

Rechtsgeschichte Legal History

www.lhft.mpg.de

<http://www.rg-rechtsgeschichte.de/rg29>
Zitiervorschlag: Rechtsgeschichte – Legal History Rg 29 (2021)
<http://dx.doi.org/10.12946/rg29/175-186>

Rg **29** 2021 175–186

Nina-Louisa Arold Lorenz*

A Summary: Portraying the Legal Culture and the European Human Rights Culture of the European Court of Human Rights and the European Court of Justice through Interviews

* Former Guest Researcher at the Max Planck Institute for European Legal History, Frankfurt am Main, Former Associate Professor, Raoul Wallenberg Institute, Lund University, Sweden

Dieser Beitrag steht unter einer Creative Commons Attribution 4.0 International License



Abstract

To show the impact of interviews for European legal studies, this article summarizes the earlier findings of two books, the first by Arold on the legal culture of the European Court of Human Rights (ECtHR), and the second by Arold Lorenz, Groussot and Petursson on the legal culture of the European Court of Justice (CJEU) and European human rights culture. In doing so, this article draws a portrait of the legal cultures of the two European courts and explains how (and to what extent) differences between European legal cultures brought to the benches of the two courts by their judges (plus for the CJEU: advocates general) impact cases concerning human rights. This article highlights parts of the methodology employed, i. e. a combination of interviews and case law analysis. The results show that there is no clash of a multitude of individual (legal) cultures at the courts; instead, both have established their own legal cultures that unite their members. Importantly, the legal cultures of the ECtHR and CJEU show some distinctive differences, which are relevant when assessing European human rights culture. Studying European human rights culture, in turn, is key for an assessment of the recent attempt to merge the two systems through the accession of the European Union to the European Convention on Human Rights (ECHR).

Keywords: legal culture, comparative law, European law, human rights, interviews



Nina-Louisa Arold Lorenz*

A Summary: Portraying the Legal Culture and the European Human Rights Culture of the European Court of Human Rights and the European Court of Justice through Interviews

I. Introduction

In October 2019 a new impetus was made to reopen the process of the European Union (EU) to accede to the European Convention on Human Rights (ECHR).¹ This political process aims to underline the EU's commitment to common values, democracy, the rule of law and respect for human rights. Accession would allow individuals to challenge acts of EU institutions at the European Court of Human Rights (ECtHR). The accession process, which opens up issues of structure and hierarchy between the two courts, had been put on hold by Opinion 2/13 of the European Court of Justice (CJEU),² which declared the draft accession agreement partly incompatible with EU law. Opinion 2/13 was delivered after the findings of Arold Lorenz, Groussot, Petursson were completed. The intention here is not to discuss the possible accession of the EU to the ECHR and Opinion 2/13, as both have been discussed widely in literature.³ However, as already expressed by former ECtHR judge Françoise Tulkens prior to Opinion 2/13: »[T]he quality of the relationship between the European Convention on Human Rights and

Union law will determine to a large extent the future of European law in general and of the legal culture inspiring it.«⁴ This inspiration will depend on the legal cultures of the two European courts. Therefore, to study the legal cultures of the two courts, especially in regard to human rights, is particularly relevant with regard to the currently re-opened accession process.

The starting point in studying the legal culture of the ECtHR and CJEU is to identify the points where different legal systems interact or even converge. An illustration published in a Swedish law article portrayed differences amongst European cultures when advertising a hammer.⁵ To sell well, the Swedish hammer ad would show a hammer above a flower and use the slogan »[I]t does not hurt the nails« as it is »[E]nvironmentally safe, [and] socially progressive«. In Germany a hammer would be advertised as »Approved by Deutsches Hammer Institut« and the ad would show a hammer in front of scientific papers and seals. A hammer in the United Kingdom would be advertised by »Royal Appointment« of her Majesty and would place two hammers like crossed swords in front of a coat of arms. In contrast, a French

* Former Guest Researcher at the Max Planck Institute for European Legal History, Frankfurt am Main, Germany. Former Associate Professor, Raoul Wallenberg Institute, Lund University, Sweden.

1 From the EU side, a letter of 31 October 2019, co-signed by the President and the First Vice-President of the European Commission, informed the Secretary General of the Council of Europe that the European Union stood ready to resume the negotiations on its accession to the European Convention on Human Rights. This was subsequently taken further and »[o]n 15 January 2020, the Ministers' Deputies approved the continuation of the ad hoc terms of reference of the

Steering Committee for Human Rights (CDDH) to finalise as a matter of priority, in co-operation with the representatives of the European Union, in an ad hoc group 47+1 and on the basis of the work already conducted, the legal instruments setting out the modalities of accession of the [ECHR] including its participation in the Convention system and, in this context, to examine any related issue.« See <https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/accession-of-the-european-union-to-the-european-convention-on-human-rights> (20 May 2020), see further https://eu2019.fi/en/article/-/asset_publisher/neuvosto-sitoutunut-eu-n-liittymi

seen-euroopan-ihmisoikeussopimukseen (20 May 2020).

2 CJEU Opinion 2/13 of the Full Court on the Accession of the European Union to the European Convention on Human Rights, 18 December 2014, ECLI:EU:C:2014:2454.

3 See for the discussion on the draft accession: AROLD LORENZ / GROUSSOT / PETURSSON (2013) 219–278; for further discussions see

LOCK (2011) 1025; LOCK (2015) 239.

