

Chapter 4

European Tort Law and the Many Cultures of Europe

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1. INTRODUCTION

This chapter will explore links between cultural identities and legal rules, particularly in the area of tort law. The focus will be on the body of laws as well as on their souls.¹ The hypothesis is that national legal rules are the outward manifestation, the body, of the national culture, the soul.²

As for legal rules, the chapter will look at three fundamental legal differences between Germany, France, and England in the area of tort law: differences in the role of rights, of strict liability and of liability for lawful acts (section 3). As for analysis of cultural identities, the chapter will particularly refer to the work of Hofstede, who, on the basis of empirical research, distinguishes a number of cultural dimensions which determine what he calls the ‘software of the mind’ (section 4).

Montesquieu alleged that the distinction between national legislations could be explained by differences in soil and climate.³ With this hypothesis he

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1. In the spirit of Charles-Louis de Secondat Baron de Montesquieu, ‘De l’esprit des lois’ in *Oeuvres complètes*, Roger Caillois (ed.) (Paris, Gallimard, 1949).
2. Compare P. Legrand, ‘European Legal Systems are not Converging’, (1996) 45 ICLQ, 57: ‘Because rules are but the outward manifestation of an implicit structure of attitude and reference, they are a reflection of a given legal culture.’
3. Montesquieu, Livre XXI, Chapitre 1.3: ‘when legal and social systems are considered in relation to factors such as the nature and principle of each government, the climate of each country, the

was ahead of his time because Hofstede's research indeed shows a link between culture and geographic latitude.⁴ However, one would not do Montesquieu and Hofstede justice with this simple example. The main thrust of Hofstede's research is to show differences between national cultures, that these differences have existed for centuries and that their practices may change over the years but that their values remain the same. In essence, Hofstede shows the inevitability and longevity of cultural diversity. Section 5 will discuss the relation between Hofstede's research and the legal differences set out in Section 3.

Although Hofstede's research takes a global approach, its results are relevant in at least two European legal respects. Firstly, and most importantly, it is relevant for EU legislation and case law. Secondly, his research is relevant for discussions on a European *ius commune* and a European Civil Code. Both issues will be dealt with in Section 6.

The past decades have shown a shift in thinking towards diversity both on a global and European level. The end of the Cold War enthused many to think in terms of unity and global values but attention soon started to shift to the importance of diversity and local values. Section 2 will provide a broad-brush picture of this development, followed by a brief account of the discussion as to whether European legal systems are converging or not.

Both in the legal and cultural analysis this chapter can only provide a rough sketch. It leaves out many details for the sake of illustrating more clearly the general points of intertwinement between cultural and legal differences.

2. GLOBAL AND LOCAL – UNITY AND DIVERSITY

Towards the end of the Cold War, marking the end of the global division between East and West, the tendency was to emphasize unity. Its ultimate manifestation was probably Francis Fukuyama's article 'The End of History' of 1989 in which he wrote:

We may be witnessing the end of history as such: that is, the end point of mankind's ideological evolution and the universalization of Western liberal democracy as the final form of human government.

He argued that the future would be devoted to resolving mundane economic and technical problems.⁵ However, Fukuyama's 'uniform' ideas were soon followed

quality of its soil, the principal occupation of the natives, whether husbandmen, huntsmen or shepherds, many laws and institutions that had seemed puzzling are in fact quite comprehensible'.

4. G. Hofstede, *Culture's Consequences*, (2nd edn, London, Sage, 2001), suggests a link between geographic latitude and the cultural dimensions of power distance (pp. 115, 116) and individualism (p. 251).

5. F. Fukuyama, 'The End of History', (1989) 16 *The National Interest*, 4, 18.

by Samuel Huntington's 'diverse' ideas in his 'Clash of Civilisations' in which he wrote:

Spurred by modernization, global politics is being reconfigured along cultural lines. People and countries with similar cultures are coming together. Peoples and countries with different cultures are coming apart.⁶

In Europe the fall of the Berlin wall in 1989 became the symbol of an historic prospect of a united Europe, a continent that had been divided for such a long time. Thinking in terms of harmony received a major boost.

How could one possibly be so unsophisticated as to oppose it? Surely everything in Europe, not only private law, would sound so much better if it were brought into harmony? . . . More than that, it would vividly demonstrate the common commitments undertaken by European States which have a bloody history of living in disharmony.⁷

The outcome of these developments could not but be a Treaty on European Union: the Maastricht Treaty signed in 1991. In the following decade the biggest enlargement of the EU was prepared, bringing ten new Member States into the Union in 2004. The European Constitution was supposed to be the crown on this development but its defeat in 2005 by France and The Netherlands was a sign that 'Europe' was no longer self-evident.

This shift in political thinking has an interesting parallel in marketing research. In 1983 Theodore Levitt wrote a famous article in the *Harvard Business Review* in which he coined the term globalization.⁸ Although the term had been used before, Levitt's article popularized it and brought it into the mainstream business audience. Globalization in marketing, however, appeared not to be the solution. Global companies soon switched back to local marketing strategies. In March 2000 Douglas Daft, CEO of Coca Cola, wrote in the *Financial Times*:

The world was demanding greater flexibility, responsiveness, and local sensitivity while we were further centralizing decision-making and standardizing our practices . . . The next big evolutionary step of 'going global' now has to be 'going local'.⁹

Unlike among political scientists and marketers, the concept of diversity has not played an important role in the European private law discourse. Over the past decades

6. S. Huntington, 'The Clash of Civilisations?' *Foreign Affairs*, Summer 1993; he expanded his thesis in *The Clash of Civilizations and the Remaking of World Order* (New York, Simon & Schuster, 1996)

7. S. Weatherill, 'Why Object to the Harmonization of Private Law by the EC?' (2004) 12 *ERPL*, 633.

8. T. Levitt, 'Globalization of Markets', [1983] *Harvard Business Review*, May-June issue.

9. Another example is Ford's global centralization of management in the mid-90s. A couple of years later executives concluded: 'That took Ford's focus off local strategy. As a result it lacks competitive offerings in segments that make up 35 per cent of the European market'.

the discussion about a European *ius commune* has been mainly one between believers and heathen. The former believed in a unified European private law to come, whereas the latter refused to believe that differences would or should be overcome.

A related issue is whether European legal systems are converging. Markesinis argues that there is

[A] convergence of solutions in the area of private law as the problems faced by courts and legislators acquire a common and international flavour; there is a convergence in the sources of our law since nowadays case law *de facto* if not *de jure* forms a major source of law in both common and civil law countries; there is a slow convergence in procedural matters as the oral and written types of trials borrow from each other and are slowly moving to occupy a middle position; there may be a greater convergence in drafting techniques than has commonly been appreciated . . . there is a growing rapprochement in judicial views.¹⁰

The opposite position is not popular. Pierre Legrand considers the differences in *mentalités* between common law and civil law to be irreducible:¹¹ because of the difference in the nature of *legal reasoning*,¹² differences in the significance of *systematization*,¹³ a different approach to *rules*,¹⁴ a different approach to *facts*,¹⁵ and a different approach to *rights*: ‘in the ordinary case to establish a legal or equitable right you have to show that all the necessary elements of the cause of action are either present or threatened.’ In the civil law tradition, on the contrary, the object of legal science is the right, in particular the subjective right.¹⁶

