

## Who is Afraid of Diversity?

### Cultural Diversity, European Co-operation, and European Tort Law

Cees van Dam\*

#### 1. LINKING CULTURAL IDENTITY AND LEGAL RULES

##### 1.1 Introduction

In his recent plea for a European Civil Code, Hugh Collins mentions some obstacles for such a project, in particular the various national attitudes of lawyers. He tells about his experiences at conferences where lawyers from different Member States discussed proposals for harmonisation: ‘German professors typically present systematic lists of rules or events, the longer the better; French lawyers explore abstract concepts, ideally through binary oppositions; and English legal scholars, if they bother to come at all, mostly tell stories.’<sup>1</sup>

Collins’ observations will be familiar to many lawyers working in comparative law or international legal practice. Despite the growing international exchange of information and growing international co-operation, differences between legal cultures do not seem to have changed much over the past decades. National legal cultures have not amalgamated into a European lawyer. German lawyers are still recognisable as German lawyers, the French remain French and the English are still very English indeed.

In this article I aim to explore links between cultural identity and legal rules, particularly in the area of tort law and consumer protection. The assumption is that national rules in this area are to a great extent the outward manifestation, the body, of the national culture, its soul.<sup>2</sup>

\* Visiting Professor, King’s College London, independent legal consultant in London, and Honorary Professor of European Private Law at Utrecht University ([www.ceesvandam.info](http://www.ceesvandam.info)). The author thanks Mihaela Carpus-Carcea for her most helpful research.

<sup>1</sup> Hugh Collins, *The European Civil Code: The Way Forward* (Cambridge University Press, 2008) 256.

<sup>2</sup> In the spirit of Charles-Louis de Secondat Baron de Montesquieu, ‘De l’esprit des lois’ in *Oeuvres complètes*, Roger Caillois (ed) (Gallimard, 1949). Compare Pierre Legrand, ‘European Legal Systems are Not Converging’ (1996) 45 *International and Comparative Law Quarterly* 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.’ Carol Harlow, ‘Voices of Difference in a Plural Community’ (2002) 50 *American Journal of Comparative Law* 341, sees law ‘not merely as a toolkit of autonomous concepts readily transferable in time and space, but as a cultural artifact embedded in the society in which it functions’.

*Culture* can be perceived as a broad, catch-all term for an array of complex beliefs, symbols, and patterns of behaviour. Hofstede describes the concept somewhat more narrowly as 'the collective programming of the mind that distinguishes the members of one group or category from another'<sup>3</sup>—in popular terms: 'the software of the mind'.<sup>3</sup> On the basis of extensive empirical research he distinguishes five cultural dimensions that provide insights into the differences between national cultures. This is not to say, however, that culture can be reduced to these dimensions. Culture goes beyond what is measurable or calculable.<sup>4</sup>

Exploring links between cultural identity and legal rules is a risky operation as the road between these two can be long and winding. Many other factors such as major historic events can influence or shape the rules. For example, since the Second World War the right to human dignity has played a crucial role in German law, including German tort law.<sup>5</sup> Legal cultures too will play a role.<sup>6</sup> As tort law is mainly judge-made law it can be argued that it reflects judicial culture rather than national culture. However, it is hard to see that long-term developments in the case law can fundamentally differ from the legal system as such, which in its turn is embedded in national culture and values. It is nonetheless arguable that the way judges are being recruited can make some difference. For example, in England, judicial culture may deviate more from mainstream culture than in continental legal systems as English judges are recruited from the body of experienced barristers with a long and successful private practice, whereas on the continent career judges are the rule.<sup>7</sup>

Hence, it would be too simple to trace legal differences between countries to cultural differences only. However, the assumption in this paper is that cultural values are sufficiently influential to be linked to the legal principles on which the rules are based. The question whether culture determines the law or the law determines culture is probably a matter of complex interaction running in both directions.<sup>8</sup> For this paper the assumption will do that culture and cultural values affect legal rules and principles—one way or another.

<sup>3</sup> Geert Hofstede, *Culture's Consequences* (Sage, 2nd edn 2001) 9. See for non-specialists Geert and Gert Jan Hofstede, *Cultures and Organizations, Software of the Mind* (McGraw-Hill, 2nd edn 2005).

<sup>4</sup> Hofstede (n 3) 29.

<sup>5</sup> See Cees van Dam, *European Tort Law* (Oxford University Press, 2006) no 404-2.

<sup>6</sup> For a brief overview of the concept of *legal culture* see David Nelken, 'Legal Culture' in Jan M Smits (ed), *Elgar Encyclopedia of Comparative Law* (Edward Elgar, 2006) 372-80.

<sup>7</sup> See for example JAG Griffith, *The Politics of the Judiciary* (HarperCollins, 5th edn 1997).

<sup>8</sup> David Nelken, 'Rethinking Legal Culture' in Michael Freeman (ed), *Law and Sociology* (Oxford University Press, 2006) 200, 214 *et seq.*

## 1.2 Overview

The end of the Cold War enthused many to think in terms of unity and global values, but more recently attention shifted 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.

Section 3 will discuss three fundamental legal differences between German, French and English tort law: the role of rights, strict liability and liability for lawful acts by a public body. The common denominator in these areas is the balance between the principles of victim protection and individual freedom.

As for the analysis of cultural identities, Section 4 will particularly refer to the cultural dimensions developed by sociologist Geert Hofstede. The main thrust of his 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 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 cultural dimensions and the legal differences set out in Section 3.

Finally, Section 6 will draw conclusions from this analysis, focusing on the feasibility of European co-operation, the balance to strike between common goals and national and cultural diversity, particularly in private law matters, and the lessons to be learned for discussions on a European *ius commune*.

It goes without saying that in both its legal and cultural analysis this paper can only provide a rough sketch. It leaves out many details for the sake of illustrating the general links between cultural and legal differences.

## 2. GLOBAL AND LOCAL—UNITY AND DIVERSITY

### 2.1 From Global to Local in Marketing

Towards the end of the Cold War, marking the end of global division between East and West, the tendency was to emphasise 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.<sup>9</sup> However, Fukuyama's 'uniform' ideas were soon followed by Samuel Huntington's 'diverse' ideas in his 'Clash of Civilisations', in which he

<sup>9</sup> Francis Fukuyama, 'The End of History' (1989) 16 *The National Interest* 18.

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.'<sup>10</sup>

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.'<sup>11</sup>

The outcome of these developments could not be but a Treaty on European Union: the Maastricht Treaty (TEU) signed in 1991. In 2004, the EU's biggest enlargement brought 10 new Member States into the Union. 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. The defeat of the Constitution was also regarded as a 'Revolt of the Regions', providing an indication that identity and cultural issues could not be ignored.

This shift in thinking has an interesting parallel in marketing research. In 1983 Theodore Levitt coined the term 'globalisation'.<sup>12</sup> Although the term had been used before, Levitt popularised it and brought it into the mainstream business audience. Globalisation in marketing, however, appeared not to be the solution. Global companies soon switched back to local marketing strategies. In 2000, Coca-Cola's CEO Douglas Daft said: '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"'.<sup>13</sup>

## 2.2 Unity and Diversity in Private Law

Unlike among political scientists and marketers, the concept of diversity has not played an important role in the European private law discourse. It was only a few years ago that Thomas Wilhelmsson wrote: 'Despite the fact that contemporary research on consumer marketing has shown a rapidly growing interest in the effect of cultural variations on the efficiency of marketing and recognised the need to combine globalism with localism, this

<sup>10</sup> Samuel P Huntington, 'The Clash of Civilisations?' *Foreign Affairs*, Summer 1993; he expanded his thesis in *The Clash of Civilizations and the Remaking of World Order* (Simon & Schuster, 1996).