4 TULKENS (2013) 16, paragraph 58; see reference in AROLD LORENZ et al. (2013) 7.

5 See as published in NORBERG (1994/1995) 378.

hammer would mirror the elegance of Catherine Deneuve, who would hold a hammer created exclusively by Maxim's Paris.⁶ While these amusing examples are based on stereotypes, they contain a certain grain of truth. Taking this further, if a caricature advertising a tool as simple as a hammer lifts the veil of cultural differences, how do these cultural differences play a role when differences in legal culture meet on international benches? Do national legal cultures, embodied by individual judges, clash constantly? Do these tensions arise especially in probing questions of human rights? During the 1990s, Pierre Legrand held legal convergence to be impossible as there are »irreducible differences between legal families based on different mentalités«.⁷ He explains »it would be like a common law lawyer acting only as if he were a civil law lawyer, but he could never be one.«⁸ Based on this, if put in the context of international/European law on the European benches,⁹ »irreducible« differences of mentalités ought to have an impact on decision-making. While criticized by Roger Cotterrell¹⁰ for being too vague, Lawrence Friedman's¹¹ definition of legal culture is used as a basis for the study at the ECtHR and CJEU. Friedman defines legal culture as »ideas, values, expectations and attitudes towards law and legal institutions, which some public or part of the public hold«.¹² This definition allows for the inclusion of features beyond the ideology and doctrine of lawyers and thus is better suited to the study of European courts.

Both the ECtHR in Strasbourg and the CJEU in Luxembourg are monitoring institutions for their respective regional organizations. The ECtHR is a

monitoring institution for the Council of Europe, with 47 member states, and aims to monitor member state compliance with the human rights enshrined in the ECHR.¹³ The CJEU is a monitoring institution for the European Union, with 27¹⁴ member states, and aims to monitor the EU legal system and its unity.¹⁵ While the CJEU is not primarily a court for human rights issues, the EU Charter of Fundamental Rights is legally binding and a growing number of cases at the CJEU touch on human rights issues.¹⁶ Each member state selects a judge in respect of its legal system.¹⁷ The judge's function is to explicitly incorporate knowledge of each of the legal systems present in the regional organizations, rather than defend the individual respective member state. Consequently, benches become meeting places of legal pluralities (beyond the mere divide of civil and common law). With ECtHR member states ranging from Iceland to Azerbaijan and CJEU member states ranging from Ireland to Slovenia, the legal systems and thus legal cultures of these states are significantly different.

Interviews conducted (mainly) with members of the courts to find out where differences matter, how experiences impact and how interviewees described elements of the legal cultures were key to the studies. In Arold Lorenz, Groussot, Petursson this was joined by their perspectives on human rights and the perceived interaction between the CJEU and ECtHR in order to find out whether there is a common European human rights culture. For the ECtHR, the analysis consisted of a combination of structured interviews with 38 judges and clerks in 2001 and 2002; a field study

6 The remaining images would show: The Belgian hammer ad would show two hammers being »[L]inguistically correct hammers exactly the same but totally different« for the French speakers and the Flemish speakers. The Italian »Amore Hammer« would be »(I)resistible to women« and displayed with a (naked) beauty. »The Dutch Economy hammer« would be shown as disassembled in three parts and advertised as »Half price – Assemble yourself«. Finally, Switzerland would be displayed with the »Swiss Army Hammer« advertised as »[M]ost effective investment tool in Europe«. See NORBERG (1994/1995) 378.

7 LEGRAND (1996) 74.

8 LEGRAND (1996) 74.

9 Acknowledging that there is a difference between being transplanted into another national legal system or being joined together to operate within international/European law.

10 Cotterrell suggests to rather focus on »legal ideology tied to legal doctrine as means on how to structure thoughts on law and translate them into practice by lawyers«, see COTTERRELL (1997) 15–21.

11 For his reply to Cotterrell see

FRIEDMAN (1997) 34.

12 FRIEDMAN (1975) 223.

13 For a list of the current member states of the Council of Europe see <https://www.coe.int/de/web/portal/47-members-states> (15 April 2020).

14 With the exit of the United Kingdom from the European Union in 2020, the CJEU will be reduced from 28 judges to 27.

15 See https://europa.eu/european-union/about-eu/countries/member-countries_en (15 April 2020).

16 AROLD LORENZ/GROUSSOT/PETURSSON (2013) 161–217.

17 Arold (2007) 47–49 and AROLD LORENZ/GROUSSOT/PETURSSON (2013) 28–29.

(in January/February 2002) and a case law analysis of (153) cases (1998–2001) that invoked Arts. 8, 9 or 10 ECHR.¹⁸ The analysis at the CJEU consisted of structured interviews with 25 judges and advocates general in 2008, 2009 and 2010,¹⁹ alongside an analysis of doctrines and dynamics in the selected case law that focused on human rights.²⁰ It was supplemented by scrutinizing policy documents,²¹ and a field study.

II. Institutional Set-up as the Framework for Interaction

The institutional set-up of the two courts frames the interaction of members of the courts. Both the ECtHR and CJEU are modern buildings where the assembly halls are elevated from the ground by giant legs and have annexed administrative offices.²² Following on from these outside impressions of where the members of each court assemble, it is interesting to note how these meetings take place. Daily interaction forms an important aspect of cultural exchange. The procedures and rules of the courts establish intimate settings for legal interaction.²³ Starting in more detail with the ECtHR, article 27 ECHR allows the court to compose chambers, committees and a Grand Chamber. The requirement that ECtHR benches are to be composed with reference to balance the legal system of the member states was »court

