A New Court for Human Rights Cases: The Court of Justice of the European Union

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Introduction

The European Court of Human Rights, based in Strasbourg, has traditionally been a preferred venue for civil society organisations seeking redress for human rights violations. By contrast, the European Union (EU) was more focused on the internal market and regulation of the four EU freedoms of capital, goods, labour and services. Even after the Charter of Fundamental Rights (Charter) was adopted in 2007, and become a core pillar of EU law, limited cases of rights violations came before the Court of Justice of the European Union (CJEU), the EU's judicial branch (based in Luxembourg). However, whilst currently underutilised, EU law has the potential to be a powerful tool to protect and defend rights. It encompasses detailed legislation in areas such as non-discrimination, personal data, and migration and the Charter covers a broad range of rights surpassing, in some cases, the rights protected in the European Convention on Human Rights.

Signalling possible new avenues for rights protection, 2020 saw a number of significant cases before the CJEU that explicitly set out to protect fundamental rights. These cases have set precedents -- for the first time the court provided detailed guidance on the right to freedom of association, academic freedom, and the independence of the judiciary -- and open the door to a more proactive approach to rights litigation. However, for rights to be restored on the ground, CJEU judgments need to be implemented. The CJEU has one significant advantage over other regional courts in this regard: it can impose hefty fines reaching figures of hundreds of thousands of euros per day. But it takes time to reach this stage and it is possible that the CJEU may be beleaguered by some of the same issues relating to implementation as other international and regional tribunals.

This post seeks to unpack a new area of rights protection. It looks at the formal systems in place to ensure implementation of CJEU judgments and poses a series of questions to help promote effective implementation. By focusing attention on these new rights-based cases while they are still limited in number we aim to open a discussion, learn from the experiences of other tribunals, and encourage good practice. Our contribution will focus primarily on the case of the *European Commission v Hungary* (C-78/18) on the transparency of associations, as well as *European Commission v Hungary* (C-66/18) on higher education.

Deteriorating rights in Hungary

In 2010, following an election victory that resulted in a constitutional supermajority in the Hungarian parliament, Viktor Orbán's government began to systematically undermine checks and balances by weakening, or occupying, institutions that exercise control over the executive branch. This steady erosion of Hungary's constitutional democracy started with organs designed to counterbalance executive power, continued by starving, buying up or closing down independent media outlets, and by tailoring the electoral system to suit the ruling party coalition. It then reached civil society, academia and cultural institutions and while, in some ways, the Hungarian judiciary resisted this dismantling, recent changes will have a significant impact on the independence of domestic courts. In ten years, an 'illiberal state' was built in the middle of Europe, leading the V-Dem Institute to conclude that "Hungary is no longer a democracy, leaving the EU with its first non-democratic Member State."

Independent civil society organisations working on human rights, accountability and refugee protection become the target of extensive smear campaigns and vigorous attacks from the government and its allied media outlets. After years of depicting NGOs as illegitimate political actors serving foreign interests in June 2017, the Hungarian Parliament adopted a law on the transparency of foreign-funded organisations ("NGO law").

The NGO law mirrors Russia's foreign agent law (a 2012 law requiring non-profit organisations that receive foreign support to declare themselves as "foreign agents") and in the preamble states that foreign funding may "endanger the political, economic interests of the country as well as the operation of statutory institutions without undue influence." It requires that any foundation or association receiving foreign funding (including funding from natural persons, charities and the European Commission) over EUR 25,000 per year must register as a "foreign-funded organisation." Failure to comply is at first sanctioned with a fine, but ultimately results in the NGO's dissolution through a simplified termination procedure.

This new legislation did not serve the otherwise legitimate aim of safeguarding transparency, as existing laws already contained adequate provisions. Instead, it blacklists NGOs through the use of negative labels and connotations, violates the privacy of donors, and has a strong chilling effect on NGOs and their freedom of association and expression. In protest, ten prominent Hungarian NGOs publicly announced their refusal to register or label themselves as a "foreign-funded organisation,: both for reasons of principle but also to use the opportunity to challenge the legislation in a Hungarian court. A further 23 NGOs turned to the Hungarian Constitutional Court, while a group of 14 NGOs applied to the European Court of Human Rights to challenge the law. The ECtHR found the application inadmissible as it considered that the domestic remedy in the form of a constitutional complaint had yet to be exhausted. The Constitutional Court decided to wait for the CJEU judgment after the EU also took action against Hungary but, to date, its proceedings remain suspended.