<sup>11</sup> Stephen Weatherill, 'Why Object to the Harmonization of Private Law by the EC?' (2004) 12 *European Review of Private Law* 633.

<sup>12</sup> Theodore Levitt, 'Globalization of Markets' [1983] *Harvard Business Review* 1, May-June.

<sup>13</sup> *Financial Times*, 27 March 2000. See also Marieke de Mooij, *Consumer Behavior and Culture: Consequences for Global Marketing and Advertising* (Sage, 2003).

has not led to any significant discussions in the legal harmonisation literature.<sup>14</sup> Over the past decades 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. None engaged with the knowledge gained in social sciences in general or marketing in particular.<sup>15</sup>

A related issue is whether European legal systems are converging. Markesinis, one of the believers, 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.<sup>16</sup>

The opposite position is not popular. Pierre Legrand, widely considered to belong to the heathens, argues that the differences in *mentalités* between common law and civil law are irreducible<sup>17</sup> because of differences in the nature of *legal reasoning*,<sup>18</sup> in the significance of *systematisation*,<sup>19</sup> in the approach to *rules*,<sup>20</sup> *facts*,<sup>21</sup> and *rights*. He also argues that in order to establish a right in an ordinary common law case you have to show that all the necessary elements of the cause of action are either present or threatened whereas in the civil law tradition the object of legal science is the right, in particular the subjective right.<sup>22</sup>

<sup>14</sup> Thomas Wilhelmsson, 'The Average European Consumer: a Legal Fiction?' in Thomas Wilhelmsson, Elina Paunio and Annika Pohjolainen (eds), *Private Law and the Many Cultures of Europe* (Kluwer, 2007) 265–6.

<sup>15</sup> In 2006, Thomas Wilhelmsson's paper (n 14) and my paper 'European Tort Law and the Many Cultures of Europe' at the Helsinki conference 'Private Law and the Many Cultures of Europe' were the first efforts in this respect.

<sup>16</sup> BS Markesinis, 'Learning from Europe and Learning in Europe' in BS Markesinis (ed), *Gradual Convergence: Foreign Ideas, Foreign Influences, and English Law on the Eve of the 21st Century* (Oxford University Press, 1994) 30. Believers in convergence do not necessarily believe in the benefits of a European Civil Code; see for example Basil Markesinis, 'Why a Code is Not the Best Way to Advance the Cause of European Legal Unity' (1998) 5 *European Review of Private Law* 519, 521.

<sup>17</sup> Legrand (n 2) 62–63.

<sup>18</sup> *Ibid.*, 64–65: common law reasoning is inductive and analogical; civil law reasoning is deductive and institutional.

<sup>19</sup> *Ibid.*, 65–67: quoting B Rudden, 'Torticles' (1991–2) 6/7 *Tulane Civil Law Forum* 105, 110: 'The alphabet is virtually the only instrument of intellectual order of which the common law makes use.'

<sup>20</sup> *Ibid.*, 67–68, quoting Frederick F Schauer, *Playing by the Rules* (Clarendon, 1991) 178: 'The common law appears consequently to be decision according to justification rather than decision according to rule.'

<sup>21</sup> *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*).'

<sup>22</sup> *Ibid.*, 70–71, quoting *Browne-Wilkinson V-C in Kingdom of Spain v Christie, Manson & Woods Ltd* [1986] 1 WLR 1120, 1129.

Opinions about whether European systems are converging or should converge are expressed in all kinds of shades between the two singled out above. Whether convergence is happening (*Sein*) requires empirical research, for which Hofstede's research provides helpful clues in the search for answers. Whether convergence is desirable (*Sollen*) is a legal-political question about the direction Europe should take.<sup>23</sup> Hofstede's research does not provide answers to this question but his research helps us to see what is feasible and what is 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 2.2 *in fine*), is the role of rights.<sup>24</sup> The relation of common law with rights is awkward because it is focused on remedies. In the English legal system claimants

can 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.<sup>25</sup>

This reluctance has a broader background. Unlike France and Germany, where revolutions in the 18th and 19th centuries paved the way for citizens' rights, England has never experienced such an event.<sup>26</sup> 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*.'<sup>27</sup>

<sup>23</sup> *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 in original).

<sup>24</sup> See with further references van Dam (n 5) nr 610.

<sup>25</sup> Geoffrey Samuel, "'Le droit subjectif" and English Law' [1987] *Cambridge Law Journal* 286.

<sup>26</sup> England did have a revolution, even a Glorious Revolution (1688), but this concerned the overthrow of King James II by Parliamentarians, the *elite*, not the *people*. Consequently, the Bill of Rights (1689) mainly contains rights of Parliamentarians. Only a few rights also apply to citizens, such as freedom from cruel and unusual punishment and excessive bail, and freedom from fine and forfeiture without a trial. This is, however, a rather modest yield as compared to the citizens' rights enshrined in the French Declaration of the Rights of Man and the Citizen (1793).

<sup>27</sup> Lord Bingham of Cornhill, 'Tort and Human Rights' in Peter Cane and Jane Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (Oxford University Press, 1998) 2.

An illustration of the reluctant English approach is the fact that in English law the European Convention on Human Rights (ECHR) did not have direct effect until 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' to provide protection.<sup>28</sup> This disguises the right to privacy as a duty for others.<sup>29</sup>

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 informed about the risk inherent in surgery.<sup>30</sup> These decisions seem to be inspired by the 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 of the *Bürgerliches Gesetzbuch* (BGB), lists the citizen's civil law rights, particularly the right to life, physical integrity, health, freedom and property.<sup>31</sup> For the courts, these rights are the starting point of their deliberations regarding a claim for compensation—the golden gates through which the claimant enters the arena where his case is heard. This starting point has strongly influenced the case law of the German Federal Court, *Bundesgerichtshof* (BGH), in providing protection for victims. Even though the victim must also prove that the defendant acted negligently, a court will not easily dismiss a claim if it has already established that the victim's right is infringed.

In French tort law rights are not a key issue, although one can argue that rights are implied in the way the Cour de cassation has interpreted the few liability provisions of the *Code civil*. In this sense, the strict liability rules, some of a very general character, embody the right to safety and security. However, the background of these rules can also be explained by the principle of solidarity, embodied in the last part of the trilogy of the French Revolution: *liberté, égalité, fraternité*. One of the few 'rights' in the Civil Code is the codification of the right to privacy in the second part of the 20th century.<sup>32</sup>

Whereas French and German law both focus on protecting a person's life and well-being, 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

<sup>28</sup> *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457.

<sup>29</sup> van Dam (n 5) nr 705-4.

<sup>30</sup> *Rees v Darlington Memorial Hospital* [2003] UKHL 52, about which see van Dam (n 5) nr 706-2; *Chester v Afshar* [2004] UKHL 41, about which see van Dam (n 5) nr 1107-3.

<sup>31</sup> van Dam (n 5) nr 402-3.

<sup>32</sup> van Dam (n 5) nr 705-3.

consideration in deciding liability matters. It is inevitable that these different starting points as regards the role of citizens' rights have an impact on the outcome of cases.

### 3.2 Strict Liability

Closely connected to the role of rights is the role of strict liability.<sup>33</sup> Over the 20th century, rules of strict liability have gained a firm foothold in continental tort law. Particularly in France strict liability is seen as the basis of civilisation, whereas in England it is considered to be a threat to (English) mankind.<sup>34</sup> The German position is somewhere in the middle.