Opinions about whether European systems are converging or should converge are expressed in all kinds of shades between the two singled out above. The question whether convergence is factually happening (*Sein*) requires empirical research in which Hofstede’s research results are helpful to find some partial answers. The question about whether convergence is desirable (*Sollen*) is a

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10. B.S. Markesinis, ‘Learning from Europe and Learning in Europe’, in *Gradual Convergence: Foreign Ideas, Foreign Influences, and English Law on the Eve of the 21st Century*, B.S. Markesinis (ed.) (Oxford, Oxford University Press, 1994), p. 30. See also J. Gordley, ‘Common law und civil law: eine überholte Unterscheidung’, [1993] ZEuP, 498–518.
 11. P. Legrand, ‘European Legal Systems are not Converging’, (1996) 45 ICLQ, 62–63.
 12. *Ibid.*, 64–65: common law reasoning is inductive and analogical, civil law reasoning is deductive and institutional.
 13. *Ibid.*, 65–67: quoting B. Rudden, ‘Torticles’ (1991–1992) 6/7 *Tulane Civ. L. Forum*, 105, 110: ‘The alphabet is virtually the only instrument of intellectual order of which the common law makes use’.
 14. *Ibid.*, 67–68, quoting F. Schauer, *Playing by the Rules* (Oxford, Clarendon, 1991), 178: ‘The common law appears consequently to be decision according to justification rather than decision according to rule’.
 15. *Ibid.*, 68–70: ‘English law’s emphasis on the facts of legal cases reflects the common law’s assumption that legal knowledge emerges from facts (*ex facto jus oritur*) rather than from rules (*ex regula jus oritur*)’.
 16. *Ibid.*, 70–71, quoting Browne-Wilkinson V-C in *Kingdom of Spain v. Christie, Manson & Woods Ltd* [1986] 1 WLR 1120, 1129.

legal-political question about the direction Europe should take.¹⁷ For the answer to the latter question, Hofstede's research does not provide answers but it should be taken into account to see what is feasible and desirable.

3. LEGAL DIFFERENCES

3.1 THE ROLE OF RIGHTS

The first important difference in approach between the national tort law systems of France, Germany and England, also mentioned by Legrand (section 2 *in fine*), is the role of rights.¹⁸ The relation of common law with rights is awkward because it is focused on remedies. In the English legal system claimants

[C]an certainly assert that they have in such or such a situation an action against some public or private body – and they can probably assert that they have a 'legitimate interest' or 'expectation'. What they cannot claim is a right to the actual substance, or object, of the action itself – they cannot claim a right, as a citizen, to succeed.¹⁹

This reluctance has a broader background. In contrast to France and Germany, where revolutions in the 18th and 19th century paved the way for citizens' rights, England has never experienced such an event. This, and the absence of an entrenched written constitution, does not mean that citizens' rights have been unprotected in the United Kingdom but, according to Lord Bingham, 'it has inevitably meant that protection, where it exists, has been piecemeal and *ad hoc*.'²⁰

An illustration of the reluctant English approach is the fact that in English law the European Convention on Human Rights did not have direct effect any earlier than 2000 when the Human Rights Act 1998 entered into force. Even after 2000 the courts have shown reluctance in confirming that someone has a 'right' to something. An example is the right to respect for private life embodied in Article 8 ECHR. The House of Lords did not develop a right to privacy but chose to re-interpret the equitable wrong of 'breach of confidence'. This disguises the right to privacy as a duty for others.

There are, however, also developments cautiously indicating the acknowledgement of rights. One may think of the conventional sum awarded to the parents in a case of wrongful conception and of the case about a patient's right to be

17. Ibid., 64: 'I wish to argue that such convergence, even if it were thought desirable (which, in my view, it is *not*), is impossible on account of the fact that the differences arising . . . are irreducible' (emphasis original).

18. See with further references Cees van Dam, *European Tort Law* (Oxford, Oxford University Press, 2006), no. 610.

19. G. Samuel, '“Le droit subjectif” and English Law', [1987] *CamLJ*, 286.

20. Lord Bingham of Cornhill, 'Tort and Human Rights' in *The Law of Obligations: Essays in Celebration of John Fleming*, P. Cane and J. Stapleton (eds) (Oxford, Clarendon Press; New York, Oxford University Press, 1998), p. 2.

informed of the risk inherent in surgery.²¹ These decisions seem to be inspired by an acknowledgement of the right to family life and the patient's right to self-determination respectively. However, despite this tiptoe approach to civil law rights, the contrast with German and French law remains obvious.

The main German tort law provision, § 823 I, lists the citizen's civil law rights, particularly the right to life, physical integrity, health, personal liberty and property. For the courts, these rights are the starting point for deciding on a claim for compensation. Rather, they are the golden gates through which the claimant enters the arena where his case is heard. This starting point has strongly influenced the BGH's case law in providing protection for victims: a court will not easily dismiss a claim if the victim's right has been infringed.

French tort law does not take rights as its starting point but it is implied in the way the Cour de Cassation has interpreted the few liability provisions of the Code civile. The strict liability rules, some of a very general character, embody the right to safety and security, whereas application of the principle of 'equality before the public burdens' in the framework of liability of public authorities is founded on the right of equal treatment of citizens. Additionally, in the second part of the 20th century France codified the right to protection of privacy.

Whereas French and German law both focus on rights protecting a person's life and good, English law takes a different starting point by protecting the freedom to act. Indeed, in common law protection of the freedom to act is often mentioned as an important consideration in deciding liability matters. It is inevitable that these different starting points as regards the role of citizen's rights have consequences for the outcome of cases.

3.2 STRICT LIABILITY

Closely connected to the role of rights in tort law is the role of strict liability. Over the 20th century rules of strict liability have gained a firm foothold in continental tort law.²² French tort law contains several general strict provisions and German tort law contains a large number of specific strict provisions. In England, rules of strict liability are rare.

Strict liability is most popular in France with a number of strict liability rules for things and persons, supplemented by a general strict liability rule for things (since 1896) and a general strict liability rule for persons (since 1991). The courts derived these general rules, contrary to the intention of the legislator, from Art. 1384 s. 1 CC. They establish liability unless the defendant can prove a kind of *force majeure*, whereas the victim's contributory negligence may lower the amount of compensation to be paid. Additionally, the *loi Badinter* provides for an almost absolute liability for damage caused in road traffic accidents.

21. *Rees v. Darlington Memorial Hospital*, [2003] 52 HL, about which Van Dam, n. 18 *above*, no. 706-2; *Chester v. Afshar* [2004] 41 HL, about which Van Dam, n. 18 *above*, no. 1107-3.

22. *See with further references* Van Dam, n. 18 *above*, no. 605.

German law contains rather specifically formulated strict liability rules which are almost all kept outside the BGB. Their enactment was strongly determined by the practical needs of the time and illustrates from when on which risks were considered to be known and important enough to 'deserve' a rule of strict liability. For instance, in the 19th century strict rules were imposed on the operators of railways; in the early 20th century on keepers of motor vehicles; and in the second half of the 20th century on those who caused environmental harm. Liability for persons is not strict but a liability for rebuttable negligence.

