CHAPTER 5

TESTING THE LEGAL CULTURE OF THE COURT

This is the empirical part of the study. Here we will use the case law to examine the legal culture of the Court. In particular, we will look at voting behaviour under Articles 8, 9 and 10.

5.1. INTRODUCTION

The legal culture of a court, especially the attitudes and ideas of judges, is elusive. In interviews, people might express wishes rather than realities. My personal views of the Court are based on observations made during a short time period in 2001–2002, and may not give a fair account of a culture that has developed over a long period of time. One of the judges, who expressed strong scepticism about my research project, said: “what you are doing is fuzzy. There is no such a thing as a legal culture here! So why do research on it? Why don’t you do an analysis of the legal doctrines of the Court?” (interview 25). Providing proof of legal culture seems as difficult as taking a picture of a ghost. In addition, the reasoning in judgments might not really reveal the actual mindset of the judges taking part. Friedman wrote that “formal legal reasoning – usually in writing – has no necessary connection with the actual mental processes. A written opinion is not a photograph or X-ray of a judge’s mind”.

However difficult it might be to establish convincing proof, analysing the legal culture of the Court is relevant for understanding possibilities of legal convergence within Europe. It adds to and is significant for both legal sociology and comparative law. Most of all, it is the legal mindset of those applying the law and their ideas determines the actual results of cases.

How does one take a picture of a ghost? One way is through interviews, and another is to undertake a field study. A third way is to look at texts produced by those whose ideas you are interested in. In the texts of the Court’s decisions, conflicts prompted by differences in the political, vocational and legal backgrounds of the judges would naturally appear. What we could sense in the interviews and what I sensed when doing the field study at the Court, we would now find in the printed words of decisions. The spirit of the Court’s legal culture would leave an imprint

238 Friedman, supra note 38, p. 235.
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there. Next I will compare the self-perception of the judges, given in the interviews, with the actual case law. Do the decisions show the harmony that the judges claim to have? And if there is no harmony, and thus dissent, can that be explained by differences in backgrounds of the judges or by other variables?

The test that we will apply to the case law will be explained in detail in the next section. To sum up, we will approach the judges’ voting behaviour from a broad to a detailed analysis: from looking at voting performance in general, to voting in regards to certain provisions, to voting in relation to subject matter, to – finally – looking at voting behaviour in individual cases.

In the interviews, the judges identified family law (Article 8) and free speech (Article 10) as areas where the different backgrounds of the judges made a difference in the outcome. Differences on the basis of background were, it was said, more obvious here than in other cases under the Convention, where consensus is high. Articles 8 and 10 are the provisions of the Convention that the interviewees gave the most often as examples for revealing differences in background. However, the judges did not mention any differences occurring in freedom of religion cases (Article 9), although religion is deeply rooted in tradition. If historical-political or geographical-legal differences have an influence, then we should expect to find dissent in cases concerning religion as well as in cases concerning family law and freedom of speech.

We should also keep in mind that the aim of the Council of Europe is to create unity between the countries of Europe. The preamble of the Convention clearly shows a shared vision of the drafters. The English text speaks of “European countries which are like-minded”; the French text of “animés d'un même esprit”; the German text of “vom gleichen Geist beseelt”. While these expressions express a different romantic rhetoric, they all stress a shared belief. For that reason, it might be natural that the judges stress harmony, even though deeply rooted diversities can be found inside the Court. Perhaps the legal culture is a harmonising force, because of common ideals of human rights and a common notion of the role of the Court. We will look into this question in the following parts of this study.

239 Convention for the Protection Human Rights and Fundamental Freedoms, supra note 79: Preamble: “[…] Considering that the aim of the Council of Europe is the achievement of greater unity between its members…of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration [of Human Rights].”