made« as it is part of the ECtHR Rules of the Court (Rule 25 II Rules ECtHR). It is not easy to balance these different legal systems, as the diversity among the ECtHR sections shows. Taking the sections when the ECtHR was first meeting as a permanent court in November 1998,²⁴ the allocation of members in Sections I and II (four sections at that time) were as follows: Section I: Ms. Palm (Sweden); Ms. Thomassen (the Netherlands); Mr. Ferrari Bravo (San Marino); Mr. Jörundsson (Iceland); Mr. Türmen (Turkey); Mr. Birsan (Romania); Mr. Casadevall (Andorra); Mr. Zupancic (Slovenia); Mr. Pantiru (Moldova); Mr. Martuste (Estonia). Section II: Mr. Rozakis (Greece); Mr. Baka (Hungary); Mr. Wildhaber (Switzerland); Mr. Conforti (Italy); Mr. Bonello (Malta); Ms. Straznicka (Slovakia); Mr. Lorenzen (Denmark); Mr. Fischbach (Luxembourg); Ms. Tsatsa-Nikolovska (FYRM); Mr. Levits (Latvia); Mr. Kovler (Russia). ECtHR benches are formed from these sections as Grand Chambers (seventeen judges), chambers (of seven or five judges, article 26 ECHR), committees of three judges (article 28 ECHR) or as a single judge formation (article 27 ECHR).²⁵ The judgments contain voted outcomes, and concurring or dissenting opinions are allowed and published as part of the judgments. At the ECtHR clerks are centrally staffed and work in units (Registry) independent from the judges' cabinets. When a case is assigned, the reporting judge works together with clerks and this working system rotates. In 2012 the

18 AROLD (2007) 17.

19 AROLD LORENZ/GROSSOT/PETURSSON (2013) 5.

20 AROLD LORENZ/GROSSOT/PETURSSON (2013) 161–217.

21 AROLD LORENZ/GROSSOT/PETURSSON (2013) 219–278.

22 Even structure of building and architecture provides, as Swedish scholar Modéer points out, some interesting insights into understanding justice and its relevancy for legal culture. For his work on courthouses and Scandinavian legal culture generally see MODÉER/SUNNQVIST (2012). In Strasbourg the building has a transparent glass facade and a colourful inside, in Luxembourg the building has a darkened glass facade and more subtle colours of black, white and gold inside. Strasbourg is a court accessible to all individuals who claim to be a victim of a human rights

violation as protected by the ECHR, hence sliding glass doors fit this image well. The image of transparency even fits the transparency of decision-making, with the disclosure of voting behaviour and separate opinions. Luxembourg is foremost a court for reference of interpretation by member state courts and complaints among EU institutions. Its decision-making is closed, no transparency of voting or dissent is given. Here the architecture underlines an image of a more remote building. AROLD (2007) 41–43; AROLD LORENZ/GROSSOT/PETURSSON (2013) 59–64.

23 AROLD (2007) 53–65; AROLD LORENZ/GROSSOT/PETURSSON (2013) 10–21.

24 Protocol 11 entered into force on 1 November 1998. Individuals may claim to be a victim under the Convention according to Art. 34 ECHR.

Interstate claims can be lodged according to Art. 33 ECHR. At the time of the book AROLD (2007) the ECtHR was composed by 41 judges. For the current composition of sections see https://www.echr.coe.int/Pages/home.aspx?p=court/judges&cc=#newComponent_1346152041442_pointer (14 April 2020).

25 The reduced number of judges in a Chamber, the committee of three judges and the single judge formation were introduced by Protocol 14. The basis of the research was the earlier composition of either Grand Chamber or Chamber formations.

Registry comprised around 270 lawyers (plus 370 members of staff).²⁶ The recruitment process is independent from the individual judges' offices. The languages of the ECtHR bench are English and French, and translations are provided during deliberations.

Decision-making at the CJEU takes place in the setting of a chamber of three judges, a chamber of five judges, the Grand Chamber of thirteen judges, or the Full Court in exceptionally important cases.²⁷ The respective national judge does not necessarily participate in the decision-making. French is the only language of the CJEU bench. The format of judgments is modelled after the French legal system and a core notion at the CJEU is the secrecy of deliberation (article 35 Statute of Court CJEU). In other words, the CJEU speaks with one tongue. Hence dissent or concurrence during the deliberation is not evident in the judgments. Prior to deliberation, the advocate general provides a legal assessment of the case in an opinion delivered to the bench. The judges are not bound by the opinion.

III. Biographies

To allow for a more complete picture of the interactions on the bench it is essential to look at the individuals who participate in the deliberation. Who are these people? What do we know about their individual religious, educational, political and vocational experiences in order to understand the different influences on the bench? Published biographies reveal some first insights on higher education, language skills and individual career paths, and they invite specification and expansion during the interviews. Studying the biographies also helps to understand the complexity of person-

alities involved in forming legal culture. They reveal a variety of esteemed legal careers among members of the court. Looking at a few examples from the varieties of backgrounds of current and past judges at the ECtHR and CJEU helps to understand the vocational plurality.²⁸ Judge Elisabeth Palm had a distinguished career within the Swedish judiciary before joining the ECtHR as its first female judge.²⁹ Judge Françoise Tulkens was a learned expert on criminal law with wide academic experience in Belgium before joining the ECtHR.³⁰ Allan Rosas was a well-known academic in Finland, Director of the Abo Institute for Human Rights and had served as a legal advisor and the Deputy Director General of the Legal Division at the European Commission before joining the CJEU. Jean Claude Bonichot was President of a Division at the Conseil d'Etat in France and an experienced academic before joining the CJEU.³¹ Many judges had a plurality of legal professional experience, with the result being that the categorization of legal professions was not always clear cut. However, an empirical overview was provided in the studies.³² It showed that at the time of the studies most members of court were grouped as former academics, with the next most numerous being former career judges.