Apart from the implemented European Directive on liability for defective products, English law only contains strict rules for damage caused by animals and by employees. No rule of strict liability applies to compensation for damage caused in road traffic accidents. The new risks of the 19th and 20th century have occurred unnoticed by the English legislator. Judicial development of a more general strict liability rule on the basis of the rule in *Rylands v. Fletcher* was brought to a halt in the 1940's in *Read v. Lyons* by allowing negligence and foreseeability to play a more important role. According to Fleming, the most damaging effect of this decision was that 'it prematurely stunted the development of a general theory of strict liability.'²³ Indeed, since World War II no claimant has ever been successful in invoking the Rule.

Whereas English law treats strict liability as an outcast on which one should rely in exceptional circumstances only, it has taken power in France where it reigns as a Sun King in the area of liability for death, personal injury and property damage.

3.3 LIABILITY FOR LAWFUL ACTS

Liability of public bodies is generally applied in a more reluctant way than liability of private entities but also here, French and German law are more generous than English law.²⁴ An important general obstacle for a public body's *fault* liability is the necessity to grant a margin of discretion in policy-related matters. This means that many claimants are left empty-handed and this is not always satisfactory. A way to solve this problem is to create a rule of strict liability for public bodies for the consequences of their *lawful* conduct. This implies that those who disproportionately suffer from measures taken in the general interest have a right to compensation for damage which is not part of their daily risk of business or life.

In France, liability for lawful acts is based on the principle of *égalité devant les charges publiques* and in Germany on the customary *Sonderopfer* rule. Additionally, the ECJ has acknowledged the right to compensation for lawful acts, although in practice it has not yet allowed such a claim.²⁵ England does not acknowledge liability for lawful acts by public bodies.

23. J. G. Fleming, *Law of Torts*, (9th edn, North Ryde, LBC Information Services, 1998), p. 383.

24. See with further references Van Dam, n. 18 above, no. 1802–1804.

25. See recently *FIAMM v. Council and Commission*, Case No. T-69/00, 14 December 2005.

Two lines meet here. First, there is a link with the English reluctance to strict liability (section 3.2). Strict liability for private actors can be considered as the expression of the same idea as pronounced in the equality principle regarding liability of public actors: if socially beneficial activities (like mass production or driving a motor vehicle) cause disproportional damage to one or more particular citizens, these persons have to be compensated in order to avoid the burdens of these useful activities weighing more heavily on some than on others.

Second, there is a link with the English emphasis on duties (here: of the government) rather than on rights (here: of the citizens) (section 3.1). In case of liability for 'lawful acts' compensation can be obtained by means of so-called *ex gratia* payments by public bodies. Since the 1990's public bodies have set up a 'bewildering' number of compensation schemes.²⁶ This redress is naturally at odds with the public body's own budget. The payments are made without admitting legal liability: essentially they are paid by the public body's grace. Hence, the basis for payment is a moral duty of the public body rather than an enforceable right of the affected citizen.

The Human Rights Act 1998 may very well make a difference in the near future, bringing English law a little closer to the French and German legal principles of equality. Whether this indeed will happen, lies mainly in the hands of the Law Lords who are called upon to reconcile common law traditions with what can be considered to be one of the fruits of the French Revolution.

The English reluctance to rights, strict liability and liability for lawful acts has a common ground in the Anglo-American fear of principles and vague rules. According to Philippe Sands, the Anglo-American tradition aims for obligations which are clear and precise and it fears

[A]ctivist judges who might be prone to take a general principle on precaution and turn it into a more specific obligation, leading, for instance, to the closure of a factory. The English lawyer's nightmare is the Indian Supreme Court decision which ordered the closing down of hundreds of polluting tanneries because they violated a vague and general 'right to life' provision entrenched in India's Constitution.²⁷

4. CULTURAL DIFFERENCES

4.1 INTRODUCTION

Geert Hofstede is a Dutch expert on national cultures and their impact on individual and organizational behaviour. His empirical research is important for understanding cultural diversity, for understanding how it works and what its

26. D. Fairgrieve, *State Liability in Tort. A Comparative Law Study* (Oxford, Oxford University Press, 2003), pp. 244–251.

27. P. Sands, *Lawless World*, (London, Penguin, 2006), p. 83.

consequences are.²⁸ The thrust of his research is that national and regional cultures differ, that cultural features are rooted in history and can be traced centuries back, and that their practices are subject to change but that their values do not change. 'Differences between national cultures at the end of the last century were already recognizable in the years 1900, 1800, and 1700, if not earlier. There is no reason they should not remain recognizable until at least 2100.'²⁹ In other words: cultural diversity is in Europe to stay.

Hofstede distinguishes five cultural dimensions: Power Distance, Individualism v. Collectivism, Masculinity v. Femininity, Uncertainty Avoidance and Long v. Short Term Orientation. These dimensions will be briefly explained in this section.

Usually, *culture* is perceived as a broad, catch-all term for an array of complex beliefs, symbols, and patterns of behaviour but this concept seems too broad and multifaceted to be useful. Similarly, the concept of *legal culture* is subject to much analysis and accordingly, many different definitions have seen the light of day.³⁰ Hofstede describes culture as 'the collective programming of the mind that distinguishes the members of one group or category from another.'³¹ His approach provides insights into national cultures on the basis of cultural dimensions which can be based on empirical data. This is not to say, however, that culture can be reduced to these dimensions. Culture goes beyond what is measurable or calculable.³²

It is important to stress that national scores of cultural dimensions only reflect national *tendencies*.³³ Individuals within a country vary around the cultural average. The parallel with analysis of legal differences between the countries in section 3 is that it focused on prevailing national legal opinion and not on individual opinions, which can vary accordingly.

For the analysis in this chapter, the use of Hofstede's data raises the classic issue as to whether culture determines the law or the law determines culture. In fact, this is probably a matter of complex interaction running in both directions.³⁴ For this chapter the assumption will do that culture and cultural values affect the operation of the legal system – one way or another.

An important caveat is that the chain between cultural values and legal rules can be long and not without interference from other factors. Hence, legal differences between countries cannot be solely traced back to cultural differences. For example, the law's autonomous function may account for discrepancies

28. See Hofstede, n. 4 above, and for non-specialists G. and G. J. Hofstede, *Cultures and Organizations, Software of the Mind* (2nd edn, New York, McGraw-Hill, 2005).

29. Hofstede, n. 4 above, p. 36.

30. D. Nelken, 'Legal culture', in *Elgar Encyclopedia of Comparative Law*, J. Smits (ed.) (Cheltenham-Northampton, Elgar, 2006), pp. 372–380.

31. Hofstede, n. 4 above, p. 9.

32. Hofstede, n. 4 above, p. 29.

33. Hofstede, n. 4 above, p. 461.

34. D. Nelken, 'Rethinking Legal culture' in *Law and Sociology*, M. Freeman (ed.) (Oxford, Oxford University Press, 2006).

with national cultural values. It is also conceivable that tort law, which is mainly judge-made law, is a reflection of the judicial culture rather than of the general culture of society. Whether and to what extent this is the case, is for instance related to the question as to how judges in each country are recruited.³⁵ In other words, this chapter cannot be conclusive but is intended to provoke discussion and further thinking.

4.2 POWER DISTANCE

The dimension of power distance is about the way societies handle human inequality. Power distance refers to the degree of inequality in power between a less powerful individual and a more powerful other in which they belong to the same social system. This dimension is particularly about the extent to which the less powerful members of institutions and organizations within a country expect and accept that power is distributed unequally.³⁶ On the Power Distance Index (PDI), France scores 68 and Germany and Great Britain 35.³⁷ The difference between France (high power distance) and Germany and Great Britain (low power distance) is striking.

