



## **The Cultural Dimensions of Legal Certainty: A Study on the Use of Intercultural Knowledge in European Law-Application**

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ABSTRACT: The need to take cultural differences into account when dealing with transnational legal problems or implementing legal concepts and principles across countries is widely acknowledged by international institutions and the academia. In this sense, there are important initiatives to funnel ‘external’ cultural expertise into the legal process (e.g. in court proceedings). Yet, the meaningful integration of cultural knowledge into legal work requires lawyers to play an active and guiding role in this exchange so as to shape its modalities, impact and scope. In particular, this involves the identification of professionally intelligible forms of cultural knowledge and the development of potential avenues for their practical integration into legal routines “from within” the legal profession. For this purpose, this article explores the use of the intercultural communication body of knowledge as a means to enrich European human rights adjudication. Focusing on the European Court of Human Rights doctrine on legal certainty and applying intercultural indexes like Uncertainty Avoidance and Individualism to supplement the Court’s assessment of the necessary levels of legal predictability, this work examines the potential viability of relying on that particular body of knowledge for a systematic, large-scale interdisciplinary exchange. With certain qualifications, the conclusions support the advisability of this type of exchange and point to further steps in this direction.

KEYWORDS: legal certainty – predictability – European Court of Human Rights – intercultural communication – cultural dimensions – law and culture.

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## 1. Introduction

The notion that cultural differences have a strong impact on the manner law is understood and applied across countries has long been acknowledged by key international institutions that emphasize the need to take such differences into account when implementing cross-national legal regimes.<sup>1</sup> In Europe, the various layers of the regional legal system (encompassing the Council of Europe [CoE], the European Union [EU] and individual Member States [MS]) provide for general principles, rules and judicial doctrines that allow for cultural differences to be considered in the application of the law.<sup>2</sup> In the same vein, some European institutional initiatives try to deal with the important impact that cultural differences have on the process and outcomes of law-application.<sup>3</sup> Similarly, academic research strives to improve our understanding of the cross-cultural dimension of law-application in Europe.<sup>4</sup> Among the most significant of such contributions, some academic and professional initiatives aim to funnel cross-cultural knowledge into legal work by inserting external experts from culture-related fields (e.g. psychology, cultural studies, anthropology, sociology, etc.) into the legal process.<sup>5</sup> Yet, awareness about the cross-cultural dimensions of law also needs to be improved and developed “from within” the legal profession. In this latter sense, we are still missing practical models and tools for the analysis of law’s cultural dimensions that are also intelligible and acceptable for wider European legal professional communities, especially for law-applying institutions and legal education, as the end-users of potential methodological innovations.

<sup>1</sup> See e.g. UN General Assembly, Resolution on the rule of law at the national and international levels (10 December 2014) UN Doc A/RES/69/123, para 9.

<sup>2</sup> For example, Arts 3(3) and 4(2) of the Treaty on the European Union and Article 17 of the Treaty on the Functioning of the European Union require the EU to respect, protect, and promote European cultural diversity. And the European Court of Human Rights’ (ECtHR) ‘Margin of Appreciation’ doctrine gives states room to consider their unique cultural characteristics when interpreting and applying the rights protected by the European Convention on Human Rights (ECHR). See e.g. JA Sweeney, ‘Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era’ (2005) *International and Comparative Law Quarterly* 459.

<sup>3</sup> Some programmes of judicial training offered by national and European institutions aim to explore and deal with European cultural differences in legal matters. See e.g. the European Judicial Training Network’s programme for European judges on ‘Cultural Diversity in the Courtroom’, at catalogue.ejtn.eu (all links in this article were last visited on 19 June 2025). See also trainings offered to judges and police by the Ministries of Justice of some German States, e.g. Nordrhein-Westfalen, at www.jak.nrw.de.