Strict liability is most popular in France with its general strict liability rule for things (as from 1896), a general strict liability rule for persons (as from 1991) and, additionally, a number of specific rules of strict liability. Contrary to the legislator's intention, the courts developed the general rules on the basis of Art 1384 s 1 CC. The rules establish liability unless the defendant can prove *force majeure*, whereas the victim's contributory negligence may lower the amount of compensation. An even stronger example is the *loi Badinter*, providing for an almost absolute liability for damage caused in road traffic accidents.

German law holds rather specifically formulated strict liability rules which are carefully kept outside the BGB in order to preserve the Code's systematic clarity. Their enactment was strongly determined by the practical needs of the time and evidences the dates from which specific 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 causing environmental harm. Liability for persons is dealt with in the BGB; these rules do not establish a strict liability 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 (although the law on this point is not entirely clear) and by employees (which is only a strict liability from the point of view from the employer). No rule of strict liability applies to compensation for damage caused in road traffic accidents. The English legislator did not respond to the new technological risks of the 19th and 20th centuries. Judicial development of a strict liability rule on the basis of the Rule *in Rylands v Fletcher* was brought to a halt in the 1940s 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'.<sup>35</sup> Indeed, since

<sup>33</sup> See with further references van Dam (n 5) nr 605.

<sup>34</sup> A slight exaggeration for the sake of comparison.

<sup>35</sup> John G Fleming, *Law of Torts* (Law Book Co, 9th edn 1998) 383.

the Second World War no claimant has successfully invoked the rule (except in cases where liability in negligence would arise anyway).<sup>36</sup>

### 3.3 Liability for Lawful Acts

In most legal systems, liability of public bodies is applied in a more reluctant way than liability of private entities but, in this area too, English tort law is more generous to the potential defendant than French and German tort law.<sup>37</sup>

An important obstacle to 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 a risk of their daily business or life.

In France, liability for lawful acts is based on the principle of *égalité devant les charges publiques* (equality before the public burdens) and in Germany on the customary *Sonderopfer* (special victim) rule.<sup>38</sup> England does not acknowledge liability for lawful acts by public bodies. Two considerations converge here. First, there is a link with the English reluctance towards strict liability (section 3.2). Strict liability for private actors can be considered to be an 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 disproportionate 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.<sup>39</sup>

Secondly, in England compensation for damage caused by 'lawful acts' can sometimes be obtained by means of so-called *ex gratia* payments by public bodies. Since the 1990s public bodies have set up a 'bewildering' number of compensation schemes.<sup>40</sup> However, 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. This links with the English emphasis on

<sup>36</sup> Ken Oliphant, 'England and Wales' in Helmut Koziol and Barbara C Steininger (eds), *European Tort Law 2003* (Springer, 2004) 136. A *Rylands v Fletcher* claim also failed in *Transco plc v Stockport Metropolitan Borough Council* [2004] 2 AC 1 (HL).

<sup>37</sup> See with further references van Dam (n 5) nrs 1802–4.

<sup>38</sup> It has been said that 'the idea that there could be any state activity which may not be challenged in court is alien to German law'. See Wolfgang Rübner, 'Basic Elements of German Law on State Liability' in John Bell and Anthony W Bradley (eds), *Governmental Liability: A Comparative Study* (UKNCCL, 1991) 252.

<sup>39</sup> van Dam (n 5) nr 1002.

<sup>40</sup> Duncan Fairgrieve, *State Liability in Tort: A Comparative Law Study* (Oxford University Press, 2003) 244–51.

duties (here: of the government) rather than on rights (here: of the citizens) that was mentioned above.

In theory, the Human Rights Act 1998 may make a difference, 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 (rather, the Justices of the Supreme Court) who are called upon to reconcile common law traditions with what can be considered to be one of the fruits of the French Revolution.

One of the roots of the reluctance towards rights, strict liability and liability for lawful acts is the Anglo-American aim of setting out obligations which are clear and precise. It fears general principles and 'activist 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.<sup>41</sup>

#### 4. CULTURAL DIFFERENCES

##### 4.1 Introduction

Geert Hofstede is a Dutch expert on national cultures and their impact on individual and organisational behaviour. His empirical research is important for understanding cultural diversity, how it works and what its consequences are.<sup>42</sup> The thrust of his research is that national and regional cultures differ, that cultural features are rooted in history and can be traced back centuries, and that their practices are subject to change even though their values do not change. He writes: '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.'<sup>43</sup> In other words: cultural diversity is in Europe to stay.

Hofstede distinguishes five cultural dimensions that will be briefly explained in this section. It is important to note that in his research national scores of cultural dimensions only reflect national *tendencies*.<sup>44</sup> Individuals within a country vary around the cultural average. The parallel with the analysis of legal differences in section 3 is that it focused on prevailing national legal opinion and not on individual opinions, which also vary considerably.

<sup>41</sup> Philippe Sands, *Lawless World* (Penguin, 2006) 83–84.

<sup>42</sup> See Hofstede (n 3).

<sup>43</sup> Hofstede (n 3) 36.

<sup>44</sup> Hofstede (n 3) 461.

#### 4.2 Individualism vs Collectivism

Individualism ‘stands 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.’<sup>45</sup>

On the individualism index (IDV) Great Britain scores 89, France 71, and Germany 67.<sup>46</sup> On a global level England, France and Germany are individualist countries, being in the world’s top 25 per cent ranking. Within Europe, however, Great Britain is the most individualist country, while France and Germany are more collectivist countries.

It is characteristic of individualistic cultures that individual interests prevail over collective: ‘... the more individualist a country, the stronger its citizens’ preference for freedom over equality.’<sup>47</sup> In individualistic cultures the role of the state in the economic system is restrained.<sup>48</sup> This implies that the stronger the individualism, the greater the appeal of the free market. Indeed, the three countries’ IDV scores correspond with the role of the state in the economic system. The dominant economic theories originate in individualist countries like the United States and Great Britain. One of the first examples is Adam Smith’s ‘invisible hand’ through which the pursuit of self-interest by individuals would lead to the maximal wealth of nations.<sup>49</sup>

Hofstede also argues that respect for human rights is a luxury that wealthy countries can afford more easily than poor ones; to what extent these wealthy countries do conform to human rights criteria, however, depends on the degree of individualism in their culture.<sup>50</sup> At first sight this seems to be at odds with the British approach to rights (section 3.1), but the role of rights in tort law is only part of the national picture. The Magna Carta (1215) and the Bill of Rights (1689) are considered to be milestones in English history. It can be argued that it is not the existence of rights that is questioned but their content, albeit that rights seem to be more vulnerable if the taxpayer has to foot the bill for them.

<sup>45</sup> Hofstede (n 3) 225.

<sup>46</sup> Hofstede (n 3) 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).

<sup>47</sup> Hofstede (n 3) 275.

<sup>48</sup> Hofstede (n 3) 245.

<sup>49</sup> Hofstede (n 3) 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. Regarding the different ways of financing business in Great Britain and Germany, see Christopher Nobes and Robert B Parker, *Comparative International Accounting* (Pearson, 6th edn 2000) 20 *et seq.*

<sup>50</sup> Hofstede (n 3) 247–8.