IV. Interviews

As primary data, interviews³³ were essential to understand the legal culture of the courts, as »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.«³⁴ While case law analysis will show the product of how law is interpreted and how – on a multi-national bench – a com-

26 AROLD LORENZ/GROSSOT/PETURSSON (2013) 16.

27 Art. 251 TFEU and Art. 16 Statute of the Court (CJEU).

28 This is a random selection of short biographies and does not reflect individuals interviewed. For a list of current judges please refer to: Council of Europe, Presentation of Court see <https://www.echr.coe.int/Pages/home.aspx?p=court/judges&c=and> CJEU https://curia.europa.eu/jcms/jcms/Jo2_7026/en/ (14 April 2020).

29 She was elected first woman judge to the ECtHR in 1998.

30 See for further ECtHR judges: AROLD (2007) 67–69.

31 AROLD LORENZ/GROSSOT/PETURSSON (2013) 26.

32 AROLD (2007) 52; AROLD LORENZ/GROSSOT/PETURSSON (2013) 23.

33 Please note that the quotes and findings are summarized from AROLD (2007) and AROLD LORENZ/GROSSOT/PETURSSON (2013). For a full account of the findings and the

context please refer to the books.

As expressed there, a few quotes were subject to language editing.

34 FRIEDMAN (1975) 235.

monly agreed solution to a legal problem is formulated, one needs to look behind these written statements in order to trace the legal culture and ask the individuals concerned as to their ideas, values, expectations and attitudes towards law. The interviews were designed as structured interviews, following Jose Toharia.³⁵ The initial set of interviews at the ECtHR was conducted in 2001.³⁶ Further research was then conducted through interviews at the CJEU in 2008, 2009 and 2010.³⁷ Focus in all interviews was legal culture in terms of ideas, values, expectations and attitudes towards law, and how the diversity of backgrounds mattered especially in issues of human rights. In both sets of interviews, the questions covered the influence of national legal system, East/West political exposure³⁸ and prior vocation. Human rights were taken up at the CJEU particularly, as it constituted the main part of the study by Arold Lorenz, Groussot and Petursson to discover the European human rights culture. The European human rights culture is based on the legal cultures of the courts, the judges' perspectives on human rights and the special interplay between the ECtHR and CJEU.

The answers given in the interviews at the ECtHR were ordered systematically according to legal family, historical political embedding, vocational experience and common commitment. In order to put the individual perspectives of interviewees into the context of case law, an empirical study was added. The empirical study of case law at the ECtHR scrutinized voting in cases concerning article 8 ECHR (protection of private life and home), article 9 ECHR (freedom of religion) and article 10 ECHR (freedom of speech)³⁹ at: 1) a general level, 2) at the subject matter level, and 3) in individual sample cases. For the CJEU, these areas were supplemented by issues of human rights and the institutional relationship between the courts. As the CJEU judgments do not disclose voting outcomes, the analysis was structured differently and exemplary cases concerning human rights were selected.⁴⁰

A. *Legal families*

The original research by Arold on the legal culture at the ECtHR started with an assumption that legal families⁴¹ meeting on the bench could be a potential source for conflict. The majority of the interviewed ECtHR judges suggested that these national differences actually make a difference in cases when discussing the detail, as highlighted in this quote »The nationality matters in the detail; even the meaning of specific words can be quite different.«⁴² In these cases, stronger discussions on the bench about the protected ambit of rights are likely, and different experiences might be shared while supporting the legal arguments. Here national experience serves as insight into particularities of a legal system. In general, legal families would rather impact on the style of discussion, not the outcome of a case. In sum, a Germanic drafting style would discuss point for point in a very detailed manner, a Scandinavian style would be shorter and more directly to the point, a Mediterranean approach would explore the background of the case more extensively, and the common law style would be more narrative and would distinguish the present case from other cases.⁴³ Such variations in style would not affect the legal solution itself.

The CJEU interviews suggested too that differences in legal families of the members of bench would not affect the substance of a case, but rather the style of approach. Most of these different approaches taken in legal reasoning would concern the style of reasoning but not the legal outcome. As it was expressed:

How we are able to work together [and have] different backgrounds? Well, I think the main reason is that the members of court who come here and who have no specific experiences with the field of EU law are confronted with a discipline which exists in itself in a way and which already has quite a history, not only in

35 For his work on judges in Spain see TOHARIA (1974). See further AROLD LORENZ et al. (2013) 5; AROLD (2007) 16.

36 AROLD (2007) 17.

37 AROLD LORENZ/GROSSOT/PETURSSON (2013) 5.

38 The interviewees at the ECtHR pointed towards including political

experience against the background of Eastern enlargement of the courts in the 1990s, which was taken up for further interviews.

39 These ambits of ECHR protection were chosen based on the expectation that issues raised in these cases would be likely to show more cultural variations or conflicts on the bench.

40 AROLD LORENZ/GROSSOT/PETURSSON (2013) 125–159.

41 See as well discussion in AROLD LORENZ (2021).

42 AROLD (2007) 74.

43 AROLD (2007) 113.

legal doctrine but [also] in the case law. So quite often, if not so in the majority of cases, we embark in legal discussions which are not at all directly linked to the legal backgrounds or to practical experiences that we received in our own law systems. I think it is more the exception that we establish in the Court, during the discussions, real differences between our approaches which are based on national experiences.⁴⁴

The CJEU established an atmosphere of communality where strong individualistic views would be an irritant. If, exceptionally, a clash of legal backgrounds occurs during decision-making, it would be seen as positive: »[I]t is only exceptionally that I am confronted with a real discussion or a real clash between our legal backgrounds; on the contrary it is quite positive to see that.«⁴⁵ Judges disassociate themselves from their national backgrounds when answering the question at hand:

The whole system is designed for an abstract question to be met with an abstract answer. And so the judge has to get rid of his training, which is to resolve the dispute between Mrs. Smith and Mr. James, and to see the principle that underlies the legal answer, but I think we all see that.⁴⁶