<sup>4</sup> For instance, projects like the CURED Database of the Law & Anthropology Department of the Max Planck Institute for Social Anthropology (at www.eth.mpg.de) examine judicial and administrative practices and show how domestic legal orders are gradually adapting to the social demand for the recognition of increasing cultural and religious diversity in Europe. This digital repository of European domestic case-law identifies arguments developed by law-appliers to justify or reject the recognition of different cultural traditions, concepts, practices, beliefs, etc. in legal rulings. The method tracks in particular the use of empirical evidence, anthropological literature, or expert testimony in judicial or administrative decisions.

<sup>5</sup> See e.g. the Cultural Expertise Network, at [culturalexpertise.net](http://culturalexpertise.net).

This is by no means an exclusively European problem. In international law, a significant part of the debate over the impact of cultural differences has been so far based on outdated notions about differences between the ‘West’ and the rest of the World.<sup>6</sup> For example, in relation to international investment law and arbitration the 2018 report of the International Law Association reminds that ‘[w]hilst there is often presumed to be a universal conception of what is just, fair, or good, there is the need to be more cognizant of specific local, cultural and social factors which may contribute to different notions of the rule of law than that accustomed in Western societies’.<sup>7</sup> That is, as far as the rule of law debate goes, there seems to be at least at the practical level a widespread assumption that “the West” is a more or less homogeneous cultural unit whose internal diversity has little importance and deserves little attention in terms of how law is understood and practiced across countries as diverse as, e.g., Greece, Netherlands, Poland, Finland or Canada.

The lack of a practical approach suitable to capture and process cultural difference in a meaningful manner also surfaces in European legal integration and cooperation debates. In part a consequence of this methodological deficit, European legal work commonly relies on the more or less implicit assumption that there is one relatively homogeneous European understanding and experience of fundamental legal notions as deeply conditioned by culture as fault, negligence, ownership, participation or ‘to be heard’.<sup>8</sup> Even where academic and institutional work acknowledges the diversity of cultural views about fundamental elements of the rule of law in Europe, such insights tend to be effaced by references to different forms of European consensus.<sup>9</sup>

However, as cross-cultural psychology shows, Europe is less culturally homogeneous than assumed by a significant part of European jurisprudence, especially as regards cultural dimensions that are fundamental to the practice of the rule of law

<sup>6</sup> This tendency seems to echo the original thrust of legal anthropology and its attempt to demonstrate that “Western” legal systems were more developed than “non-Western” legal cultures, see N Rouland, *L’Anthropologie Juridique* (2nd ed, Presses Universitaires de France 1995) 14-35. Similarly, comparative legal studies have only partially moved away from the reductionist classification of every legal system on earth according to two misleading categories, i.e., civil law and common law, both based on inaccurate images of Roman, French and German law, and English law respectively, see VV Palmer, ‘Mixed Legal Systems... and the Myth of Pure Laws’ (2007) *Louisiana Law Review* 1205; and T Herzog, ‘European Law and the Myths of a Separate English Legal System’ (History and Policy 2018), at [www.historyandpolicy.org](http://www.historyandpolicy.org).

<sup>7</sup> See e.g. International Law Association, *Report on the Rule of Law and International Investment Law* (2018), at [www.ila-hq.org](http://www.ila-hq.org) 24.

<sup>8</sup> See European Commission for Democracy through Law - Venice Commission, ‘Report on the Rule of Law’ (2011) Study No. 512/2009 - CDL-AD (2011)003rev, paras 41ff.

<sup>9</sup> See e.g. B Grabowska-Moroz, DV Kochenov, ‘EU Rule of Law: The State of Play Following the Debates Surrounding the 2019 Commission’s Communication’ in G Amato, B Barbisan, C Pinelli (eds), *Rule of Law vs Majoritarian Democracy* (Hart Publishing 2021) 63, 64-65. Note that the ECtHR’s so-called European consensus doctrine is based on the identification of common legal standards that mostly reflect political power and exclude broader considerations about cultural diversity. See JT Theilen, *European Consensus between Strategy and Principle. The Uses of Vertically Comparative Legal Reasoning in Regional Human Rights Adjudication* (Nomos 2021).