Hofstede observes that if there is to be any convergence between national cultures it should be on this dimension.<sup>51</sup>

### 4.3 Masculinity vs 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.'<sup>52</sup>

On the Masculinity Index (MAS), Germany and Great Britain score 66, and France 43.<sup>53</sup> Here, the gap is between France on the one hand (more feminine) and Germany and Great Britain on the other (more masculine).

According to Hofstede, the masculine-feminine dimension affects priorities as between rewards for the strong and solidarity with the weak.<sup>54</sup> 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.<sup>55</sup> 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.<sup>56</sup>

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.<sup>57</sup> In this respect, the masculinity-femininity dimension may be linked with the dispute resolution culture with regard to out-of-court settlements and the use of mediation techniques.<sup>58</sup>

### 4.4 Uncertainty Avoidance

Uncertainty avoidance deals with the level of anxiety about an unknown future, more particularly the extent to which the members of a culture feel threatened by ambiguous

<sup>51</sup> Hofstede (n 3) 255: 'The strong relationship between national wealth and individualism is undeniable, with the arrow of causality directed ... from wealth to individualism.'

<sup>52</sup> Hofstede (n 3) 297.

<sup>53</sup> Hofstede (n 3) 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).

<sup>54</sup> Hofstede (n 3) 317.

<sup>55</sup> Hofstede (n 3) 319.

<sup>56</sup> Hofstede (n 3) 318.

<sup>57</sup> Hofstede (n 3) 316, 320.

<sup>58</sup> See, for example, in relation to the low 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), Erhard Blankenburg, 'Civil Litigation Rates as Indicators for Legal Culture' in David Nelken (ed), *Comparing Legal Cultures* (Aldershot, 1997) 41–68; see also Christiane E Simsa, *Die gerichtliche und aussergerichtliche Regulierung von Verkehrsunfällen in Deutschland und den Niederlanden* (Bundesanzeiger, 1995).

or unknown situations.<sup>59</sup> On the Uncertainty Avoidance Index France scores 86, Germany 65 and Great Britain 35.<sup>60</sup> In other words in France uncertainty avoidance (UA) is strong, in Great Britain weak and in Germany medium.

Uncertainty avoidance should not be confused with risk avoidance. Uncertainty is to risk as anxiety is to fear. Germans and French can behave in a very risky way. The maximum speeds allowed on the freeway are positively correlated with uncertainty avoidance: stronger uncertainty avoidance means faster driving.<sup>61</sup>

In strong UA countries there is a need to protect society through technology, rules and rituals, a fear of foreign things, and a stronger desire for law and order.<sup>62</sup> Weak UA countries are more open to change and new ideas and are more tolerant of diversity. ‘The strong uncertainty avoidance sentiment is “What is different is dangerous”; the weak uncertainty sentiment in contrast is, “What is different is curious”’<sup>63</sup>

A classic example is that of low blood pressure. In weak UA countries like the UK and the US, this is not considered to be a medical problem. Rather it is a reason to congratulate the person because it increases his chances of living longer and getting a lower life insurance premium. In strong UA countries like Germany and France low blood pressure is considered to be a disorder for which a range of drugs is available and prescribed. When a French village is slowly depopulating, the local pharmacy survives longer than the local pub. In Great Britain it will be the other way around.<sup>64</sup>

Rather than leading to reducing *risk*, uncertainty avoidance leads to a reduction of *ambiguity*. In strong UA countries, people look for a structure in their organisations, institutions, and relationships that makes events clearly interpretable and predictable.<sup>65</sup> This means a greater need to prevent uncertainties in the behaviour of other people by means of laws and rules, which also tend to be more precise than in weak UA countries.<sup>66</sup>

#### 4.5 Power Distance

The Power Distance dimension is about the extent to which the less powerful members of institutions and organisations within a country expect and accept that power is distributed unequally.<sup>67</sup> On the Power Distance Index, France scores 68, and Germany

<sup>59</sup> Hofstede (n 3) 29, 159.

<sup>60</sup> Hofstede (n 3) 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).

<sup>61</sup> Hofstede (n 3) 148.

<sup>62</sup> Hofstede (n 3) 29, 159.

<sup>63</sup> Hofstede (n 3) 160–1.

<sup>64</sup> See, for example, on this topic Lynn Payer, *Medicine and Culture: Notions of Health and Sickness in Britain, the US, France and West Germany* (Victor Gollancz, 1989).

<sup>65</sup> Hofstede (n 3) 148.

<sup>66</sup> Hofstede (n 3) 174.

<sup>67</sup> Hofstede (n 3) 83.

and Great Britain 35.<sup>68</sup> The difference between France (high power distance, hence more acceptance of inequality in the distribution of power) 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. 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.'<sup>69</sup> 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.<sup>70</sup>

An interesting question in this respect is how France's high score on power distance relates to its principle of equality (*égalité*). According to Michel Crozier:

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.<sup>71</sup>

The French love of general and abstract rules can be seen in this light. Ordinary people do not get much guidance from such rules (unlike, for example, the extensive and detailed German *Verkehrspflichten*), rather they have to look up to the judge to ask what is really meant by them. It can also be argued that the extensive French welfare state and the high level of victim protection in tort law are a mechanism through which the authorities try to prevent a repeat of the French Revolution ...

#### 4.6 Long-term vs 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 obligations'.<sup>72</sup> This dimension mainly

<sup>68</sup> Hofstede (n 3) 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).

<sup>69</sup> Hofstede (n 3) 111.

<sup>70</sup> Hofstede (n 3) 113.

<sup>71</sup> Michel Crozier, *The Bureaucratic Phenomenon* (University of Chicago Press, 1964) 222.

<sup>72</sup> Hofstede (n 3) 359.

reflects the differences between East and West and is of lesser importance for an intra-European comparison.<sup>73</sup>

## 5. LEGAL DIFFERENCES AND CULTURAL DIFFERENCES

### 5.1 Introduction

How can these cultural dimensions be related to the legal differences set out in section 3? This section will look at the balance between individual freedom and victim protection as the common denominator of these legal differences (the role of rights, strict liability and liability for lawful acts by public bodies). Indeed, citizens' rights in German and French tort law function as victims' rights, which are to a greater or lesser extent embodied in rules of strict liability, including liability for lawful acts.

The common factor is that Great Britain scores low on collectivism (Germany 18, France 13, Great Britain 3), on uncertainty avoidance (France 17, Germany 43 and Great Britain 66), and on femininity (France 47, Germany and Great Britain 11).

### 5.2 Individualism vs Collectivism

In individualist societies ties between individuals are loose and one is expected to look after him- or herself. Individual interests prevail over 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 ideal, equality a collectivist ideal.<sup>74</sup>

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 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.<sup>75</sup> This is reflected in the fact that Germany and France have special rules limiting the

<sup>73</sup> Hofstede (n 3) 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 and differentiation according to abilities.

<sup>74</sup> Hofstede (n 3) 275.

<sup>75</sup> van Dam (n 5) nr 807-4 and 1408. See also Wilhelmsson (n 14) 246-50.

defence of contributory negligence in tort law whereas in England this is not the case. These differences can be linked to the fact that England scores higher on individualism than France and Germany.<sup>76</sup>

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 an emphasis on the protection of individual freedom.<sup>77</sup> A striking example is an article by Jane Stapleton, published in 2003, in which she argues that protection of the vulnerable is a core moral concern of common law tort law.<sup>78</sup> 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 outside the mainstream.