On the bench, decision-making is an intellectual logic exercise that goes beyond the individual study of law. While it was expressed that national legal differences matter for style of argumentation rather than outcome, the findings at the CJEU showed that the differences in background of legal families can be grouped in three different categories. Two of them have immediate impact and concern either the style of how to present legal arguments or are used as valuable experience for »pulse-taking«. The category with less immediate impact refers to legal principles and doctrines that

influence the court in the long-term.⁴⁷ An example is the influence of the French legal system on the court structure and format of judgment. Other long-term influences on doctrine are possible, such as the principle of proportionality as influenced by the German legal system.⁴⁸

Several judges and advocates general have themselves written about the differences in approach and the interaction of the different legal families.⁴⁹ Judge Lenaerts has published on what he calls the »comparative method«.⁵⁰ He describes an approach of a certain convergence between the national legal solutions, sometimes »interlocking« to the benefit of Community law and sometimes leaving discretion to the member states. Another dimension of using differences in national legal background on the bench is to test reactions on the bench as a »pre-test« or »pulse taking« of potential clashes with national legal particularities. Lenaerts calls the deliberations an exercise in »psycho-diplomacy« with national courts, where the judges carefully »take the pulse« of what an acceptable solution is.⁵¹ The different nationalities on the bench are essential for checking the acceptability level of legal outcomes.

B. *Historical and political embedding*

At the ECtHR⁵² in general, judges from former Eastern Bloc states were seen to bring in more experience with economic and social rights but with approaches varying diversely from cautious to rather pro-active.⁵³ Some interviewees found Eastern judges a bit more reluctant to speak up during the deliberations. Others expressed their surprise as to how similar the approaches were to their own (Western) approach or how independent the Eastern approaches on a case were.⁵⁴ Structurally, the inclusion of many more Eastern States in the Council of Europe and the EU has had a significant impact on the size of the courts. With the growth in size, the proximity and encounters of colleagues

44 AROLD LORENZ/GROSSOT/PETURSSON (2013) 114.

45 AROLD LORENZ/GROSSOT/PETURSSON (2013) 114.

46 AROLD LORENZ/GROSSOT/PETURSSON (2013) 115.

47 AROLD LORENZ/GROSSOT/PETURSSON (2013) 111.

48 AROLD LORENZ/GROSSOT/PETURSSON (2013) 116.

49 See examples discussed in AROLD LORENZ/GROSSOT/PETURSSON (2013) 116.

50 LENAERTS (2003) 876.

51 LENAERTS (2003) 904.

52 Note: At the time when the study on the ECtHR started, the Eastern enlargement of the ECtHR was rather recent.

53 AROLD (2007) 71.

54 AROLD (2007) 71.

changed. Ultimately, however, it was seen that human rights reasoning has a commonly shared basis that is independent of political structures, as expressed in this quote: »The Convention protects values of a democratic society in comparison to a totalitarian society. We might have experienced a totalitarian system. But the values in the Convention are human values. They are coming from the nature of a human being.«⁵⁵ Eastern newcomers would not change general trends at the ECtHR but rather change the balance of existing trends.⁵⁶ At the CJEU it was also expressed that judges from Eastern states would not change the general trends but rather affect pre-existing balances of approaches. A few interviewees noticed, however, a certain sensitivity of especially Eastern judges in seeing human rights issues in cases, but were cautious to identify a systematic influence.⁵⁷

C. Vocational experiences

During the ECtHR interviews it was highlighted that there was often a stronger divide in approach based on vocational experience. As the individual biographies reveal, the plurality of legal careers extends to all legal professions, including different specialisations of law. This variety is seen as astonishing, as expressed in the following quote:

What strikes me is that the experiences of the judges is so different; some are professors in either criminal, civil or public law; others, as myself, are judges, and others, which I would call various kinds of law[yers], diplomats, ambassadors, or advocates [...] Of course all are very well trained lawyers with interest in human rights, but the backgrounds are very, very different.⁵⁸

While the bench embraces this variety of legal professions, the main divide was described to generally run between former career judges and former academics. Whereas former judges would be

concerned predominantly with the legal question at hand, academics would look for the legal questions' wider implication within the development of international law. One interviewee expressed this notion as follows: »[J]udges see only cases, cases, cases, but they do not see the larger picture, the further meaning for law.«⁵⁹ This statement was supplemented by the following quote: »[J]udges go to the point; they do not make long speeches on irrelevant facts. But professors have a broader approach; they take things into account that I think to be irrelevant.«⁶⁰ Or, as summarized by another member of the court, »[J]udges and lawyers look at the details, professors look at the general picture, and politicians at geopolitical issues and traditions.«⁶¹

This applies to the CJEU too, where interviewees supported the difference between the approaches of an academic (concerned with the wider implication of the case) versus that of a judge (concerned with the facts mainly) as the two main lines of division between judicial approaches.⁶² This difference of approach was expressed in the following quote:

Yes, [vocational background] is certainly making a difference. It plays quite an important role in the approach to cases, the academic approach or the more practical approach. Someone who has had, before coming here, exclusively an academic experience, has another way [of working] than those that have a lot of experience working with cases either as a judge or someone that has worked with public administration. But that is obvious, and enriches the debate. Having different inputs is not a disadvantage, but a huge advantage.⁶³

CEJU judges generally expressed excitement about learning from their colleagues. Also, it might help to understand a colleague's reasoning better, if one shares experiences in the form of similar career background, such as with former academics or former judges.⁶⁴ The universal im-

55 AROLD (2007) 71.

56 AROLD (2007) 72.

57 AROLD LORENZ/GROSSOT/PETURSSON (2013) 110–111.

58 AROLD (2007) 73.

59 AROLD (2007) 73.

60 AROLD (2007) 73.

61 AROLD (2007) 73.

62 AROLD LORENZ/GROSSOT/PETURSSON (2013) 107–108.

63 AROLD LORENZ/GROSSOT/PETURSSON (2013) 107–108.

64 AROLD LORENZ/GROSSOT/PETURSSON (2013) 109.

pression was that of a respectful debate within a team where its members share mutual respect for each other.