(e.g., group relations, time perception, communication styles, power distance, etc.).<sup>10</sup> The question becomes even more pressing if we acknowledge that no nation is culturally homogenous due to the existence of different cultural minorities and groups within their borders –especially when the perspectives of migrant citizens and non-citizen residents are taken into consideration.<sup>11</sup>

Against this backdrop, this article explores the potential application of the ‘cultural dimensions’ tool developed by intercultural research to transnational legal work in Europe. It argues that: *a)* this specific avenue of interdisciplinary cross-pollination can deepen our understanding of key European legal debates and make the operation of cross-European legal regimes more sensitive to issues of cultural diversity –thus enhancing the social legitimacy of those legal regimes across European societies. And *b)*, given the substantive overlapping with some fundamental legal problems and some structural similarities with basic forms of legal argumentation, resort to some cultural dimensions in transnational legal work constitutes an approach that is easily accessible for legal professionals –also European judges.<sup>12</sup> As such, the approach can be learned and applied not only to improve the cross-cultural sensitivity of European law-application, but also to adapt European legal conscience and routines to the growing cultural diversity of European societies. Moreover, this can be done without excluding resort to other forms of cooperation with the field of intercultural research, e.g. through external cultural expertise in judicial proceedings.<sup>13</sup> The article also discusses certain methodological dilemmas that need to be considered in order for legal work to tap into the potential benefits of this particular form of cross-disciplinary dialogue in the future.

In order to illustrate the approach proposed, this work focuses on a distinctly classical legal issue in the case-law of the European Court of Human Rights (ECtHR): the principle of legal certainty and the promises of predictability and normative precision it contains. The ECtHR’s formulation and application of this principle are explored from the different cultural expectations that these promises may entail for different peoples in Europe. Given the topic chosen to present the approach, this work may initially appear to link with European institutional and academic initiatives that aim to improve the quality of national laws so as to enhance the democratic basis of the rule of law across Europe (i.e., better laws defined as those that can be better

<sup>10</sup> See e.g. World Values Survey, ‘2023 World Values Survey’ (17 February 2023), at [www.worldvaluessurvey.org](http://www.worldvaluessurvey.org); and Globe Project, ‘2020 GLOBE Study’ (2020), at [globeproject.com](http://globeproject.com). See also S Kitayama, CE Salvador, ‘Cultural psychology: Beyond East and West’ (2024) *Annual Review of Psychology* 495.

<sup>11</sup> AB Cohen, MEW Varnum, ‘Beyond East vs. West: Social Class, Region, and Religion as Forms of Culture’ (2016) *Current Opinion in Psychology* 5.

<sup>12</sup> See generally, JM Balkin, (1986) ‘The Crystalline Structure of Legal Thought’ (1986) *Rutgers Law Review* 1; JM Balkin, ‘Nested Oppositions’ (1990) *The Yale Law Journal* 1669; and more specifically in relation to cultural hermeneutic in law, JM Balkin, *Cultural Software: A Theory of Ideology* (Yale University Press 1998).

<sup>13</sup> L Holden, *Cultural Expertise, Law, and Rights* (Routledge 2023).

understood by the average citizen).<sup>14</sup> However, the theoretical and methodological premises of this work differ from these initiatives in fundamental respects.

First, although it incidentally features the issue of legal wording or textual precision of legal statutes and regulations as a case-study, this paper looks at legal wording styles from the viewpoint of culture and not the other way around. That is, it does not assume cultural preferences from actual practices of legal wording. Admittedly, there can be positive synergies between these two approaches. For instance, insofar as the study of actual legal wording styles in different countries is also sensitive to background cultural differences across the countries analyzed, the results of such inquiry may be used as a proxy for cultural preferences in relation to the specific issue of legal certainty.