This dimension affects not only parent-child, teacher-student and boss-subordinate relationships but also authority-citizen relationships. Countries handle power differences between authorities and citizens in very different ways. Different convictions dominate the perceptions of desirability of the various ways of handling such power differences.³⁸

High power distance societies support status consistency: the powerful are entitled to privileges and are expected to use their power to increase their wealth. 'Although formally everybody may be equal, in practice the powerful always win their case.'³⁹

In a society in which power distances are large, authority tends to be traditional, and power is seen as a basic fact of society that precedes the choice between good and evil. Its legitimacy is irrelevant and might prevail over right. There is an outspoken consensus that there should be an order of inequality in this world in which everybody has his or her place.

Conversely, in a society in which power distances are small the law should guarantee that everybody, regardless of status, has equal rights. This dimension is not unequivocal because some elements of both extremes can be found in many countries.⁴⁰ Interestingly, studies dealing with inequality show results that are more

35. See also J.A.G. Griffith, *The Politics of the Judiciary* (5th edn, London, HarperCollins, 1997).

36. Hofstede, n. 4 above, p. 83.

37. Hofstede, n. 4 above, p. 87. EU countries with high power distance are Belgium (65), and Portugal (63). EU countries with low power distance are Sweden (31), Ireland (28), Denmark (18), and Austria (11).

38. Hofstede, n. 4 above, p. 110.

39. Hofstede, n. 4 above, p. 111.

40. Hofstede, n. 4 above, p. 113.

correlated with power distance than with individualism-collectivism. Generally, in low power distance countries, philosophical systems stress equality whereas in high power distance countries, stratification and hierarchy are stressed.⁴¹

How does France's high score on power distance relate to its principle of equality (*égalité*)? Michel Crozier wrote in this respect:

Face-to-face dependence relationships are . . . perceived as difficult to bear in the French cultural setting. Yet the prevailing view of authority is still that of . . . absolutism . . . The two attitudes are contradictory. However, they can be reconciled within a bureaucratic system since impersonal rules and centralization make it possible to reconcile an absolutist conception of authority and the elimination of most direct dependence relationships.⁴²

4.3 UNCERTAINTY AVOIDANCE

Uncertainty avoidance deals fundamentally with the level of anxiety about an unknown future in a country, more particularly by the extent to which the members of a culture feel threatened by ambiguous or unknown situations.⁴³ On the Uncertainty Avoidance Index (UAI), France scores 86, Germany 65 and Great Britain 35.⁴⁴ In other words, in France uncertainty avoidance is strong, in Great Britain weak and in Germany medium.

In strong uncertainty avoidance countries there is a consequent need to protect society through three kinds of measures: technology, rules and rituals.⁴⁵ In weak UAI countries there is more openness to change and new ideas whereas there is more conservatism and a stronger desire for law and order on the strong UAI side. In weak UAI countries there is more tolerance of diversity, whereas in high UAI-countries there is more fear of foreign things. "The strong uncertainty avoidance sentiment is "What is different is dangerous"; the weak uncertainty sentiment, in contrast is, "What is different is curious".⁴⁶

Uncertainty avoidance should not be confused with risk avoidance. Uncertainty is to risk as what anxiety is to fear. Germans and the French can behave in a very risky way. The maximum speeds allowed in freeway traffic are positively correlated with uncertainty avoidance: stronger uncertainty avoidance means faster driving.

Countries with weaker uncertainty avoidance tendencies demonstrate a lower sense of urgency expressed, for example, in lower speed limits. In such countries

41. Hofstede, n. 4 *above*, p. 116.

42. M. Crozier, *The Bureaucratic Phenomenon* (Chicago, University of Chicago Press, 1964), p. 222.

43. Hofstede, n. 4 *above*, pp. 29, 159.

44. Hofstede, n. 4 *above*, p. 151. Strong Uncertainty Avoidance EU countries are Greece (112), Portugal (104) and Belgium (94). Weak Uncertainty Avoidance EU countries are Ireland (35), Sweden (29) and Denmark (23).

45. Hofstede, n. 4 *above*, pp. 29, 159.

46. Hofstede, n. 4 *above*, pp. 160–161.

not only familiar but also unfamiliar risks are accepted, such as changing jobs and starting activities for which there are no rules.⁴⁷

Rather than leading to reducing *risk*, uncertainty avoidance leads to a reduction of *ambiguity*. In strong uncertainty avoidance countries, people look for a structure in their organizations, institutions, and relationships that makes events clearly interpretable and predictable.⁴⁸ Countries belonging to the former Roman Empire show stronger uncertainty avoidance and therefore a greater need to prevent uncertainties in the behaviour of other people by means of laws and rules. These also tend to be more precise than in those with weak uncertainty avoidance. For example, Germany has Acts for the event that all other laws might become unenforceable (*Notstandsgesetze*). Britain on the other hand has a rather unsystematic body of legislation compared to Germany and it does not even have a written constitution.⁴⁹

4.4 INDIVIDUALISM V. COLLECTIVISM

According to Hofstede, individualism

[S]tands for a society in which the ties between individuals are loose: Everyone is expected to look after him/herself and her/his immediate family only. Collectivism stands for a society in which people from birth onwards are integrated into strong, cohesive in-groups, which throughout people's lifetime continue to protect them in exchange for unquestioning loyalty.⁵⁰

On the individualism index (IDV), Great Britain scores 89; France 71, and Germany 67 (sample 53).⁵¹ On a global level England, France and Germany are undoubtedly individualist countries. They are in the world's top 25 per cent ranking. Within Europe, however, Great Britain is the more individualist while France and Germany are more collectivist countries.

It is characteristic for individualistic cultures that individual interests prevail over collective: 'the more individualist a country, the stronger its citizens' preference for freedom over equality.'⁵² In individualistic cultures the role of the state in the economic system is restrained: 'The weaker the individualism in the citizens' mental software, the greater the likelihood of a dominating role of the state in the

47. Hofstede, n. 4 *above*, p. 148.

48. *Ibid.*

49. Hofstede, n. 4 *above*, p. 174. C. Nobes and Robert Parker, *Comparative International Accounting*, (6th edn, Harlow, Pearson, 2000), p.18: empirical research shows that transparency in financial reporting and accounting is reversely related to uncertainty avoidance. Transparency is increased as uncertainty avoidance is decreased.

50. Hofstede, n. 4 *above*, p. 225.

51. Hofstede, n. 4 *above*, p. 215. More individualist EU countries are the Netherlands (80), Italy (76), Belgium (75) and Denmark (74). More collectivist EU countries are Spain (51), Greece (35) and Portugal (27).

52. Hofstede, n. 4 *above*, p. 275.

economic system.’⁵³ This implies that the stronger the individualism, the greater the appeal of market capitalism. Indeed, the three countries’ IDV scores correspond with the role of the state in the economic system. The dominant economic theories are designed in individualist countries like the United States and Great Britain. One of the first examples was Adam Smith’s ‘invisible hand’ through which the pursuit of self-interest by individuals would lead to the maximal wealth of nations.⁵⁴

Hofstede also argues

[T]hat respect for human rights as formulated by the United Nations is a luxury that wealthy countries can afford more easily than poor ones; to what extent these wealthy countries do conform to UN criteria, however, depends on the degree of individualism in their culture. The United Nations’ 1948 Universal Declaration of Human Rights and other UN covenants were inspired by the values of the dominant powers at the time of their adoption, which were highly individualist.⁵⁵

These results seem to be at odds with the English approach to rights (section 3.1). The fact that France and Germany have constitutional courts and that the ECHR in these countries has been directly applicable for a long time, does not seem to be a convincing explanation. A possible explanation could be that it is not so much the national culture which is decisive but the culture of the judiciary (section 4.1).