D. Common commitment

In the interviews at the ECtHR, the notion of the court being a »melting pot« was raised.⁶⁵ Generally, there was a noticeable joint belief in human rights at the ECtHR, where the judges have a common commitment – as protectors of the ECHR – to protect the individual against human rights violations. While there might be variations in approach, this common commitment is the strongest force to bridge gaps between nationalities and legal systems.⁶⁶ The high expectations between colleagues might pose a risk too, as was pointed out in the following quote from an ECtHR interviewee about peer pressure: »[I]f you are not playing with the rules, if you don't contribute – you are out; there is a lot of peer pressure here and judges easily become marginalised.«⁶⁷ Generally, as part of the legal culture, the CJEU interviewees showed high respect for, as well as high expectations towards their colleagues. With the absence of dissenting opinions at the CJEU, judges are »condemned to solidarity«. There is a strong force felt to avoid voting in controversial decisions. This was generally seen as quite positive. In the absence of disclosure of voted outcomes this might surprise. The reason behind this is the judges' vision of collegiality and team spirit.⁶⁸ Members of court are joined together like a family. Efforts are taken to make sure all opinions are reflected in the judgment and if – rarely – a vote takes place, it seems rather stressful. This push for consensus reveals a vision of the judges as being the final resort, offering one solution about the interpretation of the treaties given by one voice.⁶⁹ It also points towards judges who see themselves as

unity, a unity in which judges are more comfortable if the legal solution is built on consensus.⁷⁰

E. Human rights

When asking at the CJEU whether individual differences would surface more often in human rights cases than in other cases, surprisingly interviewees did not notice this. Strong discussions are not reserved for human rights cases. All cases, including the most technical ones, may cause strong discussions on the bench. It was expressed that human rights do not provoke clashes in general terms and no considerable difference with regard to background emerges in human rights cases when compared to other cases.⁷¹ An increase in cases concerning human rights was noticed by the interviewees, partly because the incoming parties would invoke human rights more frequently, partly because the judges internally would be inclined to invoke human rights issues. »I think first of all that there is a change in the arguments presented to us. In most cases the human rights question or argument is brought by the parties or intervening parties and is not *ex officio* brought up by the court itself.« When asked about changes introduced by the EU Charter of Fundamental Rights, a number of interviewees pointed out that the CJEU is not a human rights court. Human rights questions are taken up and considered, but not exclusively, as the main task is to guarantee the uniform application of Community law.⁷² When asking about the relationship between the CJEU and ECtHR, the different nature of the ECtHR as an international court, with a public international law approach, different to the specifics of EU law as a discipline of its own, was pointed out.⁷³ Generally the relationship between the two courts is one of respect, as highlighted by this quote:

65 AROLD (2007) 80.

66 AROLD (2007) 79.

67 AROLD (2007) 155–156.

68 AROLD LORENZ/GROSSOT/PETURSSON (2013) 120.

69 This again reflects a vision of stability that is different to disclosing the discursiveness of law like in a common law system (or at the ECtHR), see AROLD LORENZ/GROSSOT/PETURSSON (2013) 121.

70 AROLD LORENZ/GROSSOT/PETURSSON (2013) 121.

71 AROLD LORENZ/GROSSOT/PETURSSON (2013) 151.

72 AROLD LORENZ/GROSSOT/PETURSSON (2013) 156.

73 AROLD LORENZ/GROSSOT/PETURSSON (2013) 156.

[T]here is a level or wary, courteous respect between the courts. Inasmuch as the Strasbourg court has the Convention, we have European Community law but with fundamental rights on the side. We certainly have respect for each other; we also [...] know that it would be good if we didn't tread on each other's toes.⁷⁴

ECtHR case law has been referred to in CJEU jurisprudence as established precedent. At the same time, with the growing volume of human rights both in CJEU case law and relating to the EU Charter, as was expressed by one interviewee, there might be a pull toward stronger autonomy with regard to human rights in the case law of the CJEU.⁷⁵

V. Some Numbers from the Case Law Analysis

The impressions given in the interviews were analyzed and contextualized with the case law. An empirical analysis of ECtHR case law showed an overall high amount of unanimity (generally 70%).⁷⁶ This number might surprise, given that the ECtHR allows dissenting and concurring opinions. When looking at cases invoked under article 8 ECHR (private and family life: 64% unanimity, 31% dissent and 5% concurrence), article 9 ECHR (freedom of religion: 87% unanimity, 13% dissent and no concurrence), and article 10 ECHR (freedom of expression: 51% unanimity; 31% dissent and 18% concurrence)⁷⁷ some variations seemed to depend on the subject area of the case (for

example as subject areas under article 8 ECHR (protection of private life and home):⁷⁸ a) custody cases, b) taking children into public care, c) integrity of the home, d) surveillance of correspondence/interference in personal data, and e) expulsion cases; article 9 (freedom of religion):⁷⁹ manifestation/practice of religion; article 10 ECHR (freedom of speech):⁸⁰ a) political speech and b) cases of defamation in the media. However, when these subject areas were examined no clear result concerning background parameters and respective outcome emerged in these groupings.⁸¹ Taking this a step further and looking at the reasoning in a selection of cases, some variation in approach was found mostly linked to vocational background.⁸² Because of the absence of dissenting and concurring opinions at the CJEU, empirical testing of voting behaviour at the CJEU was not possible. The analysis of sample judgments and opinions of advocates general provided some insights on tendencies.⁸³ Cases such as *Mangold* or *Kadi* seem to support a stronger autonomy of the CJEU with regard to human rights. Then again, cases such as *Römer* or *Dominguez* avoid going forward and continuing to build a clear human rights authority by way of explicit use of the EU Charter.⁸⁴ The analysis uncovered a lack of systematic use of EU fundamental rights in the case law and showed an interesting tension between judicial activism and minimalism.⁸⁵ Furthermore, when analysing the case law, the use of »alternative sources«, ⁸⁶ – such as references to general European ancient history (ancient Greek and Roman history), philosophy, myths or even religion – to support legal claims⁸⁷ was found in legal reasoning both at the ECtHR and CJEU.⁸⁸