The response of the EU

The EU had a range of tools at its disposal to address the deteriorating situation in Hungary and other member states. One possibility was a more political approach, ultimately leading to what is known as the Article 7 process and the suspension of a member states' voting rights. The Commission opted not to take this approach but another avenue, which can be pursued concurrently, is litigation, which targets individual pieces of legislation. The litigation process starts with what is known as "infringement proceedings" initiated by the EU against a member state and then a period of dialogue between the parties. If there is no satisfactory resolution during this pre-litigation phase, the Commission can then refer the case to the CJEU. As the "guardian of the treaties" the Commission is in the driving seat. Unfortunately, there is no direct access to the CJEU for victims or other affected parties.

The Commission sent a letter of formal notice – the first step in the infringement process – to the Hungarian government on 13 July 2017 with a two-month deadline to respond. In the press release the Commission concluded that the Hungarian law did not comply with EU law as it interfered with the right to freedom of association, introduced unjustified restrictions on the free movement of capital, and raised concerns regarding the protection of personal data. The government failed to address the Commission's concerns, leading to the issuance of a "reasoned opinion" from the EU in October and, then, a referral to the CJEU on 7 December 2017. It took until 18 June 2020 for the court to hand down a judgment.

The court ruled the Hungarian legislation unlawful, affirming for the first time that the right to freedom of association is protected by EU law and "constitutes one of the essential bases of a democratic and pluralist society." The judgment set out the substantive elements of freedom of association, including the right to access funding, and in doing so provided judicial guidance that will be crucial for the future development of EU law and to defend civil society.

Following a similar path and timeframe was another case against Hungary addressing the law on higher education institutions, in particular the Central European University (CEU). The CEU is a private university, accredited in both the United States and Hungary, which had become the country's most prestigious graduate school with a diverse student body and faculty from all over the world. The school was founded by the Budapest-born financier George Soros, whom Orbán has vilified as a nefarious intruder in Hungary's affairs. Soros intended the university to "become a prototype of an open society," one that could counter the kind of illiberal democracy Orbán seeks. In April 2017, however, the Hungarian Parliament passed a law setting conditions that threatened to render CEU's continued presence in the country illegal. Despite mass street protests in Budapest and an international campaign to save CEU, the Hungarian government was unwilling to resolve the terms of the university's continued operations in Hungary.

In a judgment on 6 October 2020, the CJEU again found Hungary to be in violation of EU law, including provisions of the Charter relating to academic freedom and the freedom to conduct business. This judgment will also be an important source of inspiration for future litigation, affirming the interconnection between the EU's market freedoms and fundamental rights and providing guidance on areas of law that had previously been under-explored by the CJEU.

Despite advocacy from civil society, the CJEU failed to adopt an expedited procedure or to impose interim measures on the Hungarian government. In the intervening three-and-a-half years between the adoption of the laws targeting NGOs and CEU and the court's judgments, civil society continued to be attacked and many organisations felt unable to continue their operations in Hungary. The Open Society Foundations, for example, moved its Budapest office to Berlin and the CEU moved its campus to Vienna. The slow pace of court proceedings meant that, by the time the judgments were handed down ,rights had already been irreversibly violated. This is deeply regrettable: the intricate ecosystem of independent civil society and academia that the Hungarian government sought to destroy was precious and should have been protected, much like the natural environment. Indeed, in 2017, when the Polish government sought to cut down the UNESCO-protected Białowieża Forest, the CJEU ordered interim measures requiring Poland to cease its activities, accompanied by a penalty payment of at least €100 000 per day. A similar approach should have been taken here.

Implementing CJEU judgments

A judgment from the CJEU is immediately binding on member states and needs to be implemented. If, despite the court's judgment, a member state fails to make changes and continues to violate EU law, the Commission may refer the member state back to the court. The Commission can first issue a "reasoned opinion" on the specific points where the state has failed to comply with the judgment and then ask the court to impose fines. The court will then decide to impose financial penalties, which can either be a lump sum and/or a daily

payment based on the gravity of the violations, the period over which EU law has not been applied, and the country's ability to pay. As in the Polish case, fines can be in the region of €100 000 per day.