However, it is important to stress from the outset that this article deals not with how laws could or should be drafted in order to be better aligned with the cultural understandings of different European populations. Instead, it deals with law-application and how it can be enriched with intercultural knowledge in order to be more sensitive towards cultural differences in Europe. In this sense, this work is inspired by a critical understanding of legal form and adjudication which posits that *a)* legal materials *per se* do not determine legal decision-making;<sup>15</sup> and *b)* that the actual stability of meaning and the relative predictability of legal decision-making actually stem from the collective values of interpretive communities of law-appliers, especially courts.<sup>16</sup>

Additionally, by focusing on the application of European law by supranational courts, this work takes the judicial rather than the litigant's strategic perspective. That is, it does not aim to help produce more effective cultural defence argumentation by applicants (and respondent states), even if that might be one of its by-products.<sup>17</sup> Rather, this work subscribes to the ethical principles outlined by Holden and others of 'do no harm' (akin to *in dubio pro reo* in criminal law) and procedural neutrality in the use of intercultural knowledge in law so as to support vulnerable

<sup>14</sup> See generally EU Directorate-General for Translation, 'Proceedings of the Conference "Clear Writing throughout Europe"' (Publications Office of the European Union, 2 May 2011), at [op.europa.eu](http://op.europa.eu); and A Sobota, 'The Plain Language Movement and Modern Legal Drafting' (2014) *Comparative Linguistics* 19. See also International Association of Legislation, at [ial-online.org](http://ial-online.org).

<sup>15</sup> About the linguistic and (post-)structuralist critique of traditional notions of language, see L Wittgenstein, *Philosophical Investigations* (4th ed. Wiley-Blackwell 2009); J Derrida, 'Structure, Sign and Play in the Discourse of the Human Sciences' in *Writing and Difference* (Routledge 2001) 351. About the semiotic critique of mainstream jurisprudence in Europe, see e.g. P Goodrich, *Legal Discourse. Studies in Linguistics, Rhetoric and Legal Analysis* (MacMillan Press 1987). See also American critical jurisprudence, D Kennedy, 'Legal formality' (1973) *Journal of Legal Studies* 351; D Kennedy, *A Critique of Adjudication: Fin de Siècle* (Harvard University Press 1998).

<sup>16</sup> About this thesis in critical jurisprudence, see e.g. Kennedy (n 15) 228 ff; and R Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* (Clarendon Press 1996) 104ff, 230ff. See generally Wittgenstein (n 15) paras 241-242. See also in mainstream jurisprudence, e.g., N MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford University Press 2005); and RA Posner, 'Conventionalism: The Key to Law as an Autonomous Discipline' (1988) *University of Toronto Law Journal* 333.

<sup>17</sup> On the notion of cultural defence, see Holden (n 13) 11-19.

groups and correct potential structural imbalances, in particular those potentially caused by judicial ethnocentrism.<sup>18</sup>

Finally, a further methodological clarification is in order.<sup>19</sup> The approach propounded here is not predicated upon the idea of the existence of social/cultural laws that the European judges should simply transcribe –and, thus, should not be read in this way. Instead, this work points at certain cultural belief-structures suggested by intercultural research that, along with other factors, influence and shape social conceptions and expectations about law which, given their socio-political magnitude, deserve being taken into due account.

In other words, this article and the interdisciplinary approach it propounds are based on an interpretivist approach to social knowledge which rejects both traditional legal positivism and scientific or naturalistic approaches to the social sciences.<sup>20</sup> More specifically, interpretivist social research does not try to mimic the natural sciences and their search for causal laws which would predict people's future behaviour.<sup>21</sup> For interpretivist research, such pursuit is hopeless due to the systemic flaws of scientific/naturalistic approaches.<sup>22</sup> In contrast, from a social interpretivist epistemological viewpoint, the aim of social inquiry is not to produce causal predictions in order to control human behaviour, but to understand human action and render it intelligible by studying its purpose and meaning.<sup>23</sup>

Interpretivist research acknowledges the reciprocal interrelatedness of social events and, instead of seeking linear causal connections between social phenomena, it tries to explain how and why they interlock with each other without any of them determining the rest.<sup>24</sup> Conceived as the relative correspondence between belief and action, the notion of meaning is applied to explain such interrelation.<sup>25</sup> Beliefs and actions constitute inseparable units of meaning that gather into larger semantic clusters based on collective systems of meaning. Thus, the semantic unity of a social situation is connected to the visions of life shared by its participants; a totality of meaning that derives from its constituent parts and, at the same time, gives meaning to them in a dynamic and changing relation.<sup>26</sup>

<sup>18</sup> *Ibid* 13-14.

