CHAPTER 1

INTRODUCTION: THE JIGSAW PUZZLE OF EUROPE

This is a study about European diversity and its commonalities. It is about a shared spirit of human rights, a vision that knits together currently 46 – at the time of my study 41 – countries, with vast differences in legal thought. In the current debate about legal convergence, comparative law and legal culture, I have chosen to study the legal culture of the European Court of Human Rights in Strasbourg (the Court/ECHR). Friedman, who called on scholars to be brave enough to study comparative legal culture and the sociology of transnational law, inspires this study. The Court is a successfully operating and powerful court, exceptional in two ways; it is composed of 46 member states, and it is in size, in reach and impact unique. These 46 member states, for which the Court is the highest competence on constitutional matters, range from Iceland to Russia, from San Marino to Azerbaijan. The Court embraces many different legal traditions, while giving effective remedies to individuals. Yes, there are other international courts, such as the International Court of Justice (ICJ) and the European Court of Justice (ECJ). Although the ICJ is composed of more countries and thereby more different legal traditions, it is limited to complaints by states or

1 The member states are:
   Albania, Andorra, (Armenia), Austria, (Azerbaijan), Belgium, (Bosnia Herzegovia),
   Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France,
   Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein,
   Lithuania, Luxembourg, Malta, Moldavia, (Monaco), the Netherlands, Norway,
   Poland, Portugal, Romania, Russia, San Marino, (Serbia and Montenegro), the
   Slovak Republic, Slovenia, Spain, Sweden, Switzerland, TFYR Macedonia, Turkey,
   Ukraine, the United Kingdom; see Council of Europe, <www.coe.int/T/D/
   Those countries marked in brackets have joined the Court after 2001, and are
   excluded from this study.

2 Lawrence M. Friedman, ‘Borders: On the Emerging Sociology of Transnational
   Friedman, ‘Some Thoughts on Comparative Legal Culture,’ in David S. Clark (ed.),
   Comparative and Private International Law: Essays in Honor of John Henry
   Merryman on His Seventieth Birthday (Duncker and Humblot, Berlin, 1990) p. 49.
advisory opinions. But at the ECHR any individual can bring a complaint about any member state. The reach and scope of the Court is thus much wider than that of the ICJ. The ECJ clearly has a stronger impact in national legal systems than the ECHR. The jurisdiction of the ECJ, however, covers fewer member states (27). The ECHR has both scope and impact. It is described in literature as the most effective supervisory machine for human rights in Europe.\(^3\) Human rights are important in themselves; they are especially sensitive to cultural and traditional particularities. All 46 countries are represented through judges at the Court. Most of these judges come directly from their respective domestic legal systems to sit on the bench in Strasbourg. The judges bring with them different experiences and traditions. For these reasons, the Court is an interesting vehicle for studying legal convergence, and the impact of different legal backgrounds.

As we will see, a study on the Court’s legal culture is important for several reasons: (1) it is crucial to fully understanding the outputs of the Court, and especially how the Court could be contributing to problems in implementation of its rulings at a domestic level; (2) because of the Court’s composition, it serves as a microcosm for possible convergence in the field of human rights.

1.1. THE HISTORICAL ORIGIN OF THE PROBLEM

We need to know the past in order to understand the present. This is true especially when it comes to the study of the legal culture of the Court. Europe is constantly defined in terms of its history.\(^4\) Traditions and ideologies are deeply rooted in the past. A historical overview will provide us with a broader basis to better understand the constant current debates in legal scholarship.

Europe is a continent with a rich history of wars, division and alliances, revolutions and great nation states. For centuries, war has scarred the

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