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 low. The English 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, as they are at odds with lower taxes.<sup>79</sup>

### 5.3 Masculinity vs Femininity

The core of the femininity dimension is care for or solidarity with the weak. In feminine countries, reward for the strong is less dominant; in these countries, fewer people believe that the fate of the poor is their own fault.<sup>80</sup> In a masculine country like England, Lord Denning's considerations in *Spartan Steel* provide a good illustration: 'When the energy supply is cut off, most people do not try to find out whether it was anyone's fault. They try to make up the economic loss by doing more work next day. This is a healthy attitude which the law should encourage.'<sup>81</sup> Bad luck happens, and if it happens one should not start complaining but be a man (even if one is a woman), keep a stiff upper lip and make up for the loss oneself.

<sup>76</sup> van Dam (n 5) nr 1215 and 1404–5.

<sup>77</sup> The English reluctance towards strict liability is related to the concern for unfathomed economic consequences. See Simon Deakin, Angus Johnston and Basil Markesinis, *Markesinis and Deakin's Tort Law* (Clarendon, 6th edn 2008) 626. See also Hugh Collins, 'European Private Law and the Cultural Identities of States' (1995) 3 *European Review of Private Law* 353.

<sup>78</sup> Jane Stapleton, 'The Golden Thread at the Heart of Tort Law: Protection of the Vulnerable' (2003) 24 *Australian Bar Review* 135.

<sup>79</sup> This effect may be reinforced by the fact that English judges are recruited from senior members of the Bar rather than from a broader sample of society like in Germany and France. See Griffith (n 7) 8–22.

<sup>80</sup> Hofstede (n 3) 319.

<sup>81</sup> *Spartan Steel and Alloys Ltd v Martin & Co Ltd* [1973] QB 27, 38 *per* Lord Denning.

It can be argued that in France the feminine dimension plays an important role in victim protection.<sup>82</sup> This would run parallel with the fact that feminine countries including the Nordic countries and The Netherlands have a strong social security tradition. Both tort law and social security provide a high level of protection and the line between these compensation systems is thin. In the Nordic countries and The Netherlands victim protection is linked more strongly to femininity than to uncertainty avoidance or collectivism (where these countries are ranked in the lower third).

Germany's high score on masculinity makes it unlikely that femininity plays a dominant role in victim protection. Probably more important are 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 on collectivism than France but considerably lower on femininity and uncertainty avoidance.

Hence, it can be argued that the national levels of victim protection are determined not by just one cultural dimension but by a certain mix of dimensions. An illustration is the parable of the Good Samaritan.<sup>83</sup> Hofstede explains:

... individualism/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.<sup>84</sup>

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

Both Dutch and French tort law (countries with high femininity ranking) provide for civil duties to rescue.<sup>85</sup> German law (masculine and collectivist) holds a criminal duty to rescue (§323c *Strafgesetzbuch* (Penal Code)) but the majority of the legal literature argues that this duty aims not to protect the person in danger but only society in general.<sup>86</sup> In Anglo-American countries with high masculinity and individualism rankings, a duty to rescue is not accepted. The main critique comes from a feminist perspective advocating

<sup>82</sup> 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. This reflects the difference between compulsory solidarity on the continent and voluntary charity in the Anglo-American world.

<sup>83</sup> van Dam (n 5) nr 1701 *et seq.*

<sup>84</sup> Hofstede (n 3) 293.

<sup>85</sup> van Dam (n 5) no 1702-1.

<sup>86</sup> van Dam (n 5) no 1702-2.

feminine values: 'The "no duty to rescue rule" is a consequence of a legal system devoid of care and responsiveness to the safety of others.'<sup>87</sup>

#### 5.4 Uncertainty Avoidance

Uncertainty avoidance concerns the extent to which members of a country feel threatened by uncertain or unknown situations.<sup>88</sup> 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 relatively easy to obtain in case a risk materialises.<sup>89</sup> 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'<sup>90</sup> and fault liability is ambiguity *par excellence*.<sup>91</sup>

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

Germany is a medium-strong UA 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.

UA cultures try to reduce uncertainty in other people's behaviour by means of laws and rules.<sup>92</sup> This can be illustrated with the German *Verkehrspflichten*, which are safety rules for almost all conceivable kinds of human conduct.<sup>93</sup> 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. Probably for this reason, systematic arguments are more convincing in Germany than in other countries.<sup>94</sup>

The UA dimension can be linked more generally with differences between common law and civil law. According to Hofstede, in the area of philosophy and science grand theories are more likely to be conceived in strong UA cultures than in weak UA ones. The quest for Truth is an essential motivator for a philosopher. The great theoreticians and

<sup>87</sup> Leslie Bender, 'A Feminist's Primer on Feminist Theory and Tort' (1988) 38 *Journal of Legal Education* 3.

<sup>88</sup> Hofstede (n 3) 161.

<sup>89</sup> van Dam (n 5) nr 1002.

<sup>90</sup> Hofstede (n 3) 148.

<sup>91</sup> van Dam (n 5) nr 804-13.

<sup>92</sup> Hofstede (n 3) 174.

<sup>93</sup> van Dam (n 5) nr 403.

<sup>94</sup> This may also be an explanation for the strong German involvement in drafting a European Civil Code; see van Dam (n 5) nr 603-2 and 608-1.

philosophers of the West tend to come from higher-UA countries like Germany and France (for example, Descartes, Hegel, Kant, Marx, Nietzsche and Sartre). In lower-UA countries such as 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).<sup>95</sup>

The fact that Germans and French tend to reason by deduction, and British and Americans by induction, can be illustrated at various legal levels. First, the French and the Germans have a written constitution and the United Kingdom does not. Secondly, in the area of private law the French have their *Code civil* and the Germans their *Bürgerliches Gesetzbuch* with general concepts, whereas the United Kingdom and the United States lack a codification and its common law and 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.<sup>96</sup> 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 civil* is determined by *les grands principes* which are the basis of general concepts and general rules.<sup>97</sup>

## 6. DIVERSITY, COMMUNITY LAW AND IUS COMMUNE

### 6.1 Introduction

The previous sections illustrated links between legal differences and national cultural dimensions, in particular regarding the principles of individual freedom and victim protection in tort law, and that these tort law principles are, to a great extent, the outward manifestation of the national culture.<sup>98</sup>

<sup>95</sup> Hofstede (n 3) 178.

<sup>96</sup> van Dam (n 5) nr 607.

<sup>97</sup> van Dam (n 5) nr 608; see also nr 301-3 on 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).

<sup>98</sup> A less obvious example is financial regulation. One could argue that this is mainly a technical matter and therefore less embedded in culture, but this is only true on a superficial level. If Anglo-Americans are risk takers and continental Europeans are risk avoiders, the ‘light touch’ financial regulation in the United States and the United Kingdom and the stronger (self) regulation in continental Europe were the outward manifestation of these various cultures.

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 cannot be explained by just one cultural dimension as this principle seems to be linked to a mix of uncertainty avoidance (the 'ambiguity' perspective), femininity (the 'care' perspective) and collectivism (the 'group' perspective). This suggests not only that there is a cultural motive for victim protection but also that this motive is pluriform.

Hofstede's research also suggests that cultural values will continue to differ. 'Cultures shift, but they shift in formation, so that the differences between them remain intact.'<sup>99</sup> Assuming this to be correct, it can also be submitted that the main principles of the national tort laws are not converging and will not converge.

What are the consequences of these conclusions for European co-operation (6.2), for European legislation (6.3), and for the quest for a European *ius commune* (6.4)?

