still contributes to the disconnection between law and society highlighted previously (here and here).

While *Commission v Hungary* is certainly an important case for rights within the European society, it raises several broader questions as to the relation between law and culture within the European Union; from the relation between law and cultural content, to the role of law (and courts) towards cultural rights and practices. Such questions complement the rich reflections on European society and encourage us to think about the role of law towards culture within the European social order.

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