Finally, Hofstede observes that if there is to be any convergence between national cultures it should be on this dimension. ‘The strong relationship between national wealth and individualism is undeniable, with the arrow of causality directed . . . from wealth to individualism.’⁵⁶

4.5 MASCULINITY V. FEMININITY

Masculinity stands for a society in which social gender roles are clearly distinct: Men are supposed to be assertive, tough, and focused on material success; women are supposed to be more modest, tender, and concerned with the quality of life. Femininity stands for a society in which social gender roles overlap: Both men and women are supposed to be modest, tender, and concerned with the quality of life.⁵⁷ On the Masculinity Index (MAS), Germany and Great Britain score 66, and

53. Hofstede, n. 4 *above*, p. 245.

54. Hofstede, n. 4 *above*, p. 250. This links with the capitalist joint stock company being developed in individualist Britain. The first joint stock company, the *Verenigde Oostindische Compagnie* (Dutch East India Company), carried out colonial activities in Asia and was established in 1602 in the Netherlands, also a strong individualist country. About the different ways of financing business in Great Britain and Germany, see C. Nobes and R. Parker, *Comparative International Accounting*, (6th edn, Harlow, Pearson, 2000), p. 20 *et seq.*

55. Hofstede, n. 4 *above*, pp. 247–248.

56. Hofstede, n. 4 *above*, p. 255.

57. Hofstede, n. 4 *above*, p. 297.

France 43.⁵⁸ Just as with Power distance (PDI), the gap is between France on the one hand (more feminine) and Germany and Great Britain on the other (more masculine).

The masculine-feminine dimension affects priorities as regards reward for the strong versus solidarity with the weak in one's society.⁵⁹ In masculine countries more people believe that the fate of the poor is their own fault, that if they worked harder they would not be poor and that the rich should not pay to support them.⁶⁰ In feminine cultures the idea is stronger that society should provide a minimum quality of life for everybody, and that the financial means to that end are to be collected from those who have them.⁶¹ In this respect it is not surprising that they tend to spend a higher percentage of their national income on development assistance for poor countries. Feminine cultures are also more permissive: it is thought that fathers are stricter than mothers.⁶²

Governments in masculine cultures are more likely to give priority to economic growth and to be prepared to sacrifice the living environment for this purpose. Governments in feminine cultures are more likely to choose the reverse priority: in these countries more people are concerned about environmental issues and more people say that they are prepared to pay for the environment.⁶³

Finally, masculine countries tend to resolve conflicts by fighting ('let the best man win'), whereas in feminine countries there is a preference for resolving conflicts through compromise and negotiation.⁶⁴ In masculine countries, political processes tend to be more adversarial and in feminine countries more consensus-oriented.⁶⁵ This may be linked with the national dispute resolution culture with regard to out-of-court settlements and the use of mediation techniques.⁶⁶

4.6

LONG V. SHORT TERM ORIENTATION

Long-term orientation stands for 'the fostering of virtues oriented toward future rewards, in particular, perseverance and thrift.' Its opposite pole, short-term orientation, stands for 'the fostering of virtues related to the past and present, in particular, respect for tradition, preservation of "face" and fulfilling social

58. Hofstede, n. 4 *above*, p. 286. More masculine EU countries are Italy (70), Ireland (68) and Greece (57). More feminine EU countries are Finland (26), Denmark (16), Netherlands (14) and Sweden (5).

59. Hofstede, n. 4 *above*, p. 317.

60. Hofstede, n. 4 *above*, p. 319.

61. Hofstede, n. 4 *above*, p. 318.

62. Hofstede, n. 4 *above*, p. 319.

63. Hofstede, n. 4 *above*, pp. 320–321.

64. Hofstede, n. 4 *above*, pp. 316, 320.

65. Hofstede, n. 4 *above*, p. 321.

66. *See for example* E. Blankenburg, 'Civil Litigation Rates as Indicators for Legal Culture' in *Comparing Legal Cultures*, D. Nelken (ed.) (Dartmouth, Aldershot, 1997), pp. 41–68, about the lower number of out of court settlements in Germany (high masculinity ranking, 11 out of 74) as compared to the Netherlands (low masculinity ranking, 72 out of 74).

obligations'.⁶⁷ This dimension mainly reflects the differences between East and West and seems to be of lesser importance for an intra-European comparison.⁶⁸

5. LEGAL DIFFERENCES AND CULTURAL DIFFERENCES

5.1 INTRODUCTION

This section will provide an analysis of whether the cultural dimensions set out in the previous section can be related to the legal differences set out in section 3. It needs to be stressed that these observations are in no way intended to be conclusive.

The analysis will focus on the three legal differences individually (the role of rights, strict liability and liability for lawful acts) but also on the common denominator of these differences which can be described as victim protection. Indeed, citizen's rights in German and French tort law function as victim's rights which are to a greater or lesser extent embodied in rules of strict liability including liability for lawful acts.

The following sections will consider whether victim protection can be linked to collectivism (the 'group' perspective, section 5.2), uncertainty avoidance (the 'security and safety' perspective, section 5.3) and femininity (the 'care' perspective, section 5.4). The common factor is that Great Britain scores low in collectivism (Germany 18, France 13, Great Britain 3), uncertainty avoidance (France 17, Germany 43 and Great Britain 66), and femininity (France 47, Germany and Great Britain 11).

5.2 COLLECTIVISM

In individualist societies the ties between individuals are loose and everyone is expected to look after him- or herself. Individual interests prevail over the collective, and the role of the state in the economic system is restrained. The more individualist a country is, the stronger its citizens' preference for freedom over equality. Freedom is an individualist idea, equality a collectivist ideal.⁶⁹

Tort law as a tool for victim protection is at odds with an individualist society in which one primarily looks after oneself and is not expected to be one's brother's keeper. In contract law and tort law an important issue is, to what extent one needs to take into account that other people will act negligently with regard to their own

67. Hofstede, n. 4 *above*, p. 359.

68. Hofstede, n. 4 *above*, p. 351. Hofstede's survey of this dimension is limited to 23 countries of which only six are European. One of his observations (p. 362) is that long-term orientation stands for a society in which wide differences in economic and social conditions are considered undesirable, whereas short-term orientation stands for meritocracy, differentiation according to abilities.

69. Hofstede, n. 4 *above*, p. 275.

interests. Can a trader assume that consumers are vigilant and circumspect or does he need to take into account that they are vulnerable and inattentive? To what extent does the manufacturer need to expect negligent use of his product by the consumer? On a national level these questions are answered with a different level of tolerance towards the potential victim.⁷⁰ This is reflected in the fact that Germany and France have special rules limiting the defence of contributory negligence whereas in England this defence can be generally invoked. These differences in approach can be linked to the fact that England scores higher on individualism than France and Germany.⁷¹

More generally, Great Britain's high ranking on individualism and its lower profile in victim protection can be related to a predominantly free market approach and a strong emphasis on the protection of individual freedom.⁷² A striking example is an article published in 2003 by Jane Stapleton in which she argued that protection of the vulnerable is a core moral concern of common law tort law.⁷³ Such an article would not be published in France or Germany because it would only discuss what is obvious and self-evident in these legal systems. In the individualist common law world, Stapleton advocates something which is outside the main stream.