## 6.2 Cultural Diversity and European Co-operation

Cultural diversity and European co-operation can go very well together. One does not need to think, feel and act the same way in order to agree on practical issues and to co-operate.<sup>100</sup> However, countries will co-operate differently according to their cultural values. For example, on the basis of an analysis of infringement procedures, Hofstede found that Member States with large power distances and masculine values were least inclined to implement Directives properly.<sup>101</sup> And Carol Harlow has observed: 'Empirical research shows that national administrative attitudes and culture profoundly affect implementation of Community Directives and policies; where these do not harmonise well with national administrative structures, they may be transposed and lip-service may be paid to them.'<sup>102</sup>

Community Institutions (Commission, Council and Parliament) are the marketplace where solid cultural values are liquidated into political means in order to negotiate legislation. Discussions along the lines of cultural differences and a 'clash of cultures' are more likely to appear in the Council of Ministers representing their national interests, whereas in Parliament this will be less obvious as MEPs are primarily organised along party lines. An illustration is the discussion on a Common Frame of Reference (CFR) for a European contract law. Whereas Parliament is a strong advocate of a European Civil

<sup>99</sup> Hofstede (n 3) 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 cause them to disappear.

<sup>100</sup> Hofstede (n 3) 440 *et seq.* He also argues (423 *et seq.*) that cultural differences in dealing with conflicts, in management style, in hierarchy, in co-operating, and in meeting style have to be dealt with.

<sup>101</sup> Hofstede (n 3) 433.

<sup>102</sup> Harlow (n 2) 351.

Code,<sup>103</sup> the Council is much more cautious and careful to maintain diversity. Its advising Committee on Civil Law Matters emphasised the importance of respect for diversity, considering it ‘important to recall that all legal traditions of the Member States should be respected fully in the setting up of the CFR. ... Taking account of those elements, the draft CFR could present alternative solutions on certain subjects.’<sup>104</sup>

### 6.3 Cultural Diversity and Community Law

A number of Treaty provisions emphasise the importance of cultural and national diversity. Article 6(3) TEU states that the Union ‘shall respect the national identities of its Member States. Article 151(1) of the European Community Treaty (‘EC’) holds that the Community ‘shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore’. And according to Article 151(4), the Community ‘shall take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures’.<sup>105</sup>

One of these ‘other provisions of this Treaty’ is Article 95, the legal basis for harmonising measures to establish the internal market. In 2000, the ECJ held in its *Tobacco* decision that this provision does not provide a general basis for regulating the internal market. Nor is it sufficient for issuing harmonisation measures that differences exist between national rules and that this may in the abstract lead to distortions. It has to be clear on a factual basis which distortions follow from differences in national law and how the proposed measure aims to prevent these distortions.<sup>106</sup>

It follows from the abovementioned Article 151(4) EC that, in addition to the requirements of the *Tobacco* case, respecting cultural diversity ought to be taken into account when issuing harmonisation measures. As has been indicated in this paper,

<sup>103</sup> European Parliament Resolution on Action to Bring into Line the Private Law of the Member States (1989) OJ C158/400 (26 June 1989); European Parliament Resolution on the Harmonisation of Certain Sectors of the Private Law of the Member States (1994) OJ C205/518 (25 July 1994); European Parliament Resolution on the Commission’s Annual Legislative Programme for 2000 (2000) OJ C377/326, point 28 (29 December 2000). Another illustration is the Study Group on Social Justice in European Private Law in which academics from various cultural backgrounds co-operate on the basis of a joint political programme: G Brüggemeier *et al.*, ‘Social Justice in European Contract Law: A Manifesto’ (2004) 10 *European Law Journal* 653.

<sup>104</sup> Brussels, 7.11.2008, 15306/08, JUSTCIV 236, CONSOM 167, nr 15, p 4. Considering its Resolution of 8 December 2008 (P6\_TA-PROV(2008)0397), the European Parliament seems to have become more realistic by expressing as its furthest reaching option (at least for the time being) the development of the CFR into an optional instrument. The Commission will select which parts of the academic CFR are useful as a tool box. The Council is expected to further conclude on this matter in June 2009 and the Commission is expected to publish a nonbinding initiative by the end of 2009.

<sup>105</sup> See also the Opinion of AG Van Gerven before Case C-17/92, *Federación de Distribuidores Cinematográficos/Estado Español en Unión de Productores de Cine y Televisión (Fedicine)* ECR I-2239, about cases in which national cultural policy was considered to justify indirect discrimination.

<sup>106</sup> Case C-376/98, *Germany v European Parliament and Council* [2000] ECR I-8419.

cultural diversity is strongly linked with legal diversity. 'Taking cultural diversity into account' would mean considering the potential damage that harmonising measures might cause to European cultural diversity. Hence, when assessing the necessity of EU legislation it does not suffice to look at the benefits of harmonisation for businesses and consumers. Also the flip of the coin has to be considered: the costs in terms of welfare loss caused by legal rules that are less or not at all tailored to national cultural preferences.<sup>107</sup>

This is all the more important as cultural diversity has substantially increased with the enlargement of the EU to 27 Member States, particularly as compared to the beginnings of European co-operation with six Member States from fairly similar backgrounds. Harmonisation in a more diverse EU is likely to increase losses in terms of welfare and well-being. As Majone points out:

... each enlargement of the Union necessarily changes the calculus of the benefits and costs of integration—the reduction of transaction costs made possible by harmonised rules, on the one hand, and the welfare losses entailed by rules that are less precisely tailored to the preferences and resources of each Member State, on the other. As long as resources and preferences are fairly similar across countries, the advantages of harmonisation are likely to exceed the welfare losses, but when heterogeneity exceeds a certain threshold, the reverse will be true.<sup>108</sup>

Hence, maximum harmonisation in an enlarged Community will more easily lead to higher welfare losses and therefore run the risk of increasing the distance between the EU and its diverse citizens.<sup>109</sup>

The obvious risk is that that seemingly 'soft' cultural interests will be too easily overruled by seemingly 'hard' economic interests. But even if this would be justified, it does not necessarily mean that national and cultural differences have to be bulldozed away. The instruments of the Community are sufficiently sophisticated to respect diversity. For example, Directives bind Member States only as to the result; they leave the choice of form and method to the States themselves (Article 249(3) EC). Minimum harmonisation Directives support diversity by allowing Member States to provide a higher level of protection. Another option is to leave the application of a European standard to the Member States. For example, the ECJ has developed the concept of the 'average consumer' in the context of Article 28 EC and consumer protection and trademarks Directives.<sup>110</sup> Its case law allows for social, cultural and linguistic differences in the

<sup>107</sup> As far as I can see, this specific aspect of cultural diversity has not yet been explored. See for an extensive discussion of Article 151 EC Evangelia Psychogiopoulou, *The Integration of Cultural Considerations in EU Law and Policies*, (Martinus Nijhoff, 2008).

<sup>108</sup> Giandomenico Majone, 'Unity in Diversity: European Integration and the Enlargement Process' (2008) 33 *European Law Review* 468.

<sup>109</sup> Harlow (n 2) 352: '... implementation will not be achieved through working against the grain of national cultural traditions; backlash and anti-European sentiment are—as current political events show—a more likely outcome.'