<sup>19</sup> The following is based on JJ Garcia Blesa, 'Legal Method in the Context of Social Thought' in JJ Garcia Blesa (ed), *Contemporary Methods in International Legal Research* (Springer 2024) 5-20.

<sup>20</sup> DM Trubek, 'Where the Action Is: Critical Legal Studies and Empiricism' (1984) 36(1/2) *Stanford Law Review* 600-605. On the distinction between naturalist and interpretivist research approaches, see A Rosenberg, *Philosophy of Social Science* (5<sup>th</sup> ed., Routledge 2018) 11-33; M Hollis, *The Philosophy of Social Science. An Introduction* (Cambridge University Press 2002) 8-16.

<sup>21</sup> Rosenberg (n 20) 13.

<sup>22</sup> *Ibid* 41-50.

<sup>23</sup> *Ibid* 43, 56.

<sup>24</sup> RM Unger, *Law in Modern Society. Toward a Criticism of Social Theory* (The Free Press 1977) 14.

<sup>25</sup> *Ibid* 246.

<sup>26</sup> *Ibid* 249.

Insofar as interpretivism rejects causality and determinism,<sup>27</sup> the traditional conundrums of the naturalistic social sciences are not regarded as unsurmountable obstacles, but as the inherent limits of social research. For interpretivists, given such limitations, social inquiry is always sketchy and largely based on guesswork.<sup>28</sup> Therefore, the goal of social research is the interpretation of action in order to understand it, i.e. to establish some coherence between reasons and actions, and possibly transform action by influencing or modifying the reasons that motivate it.

In the same vein, interpretivist research does not solve the dilemmas of individual vs. structural sources of meaning that underlie modern social sciences, nor the problem of combining people's self-understanding (subjective) with the observer's or system's perspective (objective).<sup>29</sup> Neither does it escape the recurring dilemma between abstract vagueness and meaningless precision in scientific explanation that plagues every research approach.<sup>30</sup> In practice, thus, interpretivism, as any other form of social research, is always compelled to seek some sort of reconciliation between concrete perception and abstract knowledge.<sup>31</sup>

Against this backdrop, the cultural beliefs and values on which the approach outlined in this paper is predicated should not be comprehended as causes that determine social action, but as 'reasons' that render action intelligible by highlighting how actors justify it in the empirical studies cited below.<sup>32</sup>

The result is a tool of understanding, a cultural heuristic of law or a 'meta-bricolage' about the 'bricolage' that human culture is itself.<sup>33</sup> Using the hermeneutic power of cultural shared understandings, this approach offers insights into cultural differences in legal interpretation and explores tentatively some potential avenues for European courts to become more responsive towards such differences.

In order to unpack these issues, the article proceeds by analysing the ECtHR's doctrine regarding the principle of legal certainty (section 2). Next, taking this doctrine as a case-study, it introduces the notion of cultural dimensions as the main tool of the proposed intercultural approach to law-application, and outlines some appli-

<sup>27</sup> Defined as the belief in the existence of certain laws of the social world that ultimately determine human action beyond human will, Trubek (n 21) 580.

<sup>28</sup> Rosenberg (n 20) 64-65, 69.

<sup>29</sup> Unger (n 25) 15-17.

<sup>30</sup> *Ibid* 20-22.

<sup>31</sup> *Ibid* 15. Despite these inevitable weaknesses, interpretivism's optimistic view on the potential of anti-naturalist approaches to the study of human behaviour seems to offer the only way out of the pessimism (and cynicism) to which naturalist approaches have led social research throughout the second half of the twentieth century, Rosenberg (n 20) 70.

<sup>32</sup> Thus, the approach is linked to philosophical pragmatism for it skips the fact-value dichotomy and the notion that the purpose of knowledge is the representation of "reality" (e.g. through generalisations), while it still tries to learn something about social *reality* ('what is out there'), to understand better the connection between beliefs/values and action, R Rorty, *Consequences of Pragmatism (Essays: 1972-1980)* (University of Minnesota Press 1982) 160-166.