The individualist preference for a free market approach and for freedom over equality implies a less dominant role for the state. This is generally reflected in a preference to keep taxes (relatively) low. The term 'taxpayers' money' does not have the same political impact as its German or French equivalents. An obvious consequence of this is that governmental liability in general and liability for lawful acts in particular are not too warmly welcomed since they are at odds with lower taxes.

5.3 UNCERTAINTY AVOIDANCE

Uncertainty avoidance concerns the extent to which members of a country feel threatened by uncertain or unknown situations.⁷⁴ It can be argued that strict liability provides a reduction in uncertainty, firstly because of the hard-and-fast rule character of strict liability. This provides more legal certainty about the outcome of a case than fault liability. Secondly, strict liability ensures that compensation is

70. Van Dam, n. 18 *above*, no. 807-4 and 1408. *See also* T. Wilhelmsson, 'The Average European Consumer – A Legal Fiction', in this book, chapter 13, and C. van Dam and M. Carpus-Carcea, 'The Concept of the "Average Consumer" in Community Law: Aurea Mediocritas?' (forthcoming).

71. Van Dam, n. 18 *above*, no. 1215 and 1404–1405.

72. The English reluctance towards strict liability is related to the concern for unfathomed economic consequences. *See* Basil S. Markesinis and Simon Deakin, *Tort Law* (Oxford, Clarendon Press, 2003), p. 545. *See also* H. Collins, 'European Private Law and the Cultural Identities of States', (1995) 3 ERPL, 353–365.

73. J. Stapleton, 'The Golden Thread at the Heart of Tort Law: Protection of the Vulnerable' (2003) 24 *Australian Bar Review*, 135–148.

74. Hofstede, n. 4 *above*, p. 161.

relatively easy to obtain in case a risk materializes.⁷⁵ Fault liability traditionally requires balancing the interests of claimant and defendant. The outcome of this balancing act very much depends on the circumstances of the case. ‘Uncertainty-avoiding cultures shun ambiguous situations’⁷⁶ and fault liability is ambiguity par excellence.⁷⁷

Hence, it is not surprising that in France, a strong uncertainty avoidance country, the predominant liability rules for death and personal injury are strict, whereas in a weak uncertainty avoidance country like Great Britain fault liability is predominant. Apparently the Brits can live more easily with such uncertainties.

Germany is a medium-strong uncertainty avoidance country, which coincides with the medium position it takes as regards the role of strict liability as compared to France and England. German tort law provides for an abundance of detailed strict liability rules, covering virtually all new risks to life, bodily integrity and health.

Uncertainty avoidance cultures try to reduce uncertainty in other people’s behaviour by laws and rules.⁷⁸ This can be illustrated by the German *Verkehrspflichten*, which are safety rules for almost all conceivable kinds of human conduct.⁷⁹ The German fondness for a legal system can be seen in the same light. In the German perspective, a system helps to avoid uncertainties as regards legal interpretation. For this reason, in Germany systematic arguments are more convincing than in other countries.⁸⁰

The uncertainty avoidance dimension can be linked more generally with the legal differences between common law and civil law.⁸¹ According to Hofstede, in the area of philosophy and science grand theories are more likely to be conceived within strong uncertainty avoidance cultures than in weak uncertainty avoidance ones. The quest for Truth is an essential motivator for a philosopher. The great theoreticians and philosophers of the West tend to come from higher-UAI countries like Germany and France (for example, Descartes, Hegel, Kant, Marx, Nietzsche and Sartre). In lower-UAI countries like the United States and Great Britain, empirical scientists dominate: people developing conclusions from observation and experiments rather than from pure reflection (for example, Newton, Linnaeus and Darwin).⁸²

The fact that the Germans and French tend to reason by deduction, and British and Americans by induction can be illustrated at various legal levels. Firstly, the French and the Germans have a written constitution and the United Kingdom has not. Secondly, in the area of private law the French have their *Code civile* and the Germans their *Bürgerliches Gesetzbuch* with their general concepts, whereas the

75. Van Dam, n. 18 above, no. 1002.

76. Hofstede, n. 4 above, p. 148.

77. Van Dam, n. 18 above, no. 804–813.

78. Hofstede, n. 4 above, p. 174.

79. Van Dam, n. 18 above, no. 403.

80. This may also be an explanation for the strong German involvement in drafting a European Civil Code; see Van Dam, n. 18 above, no. 603-2 and 608-1.

81. See section 2 above, *in fine*.

82. Hofstede, n. 4 above, p. 178.

United Kingdom lacks a codification and its statutes hardly contain general concepts.

Thirdly, the emphasis on theories in Germany and France and on empirical evidence in the United Kingdom links with the difference between common and civil law: reliance on general rules in France and Germany and on case law and precedents in the United Kingdom.⁸³ A precedent is based on specific facts and thus can be seen as ‘empirical evidence’ for the correctness of the solution in the given case. Indeed, the common law has been developed on a case by case basis by practitioners and it is no coincidence that case books are still the most popular species of law books in the common law world. In the continental codifications, academics played a major role. The BGB is known as *Professorenrecht* (law made by professors) and the *Code civile* is determined by *les grands principes* which are the basis of general concepts and general rules.⁸⁴

5.4 FEMININITY

The core of the femininity dimension is care for or solidarity with the weak. In feminine countries, reward for the strong is less at stake; in these countries, fewer people believe that the fate of the poor is their own fault.⁸⁵

It can be argued that in France the feminine dimension plays a role in victim protection.⁸⁶ This would run parallel with the fact that feminine countries like France, the Netherlands and the Nordic countries have a strong social security tradition. Tort law and social security both provide a high level of protection and the line between these compensation systems is thin. In the Netherlands and the Nordic countries, femininity plays a more important role regarding victim protection than uncertainty avoidance and collectivism (where these countries are ranked in the lower third).

Germany’s high score on masculinity makes it unlikely that femininity plays a relevant role in victim protection. More important are probably collectivist values combined with medium uncertainty avoidance. The German level of victim protection is slightly lower than the French, which coincides with the fact that Germany scores slightly higher in collectivism than France but considerably lower in femininity and uncertainty avoidance.

83. Van Dam, n. 18 above, no. 607.

84. Van Dam, n. 18 above, no. 608. *See also* no. 301-3 about the apodictic way in which the Cour de Cassation formulates its decisions. This may be linked to the high power distance score of France (section 4.2).

85. Hofstede, n. 4 above, p. 319.

86. In France, solidarity is a constitutional principle if it comes to the burden caused by calamities (*La Nation proclame la solidarité et l'égalité de tous les Français devant les charges qui résultent des calamités nationales*). In the United Kingdom, solidarity (politically correct: *altruistic concern*) is an *ex post* rather than *ex ante* matter which reflects the difference between compulsory solidarity on the continent and voluntary charity in the Anglo-American world.