<sup>110</sup> See Directive 76/768/EEC of 27 July 1976 on cosmetic products; Directive 84/450/EEC of 10 September 1984 concerning misleading advertising; Directive 89/104/EEC of 21 December 1988 to approximate the

application of this concept by national courts.<sup>111</sup> Since 2007, this ‘average consumer’ also plays an important role in the Directive on Unfair Commercial Practices. In principle, this is a maximum harmonisation Directive but the concept of the ‘average consumer’ provides for diversity in its application.<sup>112</sup>

Until recently, the focus of the EU’s policy in the area of consumer protection was on minimum harmonisation. In 2004, however, the Commission launched a review of the Consumer Acquis with the objective of simplifying and completing the existing regulatory framework.<sup>113</sup> In 2008, this resulted in a proposal for a Directive on Consumer Rights.<sup>114</sup> Apparently over-confident in the light of the success of the maximum harmonisation Directive on Unfair Commercial Practices,<sup>115</sup> the Commission decided to embrace a full (or maximum) harmonisation approach.<sup>116</sup>

However, this full harmonisation approach is flawed in many ways, as it overestimates both the saving effects of harmonisation and the impact of differences in contract law on cross-border trade.<sup>117</sup> Moreover, it wrongly suggests that the Directive will secure a high level of consumer protection whereas in many Member States the effect will surely be a lower level of protection.<sup>118</sup> These counterarguments to the Commission’s proposal

laws of the Member States relating to trade marks; Regulation (EEC) No 1907/90 on certain marketing standard for eggs; and Directive 2000/13/EC of 20 March 2000 on the labelling, presentation and advertising of foodstuffs.

<sup>111</sup> See Wilhelmsson (n 14) 243–6. See also Harlow (n 2) 367.

<sup>112</sup> 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* (Kluwer, 2004); Rogier W de Vrey, *Towards a European Unfair Competition Law. A Clash Between Legal Families* (Martinus Nijhoff, 2006); Jules Stuyck, Evelyne Terryn and Tom van Dyck, ‘Confidence through Fairness? The New Directive on Unfair Business-to-Consumer Commercial Practices in the Internal Market’ (2006) 43 *Common Market Law Review* 107; Cees van Dam and Erika Budaite, ‘The Statutory Frameworks and General Rules on Unfair Commercial Practices in the 25 EU Member States on the Eve of Harmonisation’ in Christian Twigg-Flesner, Deborah Parry, Geraint Howells and Annette Nordhausen (eds), *The Yearbook of Consumer Law 2008* (Ashgate, 2007) 107.

<sup>113</sup> See Communication on European Contract Law and the revision of the acquis: the way forward: COM(2004) 651 final, 20.1.2005; Green Paper on the Review of the Consumer Acquis, 08.2.2007, COM(2006) 744 final.

<sup>114</sup> Brussels, 8.10.2008, COM(2008) 614 final, 2008/0196 (COD).

<sup>115</sup> Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market

<sup>116</sup> Note 120, 3.

<sup>117</sup> As the Canadian economist André Breton wrote: ‘... if one compares the degree of harmonization in Europe with that in Canada, the United States, and other federations, one is impressed by the extent to which it is greater in Europe than in the federations’: André Breton, *Competitive Governments* (Cambridge University Press, 1996) 276.

<sup>118</sup> See, for a concise overview of these flaws, Michael Faure, ‘Towards a Maximum Harmonization of Consumer Contract Law???’ (2008) 15 *Maastricht Journal of European and Comparative Law* 433. For a more extensive discussion regarding European tort law, see Michael Faure, ‘Economical Analysis of Tort Law and the European Civil Code’ in Arthur Hartkamp *et al* (eds), *Towards a European Civil Code* (Kluwer, 2004) 657. See also Fernando Gomez, ‘The Unfair Commercial Practices Directive: A Law and Economics Perspective’ (2006) 2 *European Review of Contract Law* 17.

are reinforced when considering the importance of cultural diversity.<sup>119</sup> This paper's analysis suggests that preferences regarding victim and consumer protection are embedded in the national culture. Therefore, full harmonisation will cause welfare losses inasmuch as the new European rules deviate from the current national rules that reflect cultural values and preferences.<sup>120</sup> The fact that it is hard to estimate these welfare losses cannot be an argument for neglecting them.

Moreover, whereas the European Commission is inclined to underestimate the costs of harmonisation, it often overestimates its effects. This paper's analysis suggests that European Directives can harmonise the bodies of law, but not their souls. This means that European rules will be interpreted differently throughout the Member States in line with national legal and cultural traditions and preferences. For example, the English approach to the concept of strict liability in the Product Liability Directive may be more reluctant than the French one. In *A v National Blood Authority* (a case on liability for blood products) Burton J said that he took 'all relevant circumstances' into account when interpreting Article 6 of the Directive.<sup>121</sup> He was criticised for this as the Directive speaks about 'all circumstances'. One might wonder why a judge should also take non-relevant circumstances into account, but the key of the criticism was that all circumstances should include 'the care taken by the producer' and 'the avoidability of the defect'.<sup>122</sup> In France and other continental countries, such circumstances would surely be considered to be irrelevant for the Directive's strict liability regime.<sup>123</sup> Moreover, for France the regime is not even strict enough as France has persistently resisted the transposition of the Directive in order to prevent its national product liability law from being displaced by lower European standards.<sup>124</sup>

#### 6.4 Cultural Diversity and *Ius Commune*

Since the late 1980s, the discourse on a common European private law has grown extensively. Perhaps the most important result so far is that academic discussions of

<sup>119</sup> Green Paper on the Review of the Consumer Acquis, 08.2.2007, COM(2006) 744 final, 8. An older example of maximum harmonisation is the Product Liability Directive, although this Directive provided for a number of options. See van Dam (n 5) nr 1407.

<sup>120</sup> See also from a broader law and economics perspective Michael Faure, 'Economical Analysis' (n 118).

<sup>121</sup> [2001] 3 All ER 289.

<sup>122</sup> In this sense, see eg Christopher Hodges, 'Compensating Patients' (2001) 117 *Law Quarterly Review* 528, 530.

<sup>123</sup> See also *Sam Bogle and others v McDonalds Restaurants Ltd* [2002] EWHC 490 (QB) in which the court considered relevant, in order to assess a defect, the steps taken by McDonalds to train its staff in relation to the safe service of hot drinks to customers. Another example is the transposition of the 'development risk' defence of the Directive which was drafted with a slightly wider scope, albeit according to the ECJ still in line with the Directive. See Consumer Protection Act 1987, s 4(1)(e): Case C-300/95, *Commission v United Kingdom* [1997] ECR I-2649.

<sup>124</sup> van Dam (n 5) nr 1407. See, for the Directive's impact in England and France, Simon Whittaker, *Liability for Products: English Law, French Law, and European Harmonization* (Oxford University Press, 2005).

private law issues are lifted to a European level. This development 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.

Not satisfied with this result, however, a number of academics want to go further by looking for commonalities and harmony, even drafting principles of European private law. In some European academic bedrooms, dreams are dreamed not only of a European *ius commune* but even of a European Civil Code. Many academic bees are busy collecting the honey of the national flowers and bringing it to the European honeycomb, where the Queen bee of European harmony is watching the work with approval. The fruits of this work are a growing number of sets of European Principles, first in the area of contract law but subsequently in other areas too. The Principles are usually designed as model laws for a European land of milk and honey and of lasting harmony.

Looking at the *Principles of European Tort Law* (PETL) in particular, these are in fact some thoughts on common European tort law rules by a group of well respected law professors, all men, and mainly from the old Member States. The drafters describe the PETL as ‘a basis for enhancement and harmonisation of the law of torts in Europe and a framework for further development of a truly harmonised European tort law’.<sup>125</sup> At the same time they admit that they have not come close to their goal as there are too many differences among national legal systems and that these are related to traditions and culture.<sup>126</sup> For this reason they chose to adopt a flexible system with a list of factors ‘to be taken into account’.<sup>127</sup> It would have been most interesting to hear more about exactly this aspect of the drafters’ work and how they perceived the acknowledged differences in traditions and culture.