74 AROLD LORENZ/GROSSOT/PETURSSON (2013) 157.

75 AROLD LORENZ/GROSSOT/PETURSSON (2013) 153.

76 AROLD (2007) 92.

77 AROLD (2007) 93.

78 AROLD (2007) 104–107.

79 AROLD (2007) 107–108.

80 AROLD (2007) 108–109.

81 AROLD (2007) 110.

82 AROLD (2007) 112–152.

83 AROLD LORENZ/GROSSOT/PETURSSON (2013) 125–159.

84 For a discussion of these and further cases, and activism versus minimalism, see AROLD LORENZ/GROSSOT/

PETURSSON (2013) 161–217, especially 175.

85 AROLD LORENZ/GROSSOT/PETURSSON (2013) 172–181.

86 This phenomenon shows the need for parting judges or advocates general to search for common reference points that go beyond one's national cultural heritage and thereby transmit legal arguments.

87 AROLD (2014) 129; AROLD (2010) 275. A short systematic analysis of the use of the term »philosophy« in the case law showed that 1) philosophy is part of the facts; 2) philosophy is part of comparison to other documents of

international law; 3) philosophy is used to explain the meaning of ECHR or EU law; 4) philosophy is used to support a legal argument.

88 The writers of opinions who use such »alternative« sources display a balanced mix of legal families and are members of court both from the East and West, and while a number are written by former academics (with the noted overlap in career paths) this applies to the other vocational backgrounds too; see AROLD (2014) 135. More recent examples are added in AROLD LORENZ (2021).

VI. Conclusion

»Yes, we do have a shared vision, a spirit of ideals and a human rights spirit! You can smell it, when it is there, especially if you look in the cases.«⁸⁹ As said above, case law does not provide X-rays of judges' minds, the combination of interviews with case law analysis provides reliable proofs of legal culture. As legal culture is formed by ideas, values and expectations towards law, it remains a somewhat intangible, impressionistic and fluid portrait. Legal culture has institutional aspects, where attitudes and actions between members of court form habits. The interviews, which provided strong insights into the dynamics inside the courts, showed that there is very little difficulty caused by national legal cultures on the bench. Working style differences of approach might in some cases be linked to vocational experience (and on rare occasions to political/historical embeddings). These differing attitudes did not change the legal outcome – they mattered for style rather than substance. In summary, with their legal cultures both courts successfully surmount the risk of tensions between national legal cultures. The members of the courts find diversities rather enriching. Individual pluralities do not weaken but rather strengthen the European benches and are generally overwritten by the legal cultures of both courts.

Looking at the European human rights culture, which builds on the legal culture, communalities as well as differences were found when comparing the two courts.⁹⁰ Both European courts have distinctive features in their legal cultures tied to their institutional set-up. The French civil law institutional model left its impact on the legal culture of the CJEU, while the ECtHR is more flexible, leaning towards a common law model. The mode of decision-making is important for the courts' legal

cultures. With the strict secrecy and short textual reasoning at the CJEU modelled after the French legal system, this »Frenchness« also marks the CJEU legal culture. While the ECtHR is a public international law court, the CJEU operates within European law and is marked by »high law density«. At the ECtHR, employing a more transparent way of decision-making with longer judgments and allowing separate and dissenting opinions, as well as employing two working languages on the bench, the legal culture is rather common law-like.⁹¹ When it came to human rights, the interviews showed some variation and different tendencies between judicial activism and minimalism that could be seen in the case law. While both courts have their visions of human rights, their core missions – namely for the CJEU to protect the EU legal system and for the ECtHR to protect the values of the ECtHR – are fundamentally the same. The study of Arold Lorenz, Groussot, Petursson on the European human rights culture discovered a number of paradoxes that shape European human rights protection: a paradox between the two courts, one of which was not entrusted with human rights protection from the beginning, but now seems to serve as an engine in the European human rights landscape; a paradox between judicial activism and minimalism within the (human rights) case law; a paradox between complexity and simplicity (of human rights); and a paradox between political ambition and judicial sense.⁹² As expressed there,

[t]he European human rights culture is made up of the actors of the two [European] Courts' beliefs, ideas, habits and attitudes towards human rights as expressed in interviews and case law. The political dimension is manifested in declarations, such as by the former President of

89 AROLD (2007) 79.

90 AROLD LORENZ/GROUSSOT/PETURSSON (2013) 219–291.

91 While there are some similarities between the legal cultures of both institutions, there are also significant differences. The ECtHR, as separate legal system, is in its basic features rather one of common law than of civil law. While founded on the Convention text from the 1950s, the legal work of the judges needs constant interpretation of the Conven-

tion's meaning today and is heavily influenced by the body of case law. Compared to the EU with all its legislation, the Convention is supplemented by the use of ECtHR case law. Using the concept of precedent, the argument style and the individual responsibility of judges through freely concurring or dissenting opinion are much more reminiscent of common law than civil law. It also allows legal creativity. In Luxembourg the structure is more reminis-

cent of a civil law model, with high law density (all European legislation). Precedents are used for coherency of case law. AROLD LORENZ/GROUSSOT/PETURSSON (2013) 65.