Individualism does not necessarily imply egocentrism. High individualist scores can very well go together with a high level of victim protection. For example, the Netherlands scores very high on individualism but is known as a victim-friendly country. This suggests that in the Dutch approach to victim protection the feminine values predominate as compared to collectivism and uncertainty avoidance.

Hence, it is likely that the level of victim protection is not determined by just one cultural dimension. The explanation has to be found by looking at the mix of various cultural dimensions. A good illustration is provided by the parable of the Good Samaritan who helped a Jew in need.⁸⁷ Hofstede explains that

[I]ndividualism/collectivism is about ‘I’ versus ‘we’, independence from versus dependence on in-groups ... Masculinity/femininity is about ego enhancement versus relationship enhancement, regardless of group ties. The biblical story of the Good Samaritan who helps a Jew in need – someone from an enemy ethnic group – is an illustration of feminine and not of collectivist values.⁸⁸

Both collectivism and femininity can provide for victim-friendliness but if it concerns someone from outside the (ethnic) group this can only be explained by femininity and not by collectivism.

6. DIVERSITY, COMMUNITY LAW AND *IUS COMMUNE*

6.1 INTRODUCTION

In this section, conclusions will be drawn from the previous sections. It will also provide an outlook as regarding some aspects of diversity and European cooperation on a legislative, judicial and academic level, mainly but not solely from a private law and tort law perspective. It will demonstrate the available space for diversity within the context of European cooperation and the need to make better use of the available empirical research to provide a more fertile and sustainable ground for mutual understanding and mutual trust in Europe.

In the 1990s, marketers (re)discovered the importance of national and local differences and sensitivities. For lawyers and politicians it is equally important to be aware of these differences and sensitivities. The previous sections have illustrated links between legal differences and national cultural dimensions. It was shown that England’s lower level of victim protection coincides with its lower scores on collectivism, uncertainty avoidance and femininity. It was also indicated that the higher level of victim protection in France and Germany could not be explained by just one cultural dimension. Victim protection seems to be linked to a

87. Van Dam, n. 18 *above*, no. 1701 *et seq.*

88. Hofstede, n. 4 *above*, p. 293.

mix of uncertainty avoidance (the ‘security and safety’ perspective), femininity (the ‘care’ perspective) and collectivism (the ‘group’ perspective). If this is correct, it implies a pluriform cultural motive for a high level of victim protection.

According to Hofstede, cultural values continue and will continue to differ, also among European countries. ‘Cultures shift, but they shift in formation, so that the differences between them remain intact.’⁸⁹ Provided that cultural values are not converging, it can be submitted that legal systems are not converging inasmuch as they are the outward manifestation of national cultures. Indeed, in many respects national private law, for example victim protection in tort law, is such a manifestation of national culture. This puts the question as to whether legal systems converge or ought to converge (section 2) in a different perspective. This would mean that even if the bodies of law converge, for example as the consequence of implemented EU Directives, their souls will not.

An important reason for this is that Community law is not linked to a national legal culture. It can therefore be considered as a *Fremdkörper* or a legal transplant.⁹⁰ This term relates to the transplant of legal rules or institutions of one legal system into another, in the framework of law reform either self-chosen or imposed.⁹¹ Community law rules provide for legal transplants albeit in a slightly different way. They do not come with a history or a legal-cultural background. They are newly designed and in medical terms comparable to an artificial transplant organ rather than a human one. To use Montesquieu’s image: European rules provide the body but the national courts have to provide them with a soul in the spirit of Community law. This process will often be influenced along the lines of national legal concepts, language, political, socio-economic and cultural backgrounds. This is particularly the case if the rule provides for general concepts rather than precise technical rules.

An illustration is the way the English High Court interpreted the strict liability concept of ‘defect’ in the Product Liability Directive. In order to assess a defect it considered relevant the steps taken by McDonalds to train its staff in relation to the safe service of hot drinks to customers.⁹² Unfamiliar with the concept of strict liability and the motives behind it, the court relied on elements of fault liability.

89. Hofstede, n. 4 *above*, p. 255. He also argues (p. 431) that the implication of cultural values is moderated by the level of economic prosperity. This means that decreasing the economic differences within the EU would make cultural differences less strong. However, it would not make them disappear.

90. Coined by A. Watson, ‘Legal Transplants and Law Reform’, (1976) 92 LQR, 79–84.

91. For a brief overview, see J. Fedtke, ‘Legal transplants’ in *Elgar Encyclopedia of Comparative Law* J. Smits (ed.) (Cheltenham-Northampton, Elgar, 2006), pp. 434–437.

92. *Sam Bogle and Others v. McDonald’s Restaurants Ltd*, [2002] EWHC 490 (QB). See for an extensive analysis of the Directive’s impact in England and France: S. Whittaker, *Liability for Products: English Law, French Law, and European Harmonization* (Oxford, Oxford University Press, 2005).

6.2 DIVERSITY AND EUROPEAN COOPERATION

One does not need to think, feel and act in the same way in order to agree on practical issues and to cooperate.⁹³ Cultural diversity and European cooperation can go very well together but one should be aware that the closer an issue is connected with cultural values the higher eyebrows will be raised.⁹⁴

Firstly, at an international level countries will cooperate differently according to their cultural values. On the basis of analysis of infringement procedures, Hofstede found that Member States with large power distances and masculine values were least inclined to implement Directives properly.⁹⁵ For our purpose an illustration is France, a high power distance country, which has always strongly supported the European idea but seems to be less convinced when European interests do not run parallel with its own interests. For example, the product liability directive was only implemented more than a decade after it entered into force and (so far) two infringement procedures by the Commission were needed to get the implementation right.⁹⁶

Secondly, in the legislative process between Commission, Council and Parliament, discussions will be fiercer when cultural values are directly or indirectly at stake. Generally, the Community Institutions (Commission, Council and Parliament) are the marketplace where solid cultural values are liquidated into political means in order to negotiate legislation. This is not unique for Europe but it is normal procedure in every country because to a certain extent cultural values will also differ at a national level. An example is Switzerland, for which Hofstede found diverging cultural values for the German- and French-speaking Swiss.⁹⁷

Cultural differences are more likely to appear in discussions in the European Council of Ministers representing their country's interests, whereas in Parliament – where the Members of Parliament are primarily organized along party lines – political diversity will be more dominant. An illustration at academic level is the Study Group on Social Justice in European Private Law in which persons from various cultural backgrounds cooperate on the basis of a joint political programme.⁹⁸

Thirdly, in the judicial process in the European courts cultural differences can play a role in the interpretation of European legislation and particularly in the

93. Hofstede, n. 4 above, p. 440 *et seq.*

94. Hofstede, n. 4 above, p. 423 *et seq.*, also points out that in all international organizations and multinational companies where people from various nationalities work together, cultural differences in management style, in dealing with conflicts, in hierarchy, in cooperating, and in meeting style have to be dealt with.

95. Hofstede n. 4 above, p. 433.

96. Van Dam, n. 18 above, no. 1406. *See also Commission v. France*, Case No. C-177/04, 14 March 2006.

97. Hofstede, n. 4 above, p. 63.

98. G. Brüggemeier *et al.*, 'Social Justice in European Contract Law: A Manifesto', (2004) 10 ELJ, 653–674.

search for principles common to the Member States.⁹⁹ These principles concern the core of the national legal systems, which themselves are strongly linked to cultural backgrounds. Knowledge of legal and cultural backgrounds can contribute to a better understanding as to why countries look at certain issues as they do. For example, it helps to understand why in the United Kingdom strict liability is considered to be a threat to mankind whereas in France it is seen as the basis of civilization. More generally, ideas about fairness, justice and reasonableness differ accordingly. What in England is regarded as a consequence of the rule of law, of victim protection or of social justice may be regarded differently in Germany because these ideas are strongly related to different cultural values.