It is not clear why the drafters think that ‘a truly harmonised European tort law’ is desirable, particularly as it must have been clear to them that there is no legal basis for harmonisation of this area of the law (see section 6.3). The drafters did not provide other reasons for their desire to harmonise the national rules of European tort law.<sup>128</sup>

In my view, the search for a *ius commune* (provided there is one) cannot be conducted without a discussion on the political, social and cultural backgrounds of rules.<sup>129</sup> The

<sup>125</sup> European Group on Tort Law, *Principles of European Tort Law: Text and Commentary* (Springer, 2005) 16. See further Koch, this issue.

<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid.*, 15.

<sup>128</sup> The Principles seem to have been based mainly on the highest common denominator. In politics, it does not work as simply as that. There would be more give and take, also in connection with other issues. For example, many of the Principles come close to the German rules. This would be an unlikely political result unless Germany was prepared to make concessions in other areas.

<sup>129</sup> See, for example, Guy Canivet and Horatia Muir Watt, ‘Européanisation du droit privé et justice sociale’ (2005) *Zeitschrift für Europäisches Privatrecht* 518: ‘... il nous semble que l’européanisation 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.’

PETL drafters may very well have discussed such matters but, unfortunately, they do not give account of it. Their comparative law method seemed mainly to have been a matter of rule and case comparison with a view to commonalities and harmony. As I have indicated before,<sup>130</sup> a stronger emphasis on a policy discourse and its relation to cultural backgrounds is needed. One cannot agree more with Walter van Gerven when he said: 'Learning about each other's legal mentalities ... and ways of solving concrete legal problems, is ... of crucial importance.'<sup>131</sup>

This paper's analysis suggests that differences in the core of national tort laws are related to differences in national culture. Such differences cannot be 'drafted away' by choosing a flexible system with 'factors to be taken into account'. Two examples illustrate this. First, the Principles take as their 'basic norm'<sup>132</sup> the general negligence rule, the *lex Aquiliae*. However, in personal injury cases (the most important and most culturally determined area of tort law) the 'basic rule' in France will be a strict rule, whereas in England it will be a negligence rule. Secondly, the drafters of the Principles tried very hard but failed to draft rules of strict liability, one of the most sensitive issues in tort law.<sup>133</sup> These are differences that can hardly be overestimated and they are a major obstacle to finding any kind of compromise that is acceptable to both countries, let alone one that is also acceptable to the other 25 Member States.

The PETL drafters were stuck at exactly these issues because they are strongly related to national and cultural preferences regarding individual responsibility and victim protection. Not only Member States' rules differ (the body) but also the principles behind the rules (the soul). Discussing principles and understanding the differences is of pivotal importance but it will be hard to put them on a common European footing.<sup>134</sup> Fortunately, in most areas of private law there is no need for it. On the contrary, focusing on commonalities runs the risk of losing the view of the European varieties, their roots and their intrinsic dynamic power.

Apart from specific designated areas, harmonisation should not be the goal of the international private law discourse. The agenda, not only for academics but also for policy makers, should focus on the economic, social, cultural and policy backgrounds of private law rules and on understanding the reasons for the variety of these backgrounds. For the 'why' of the differences is more important than the 'what'.

Finally, the fun of harmonising is usually short-lived because drafting common principles and rules is only interesting as long as the work is not yet done. Once principles

<sup>130</sup> van Dam (n 5) nr 613.

<sup>131</sup> Walter van Gerven, 'The ECJ Case Law as a Means of Unification of Private Law?' in Hartkamp *et al* (n 118) 123.

<sup>132</sup> PETL, Art 1:101.

<sup>133</sup> van Dam (n 5) nr 605. See also Koch, this issue ('the most disputed of all parts of the Principles').

<sup>134</sup> For this reason I am sceptical about Hugh Collins' proposal (n 1) to create a European Civil Code comprising 'principle-based regulation, a framework of normative standards for a transnational civil society'.

and rule have been adopted the fossilisation process starts, even more so when they are enacted in legislation that can only be changed through cumbersome and time consuming procedures. This would create an important obstacle for the development of the law. A truly living European private law discourse, and in particular a European tort law discourse, supported by an ongoing and extensive exchange of information aims to facilitate a diverse, dynamic, and open-ended development of the law.<sup>135</sup>

## 7. CONCLUDING REMARKS

The European Union is beyond doubt the most important and most valuable political achievement of the second part of the 20th century in maintaining peace and contributing to prosperity in Europe. The constitutional rules of the European Union, however, are aimed not at creating a supranational state but at striking the right balance between pursuing common goals and respecting the national identities of the Member States. This tension is inherent in the constitution of the European Union, and for good reason. Europe's diversity with its deep values of heritage and legal culture is a most valuable asset. Harlow has rightly said that 'a pluralist Europe is not inconsistent with a commitment to internationalism. Cultural diversity is valuable in its own right and is a basic strength of the European enterprise, providing a valuable genetic store of cultural experience, essential as a foundation for constitutional and legal experiment.'<sup>136</sup>

To a considerable extent, the national private laws are a manifestation of Europe's diversity. This paper has shown that the Member States' different preferences when balancing the freedom to act and the protection of victims are linked with differences in national cultural identities. Harmonisation in areas where legal rules are the outer manifestation of the national culture will therefore lead to a loss of cultural identity.

In order to achieve Community goals, harmonisation of private law rules can be a proper measure, for example in internal market matters when differences in national rules lead to distortions and the proposed rules are fit to solve the problems (Article 95 EC). However, the impact assessments for harmonisation measures should look not only at the benefits of harmonisation for business and consumers but also at the cost of damaging part of the diverse European cultural heritage. And in cases where harmonisation is necessary, it does not have to be 'full' as in many cases minimum harmonisation may very well serve the Community goals to be achieved.

<sup>135</sup> For example, the excellent series of *European Tort Law Yearbooks* provides overviews of the main developments in the tort laws of many European jurisdictions accompanied by insightful and clarifying comparative observations by Ken Oliphant, Director of the Institute for European Tort Law in Vienna and editor of this special issue.

<sup>136</sup> Harlow (n 2) 340.

This leaves broad areas of private law, in particular tort law, untouched by the EU. In these areas, the (mainly academic) discourse should be less on commonalities and the search for common principles than on the exchange of information to facilitate an ongoing and genuine European debate. The emphasis should be on learning about legal differences, about their economic, social, cultural and political backgrounds, about legal mentalities, about the perception of legal problems and the various ways to solve them. This would help the development of the law in Europe in a much more dynamic way than by drafting principles or rules that underestimate the differences and run the risk of fossilising the development of the law.

One may wonder whether the continuing search for common European principles is a sign that we find it hard to accept diversity. Rather, that deep in our heart we are afraid of diversity. If so, in Hofstede's terminology we could be considered to be uncertainty avoidant ('What is different is dangerous', rather than 'What is different is curious': see 4.4). However, the influence of major historical events may also be relevant here (see 1). Among the academics advocating harmonisation, the post-war generation is strongly represented. Their experience of the Second World War and its aftermath may very well have influenced their views on how to shape European co-operation and secure European interdependence. The course of history may cause the next generation to look at this co-operation from a different, possibly more diverse perspective. However, for both generations the goal needs to remain the same. Because European co-operation is the only way to secure interdependence, prosperity and lasting peace.