92 AROLD LORENZ/GROUSSOT/PETURSSON (2013) 283–291.

the European Commission, José Manuel Barroso [who called upon an European human rights culture], and political actions, such as the [EU] Charter and the accession of the EU to the ECHR. Those two forces, the judicial and political one, interact and are at the risk of colliding. Recent political trends endanger the political one, as new judicial cautiousness or minimalism shows.⁹³

As legal attitudes and case law might change, and new judges (and advocates general) join the courts, further interviews are called for. A glance at some more recent case law from both courts al-

ready suggests changes.⁹⁴ Legal culture does not remain static. Arold Lorenz, Groussot, Petursson have suggested, in one of the conclusions, that the accession of the EU to the ECHR will be difficult, based on the mindset and case law at that time.⁹⁵ Further interviews at the European courts and further case law analysis seem timely, given the recent push towards accession. Clearly, a pan-European human rights culture cannot only be pressed for politically. It is the legal culture, as Tulkens reminded us at the beginning, especially the beliefs and attitudes, that needs to carry the inspiration. ■

Bibliography

- AROLD, NINA-LOUISA (2007), *The Legal Culture of the European Court of Human Rights*, Leiden
- AROLD, NINA-LOUISA (2010), Promoting cracks in the surface: Strasbourg changing Swedish legal culture, in: CHRISTOFFERSEN, LISBET et al. (eds.), *Law and Religion in the 21st Century – Nordic Perspective: New Life in the Ruins – Pluralistic Renewal in the Lutheran Setting*, Copenhagen, 275–294
- AROLD LORENZ, NINA-LOUISA (2014), No Court is an Island: Philosophy at the European Court of Human Rights and the European Court of Justice, in: ZIRK-SANDOWSKI, MAREK et al. (eds.), *Towards Recognition of Minority Groups: Legal and Communication Strategies*, Farnham, 129–159
- AROLD LORENZ, NINA-LOUISA (2021), A kaleidoscope of people: The legal cultures of the European Court of Human Rights and the European Court of Justice, in: MODÉER, KJELL ÅKE (ed.), *Legal History: Reflecting the Past and the Present: Current Perspectives for the Future*, Stockholm, 298–318
- AROLD LORENZ, NINA-LOUISA, XAVIER GROUSSOT, GUNNAR THOR PETURSSON (2013), *The European Human Rights Culture – A Paradox of Human Rights Protection in Europe?*, Leiden
- COTTERRELL, ROGER (1997), The Concept of Legal Culture, in: NELKEN, DAVID (ed.), *Comparing Legal Cultures*, Dartmouth, 13–31
- FRIEDMAN, LAWRENCE M. (1975), *The Legal System: A Social Science Perspective*, New York
- FRIEDMAN, LAWRENCE M. (1997), The Concept of Legal Culture: A Reply, in: NELKEN, DAVID (ed.), *Comparing Legal Cultures*, Dartmouth, 33–39
- GILL-PEDRO, EDUARDO, XAVIER GROUSSOT (2017), The Duty of Mutual Trust in EU Law and the Duty to Secure Human Rights: Can the EU's Accession to the ECHR Ease the Tension?, in: *Nordic Journal of Human Rights* 35, 258–274
- LEGRAND, PIERRE (1996), European Legal Systems Are Not Converging, in: *International & Comparative Law Quarterly* 45, 52–81
- LENAERTS, KOEN (2003), Interlocking Legal Orders in the European Union and Comparative Law, in: *International & Comparative Law Quarterly* 52, 873–906
- LOCK, TOBIAS (2011), Walking on a Tightrope: The Draft ECHR Accession Agreement and the Autonomy of EU Legal Order, in: *Common Market Law Review* 48, 1025–1054
- LOCK, TOBIAS (2015), The future of the European Union accession to the European Convention on Human Rights after Opinion 2/13: Is it still possible and is it still desirable?, in: *European Constitutional Law Review* 11, 239–273
- MODÉER, KJELL ÅKE, MARTIN SUNNQVIST (eds.) (2012), *Legal Stagings: The Visualization, Medialization, and Ritualization of Law in Language, Literature, Media, Art, and Architecture*, Copenhagen

93 AROLD LORENZ/GROUSSOT/PETURSSON (2013) 287–288.

94 For a discussion of CJEU and ECtHR case law post Opinion 2/13 and how the CJEU presumably seeks to re-establish trust between the two courts, see GILL-PEDRO/GROUSSOT (2017) 258.

95 Written prior to CJEU Opinon 2/13, see AROLD LORENZ/GROUSSOT/PETURSSON (2013) 288–290.

- NORBERG, SVEN (1994/1995), Reflexioner över svenska rättstraditioner i en europeisk rättsmiljö, in: Juridisk Tidskrift 3, 369–391
- TOHARIA, JOSÉ JUAN (1974), *The Spanish Judiciary: A Sociological Study. Justice in a Civil Law Country Undergoing Social Change Under an Authoritarian Regime*, New Haven
- TULKENS, FRANÇOISE (2013), EU Accession to the European Convention on Human Rights, European Judicial Training Network – Human Rights and Access to Justice Seminar, National School of Judiciary and Public Prosecution (KSSIP), Krakow, 1 March 2013, https://www.ejtn.eu/Documents/About%20EJTN/Independent%20Seminars/Human%20Rights%20and%20Access%20to%20Justice%20Seminar/Krakow_Tulkens_final.pdf (20 May 2020)