If bridges need to be built in Brussels or Luxembourg, it is valuable to know which points need to be connected, both from a legal and a cultural perspective. This is a useful investment since these differences are not about to change (section 6.1).

6.3

DIVERSITY AND EUROPEAN LEGISLATION AND CASE LAW

It is beyond doubt that European cooperation culminating in the European Union is the most important and most valuable political achievement of the second part of the 20th century in maintaining peace and contributing to prosperity. The European Union, however, not only aims to achieve common goals but also, in the terms of Article 6(3) TEU, it is bound to respect the national identities of its Member States. This happens in various ways.

The legal weight of national identities and cultural diversity can only be assessed in relation to the EU goals as set out in the EC Treaty. In internal market matters, the ECJ has set a benchmark in its Tobacco decision. It held that Article 95 does not provide a general basis for regulating the internal market, nor is it sufficient for issuing a measure of harmonization that differences exist between national rules and that this may in the abstract lead to distortions. A harmonizing measure has to make clear on a factual basis not just what the differences between national laws are but also what distortions follow from these differences and how the proposed measure aims to prevent these distortions.¹⁰⁰ Hence, at least in theory, the threshold for internal market measures is considerable.

Moreover, in areas which do not fall within its exclusive competence the principle of subsidiarity applies. This means that the Community should take action only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community (Article 5(2) EC).

If Community measures are needed, this does not mean that national and cultural differences necessarily need to be bulldozed away. Firstly, it is usually not a matter of either national or Community law but a combination of both.

99. Van Dam, n. 18 *above*, no. 201-1.

100. *Germany v. European Parliament and Council*, Case No. C-376/98 [2000] ECR I-8419.

Community law affects national laws with various levels of interference. This varies from directly applicable Community law (e.g. Article 81 EC), via Community law implemented into national law (Directives providing for maximum or minimum harmonization), purposive interpretation of national law (horizontal direct effect), mutual recognition of the effects of foreign law, to the requirement that national law (in particular remedies) needs to be in line with the principles of effectiveness and equality.

Secondly, in the area of private law, diversity remains visible because the most important instrument is the Directive, which only binds as to the result and not as to the way to reach that result (Article 249(3) EC). Moreover, many Consumer Protection Directives provide for minimum harmonization and leave it to the Member States to provide a higher level of protection.

Thirdly, not only for the legislator but also for the European courts a more diverse approach is conceivable by setting the standard and leaving the application of that standard to the Member States. An excellent example is the application of the concept of the ‘average consumer’ in the case law of the ECJ. The ECJ has set the standard but leaves space for social, cultural and linguistic differences in the application of this concept by national courts.¹⁰¹ The concept of the ‘average consumer’ will play an important role in the forthcoming Directive on Unfair Commercial Practices.¹⁰²

6.4 DIVERSITY AND *IUS COMMUNE*

What lessons can be learned from this chapter’s analysis for a possible European Civil Code and a European *ius commune*? Since the late 1980’s, the discourse on a common European private law has grown extensively. In some European academic bedrooms, dreams are dreamed not only of a European *ius commune* but even of a European Civil Code. It is thought that such a Code could build bridges between Member States and support a common European identity. It is, however, generally agreed that no legal basis exists for such a European Code, even though the European Parliament is pressing to embark on such a project.¹⁰³

101. See T. Wilhelmsson, ‘The Average European Consumer – A Legal Fiction’, in this book, Chapter 13, and C. van Dam and M. Carpus-Carcea, ‘The Concept of the “Average Consumer” in Community Law: Aurea Mediocritas?’ (forthcoming).

102. Directive 2005/29/EC of 11 May 2005, concerning unfair business-to-consumer commercial practices in the internal market. See *inter alia* Hugh Collins (ed.), *The Forthcoming EC Directive on Unfair Commercial Practices* (The Hague/London/New York, Kluwer Law International, 2004); R. W. de Vrey, *Towards a European Unfair Competition Law. A Clash Between Legal Families* (Leiden-Boston, Martinus Nijhoff, 2006); J. Stuyck, E. Terryn and T. Van Dyck, ‘Confidence Through Fairness? The New Directive on Unfair Business-to-Consumer Commercial Practices in the Internal Market’, (2006) 43 CMLR, 107–152; C. van Dam and E. Budaite, ‘The Statutory Frameworks and General Rules on Unfair Commercial Practices in the 25 EU Member States on the Eve of Harmonization’, in *Consumer Yearbook 2007* (forthcoming).

103. Van Dam, n. 18 *above*, no. 611.

Moreover, this chapter's analysis suggests that such a Code will face serious problems since extensive parts of civil law can be considered to be the outward manifestation of national cultures. Drafting European provisions in these sensitive areas will lead to a clash of cultures.¹⁰⁴

These arguments do not apply to the search for a European *ius commune*. Perhaps the most important result so far of this quest is that it has lifted academic discussions on private law issues to a European level. It has paved the way for a truly European rather than merely national legal scholarship. Comparative research has become core business and this has strongly stimulated the transboundary dissemination of information. So far, the accent has been on commonalities and harmony by drafting principles of European contract law and European tort law. However, these principles, impressive though they are, lack political legitimation.¹⁰⁵ Moreover, many other questions are yet to be answered¹⁰⁶ and a stronger emphasis on a policy discourse and its relation to cultural backgrounds is needed. One cannot agree more with Walter van Gerven: 'Learning about each other's legal mentalities ... and ways of solving concrete legal problems, is ... of crucial importance'.¹⁰⁷

European cultural diversity is an asset rather than a burden and national private laws are to a great extent a manifestation of this diversity. In many private law areas, community legislation will be necessary but in many other areas national law can remain untouched by Europe. In these areas, the development of non-binding Restatements is conceivable but such Restatements need a discussion on the policy and cultural rather than on the systematic and technical level. Their influence will be naturally limited by what national legislators and judiciaries consider to be the boundaries of their national law and its cultural roots.

All in all, the challenge remains to balance the common goals of European cooperation with the rich European heritage of cultural diversity of which national private laws are but one aspect.

104. Illustrative is that the drafters of the PETL tried very hard but failed to draft rules of strict liability, one of the most sensitive issues in tort law; see Van Dam, n. 18 *above*, nr 605. The fact that other drafting efforts were more successful is mainly due to the fact that the drafters were working in less sensitive areas and did not have a political mandate.

105. Van Dam, n. 18 *above*, no. 603-1.

106. See for example G. Canivet and H. Muir Watt, 'Européanisation du droit privé et justice sociale', (2005) *ZEuP*, 518: 'il nous semble que l'eupéanisation du droit privé exige un débat approfondi sur de très nombreuses questions qui se posent préalablement à celle du seul choix de la technique législative adéquate'.

107. W. van Gerven, 'The ECJ-Case law as a Means of Unification of Private Law?' in *Towards a European Civil Code*, A. Hartkamp *et al.* (eds) (3rd edn, Deventer, Kluwer, 2004), p. 123.