NGOs in Hungary and elsewhere in Europe welcomed the CJEU's judgments and called on the Hungarian government to repeal the NGO Law. In response, Prime Minister Orbán alluded to the influence Soros and "international networks" control over international courts when commenting on the judgment. The minister of justice also stressed that the government would continue to insist on the transparency of NGO funding and find the means necessary to achieve this aim.

Surprisingly, despite the decision of prominent human rights organisations not to register as "foreign funded," the Hungarian prosecutor's office has not, to date, opened any investigations. However, a number of NGOs have reported being rejected from EU funding opportunities on the grounds of not having complied with the NGO Law. In September 2020, for instance, the Tempus Public Foundation, established by the Hungarian government to distribute international funds, including Erasmus+ funds, rejected several grant applications from NGOs because they did not comply with the requirement to self-identify as a foreign-funded organisation. Meanwhile the European Commission has sent two letters to the Hungarian government, the latest on 29 October 2020, urging it to inform them of steps taken. After more than six months, in February 2021, the European Commission sent a letter of formal notice to the Hungarian government. This opens a formal dialogue that could lead to the case being referred back to the CJEU.

Questions for effective implementation

The fines that the CJEU is able to impose gives the court greater teeth than many other regional courts who rely on more limited sanctioning authority, goodwill, and diplomatic pressure to ensure the implementation of judgments. But it is no guarantee of success; despite the threat of financial penalties, the Hungarian government remains recalcitrant in its refusal to comply with the court's judgments. Long timelines are an added challenge. As noted, without an expedited procedure or interim measures, it took over three years to reach a judgment and, six months post judgment. the case still has not been referred back to the CJEU for penalties. Meanwhile, the Commission has asked the Hungarian government to "share draft modifications to the existing law and provide a clear timeline when they would adopt the necessary legal modifications."

All of this raises four key questions both for these two cases and other, future rights-based cases. The first relates to what constitutes implementation of a judgment. In the Hungarian context it should be relatively straightforward, since a piece of legislation was found to be in violation of EU law. So long as the legislation persists the violation remains. Questions may, however, arise if legislation is only partly repealed or adapted in some way. Are such modifications sufficient to ensure compliance? Do they appear to comply but, in practice, will violations persist? In other cases, a legislative solution may be insufficient and closer examination of how implementation works in practice and on the ground will be required.

This leads to the second and third questions on how prescriptive judgments should be and the question of documentation. Experience and research from other tribunals shows that the more precise the direction given in a judgment, the greater the chance of effective implementation (see, for instance, Murray and Sandoval). The CJEU judges did not specify that the NGO law

be repealed, even though this is the obvious conclusion and only solution to remedy the violations.

The questions of implementation in practice then raises the issue of documentation and monitoring. Who assesses whether implementation is effective and how do they measure that? The Commission is well placed to compare legislative amendments but has very limited capacity to carry out monitoring on the ground. If, for example, the Commission needs information on how schools are putting legislation into practice or how the independence of judicial selection is being assured, then it often relies on civil society organisations to provide information, collect, data and present it to the Commission. In some cases (for example on air quality), the Commission is playing a more active monitoring role, but at present, for human rights cases, there is no system in place to contract out this kind of monitoring or provide guidance as to what kind of information is required. Are there cases where a certain level of statistical information is necessary and, if so, how wide a sample is needed? Similarly, what form should witness testimony take and how should the Commission deal with sensitive information?

The final question concerns the role of different actors. In the human rights sector, the Commission generally relies on civil society to provide information about human rights violations on the ground. Apart from the standard complaint procedure – open to any citizen to report a suspected violation of EU law – there is no further formal role for civil society in the infringement process and all documents are confidential. It is therefore difficult for those outside the Commission to access information, understand the stage of proceedings, and know how to provide the most relevant and targeted information. Drawing from the experience of other regional tribunals, the Commission could hold a formal briefing with civil society organisations and the relevant national human rights institution to understand the extent of implementation and associated challenges. Such briefings should allow the Commission to request additional, targeted information to help inform and complement the information provided by the government.

The next months will prove decisive as to whether the Hungarian government will take adequate steps to comply with these judgments and, if it does not, what the Commission and CJEU will do next. More broadly, they will also provide critical lessons for future rights claims brought before the court and how to shape the actions of all actors involved – and affected – to ensure effective and timely implementation.

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