<sup>33</sup> Balkin (n 12) xi.

cations of the cultural dimensions to the issue of legal certainty (section 3). The following section discusses some limitations and caveats about the use of cultural dimensions in law-application (section 4). This part also clarifies the relation between the approach proposed and the fundamental legal postulates of the generality of laws and equality before the law. Finally, the article reflects on the general advisability and the substantive and geographic scalability of the model (section 5).

## 2. Making European law-application more culturally sensitive: the ECtHR's application of the legal certainty principle as a case-study

### 2.1. The uncertainties of legal certainty and the ECtHR's assessment of foreseeability and normative precision

Being one of the core themes of the rule of law debate in the last decades, the principle of legal certainty is connected to a broad cluster of themes that usually includes notions of formal legality, textual clarity, stability and consistency of the law, publicity or accessibility, non-retroactivity, etc.<sup>34</sup> Aside from the specific complexities of each of these themes, the main rationale of legal certainty has traditionally revolved around the idea of predictability or foreseeability in the context of political liberalism and capitalism. That is, the essential purpose of the legal certainty principle is to allow people to know in advance the range of free action they have without the need to fear public sanction, thus, making it possible for them to orient their behaviour and plan for their future.<sup>35</sup>

This is also the basis of the ECtHR's doctrine regarding the principle of legal certainty. According to the European Convention on Human Rights, any allowed interferences with Convention rights must be 'prescribed by law'.<sup>36</sup> But in the Court's case-law this does not only mean that restrictive norms must have some textual basis in domestic or international law; they must also fulfil some criteria as to the *quality of the law* in question.<sup>37</sup> Particularly important in this regard is the general principle that the law must be clear and its consequences foreseeable to the persons concerned.<sup>38</sup>

<sup>34</sup> LL Fuller, 'The Morality of Law' (Rev. ed., Yale University Press 1969); J Raz, *The Authority of Law* (Clarendon Press 1979); BZ Tamanaha, *On the Rule of Law. History, Politics, Theory* (Cambridge University Press 2004); A Bedner, 'An Elementary Approach to the Rule of Law' (2010) *Hague Journal on the Rule of Law* 48.

<sup>35</sup> In the context of capitalist economies, the role of this principle has been linked to the facilitation of market exchanges "because predictability and certainty allow merchants to calculate the likely costs and benefits of anticipated transactions", Tamanaha (n 34) 119.

<sup>36</sup> Aside from the rights protected by absolute prohibitions (i.e., the prohibitions of torture in Art 2 and slavery in Art 3), the ECHR contains several explicit references to the principle of legality ("provided by law", "prescribed by law", "according to the national laws", "in accordance with the law") in relation to most of the rights protected (see Arts 5-12).

<sup>37</sup> *Maestri v Italy* App no 39748/98 (ECtHR, 17 February 2004) para 30.

<sup>38</sup> *The Sunday Times v the United Kingdom (no. 1)* App no 13166/87 (ECtHR, 26 April 1979) para 49; *Larissis and Others v Greece* Apps nos 23372/94, 26377/94 and 26378/94 (ECtHR, 24 February

Clarity and foreseeability, however, are flexible standards and are generally understood in relative terms. For instance, the Court has pointed out that ‘the mere fact that a legal provision is capable of more than one construction does not mean that it does not meet the requirement implied in the notion “prescribed by law”’.<sup>39</sup> For the court ‘it is a logical consequence of the principle that laws must be of general application that the wording of statutes is not always precise [...]’.<sup>40</sup> Thus, the restriction on the enjoyment of fundamental rights must be formulated only with ‘sufficient precision’ to enable the citizen to regulate their conduct by enabling them to anticipate ‘to a degree that is *reasonable in the circumstances*, the consequences which a given action may entail’.<sup>41</sup> And ‘those consequences *need not be foreseeable with absolute certainty*: experience shows this to be unattainable’.<sup>42</sup>

In the same vein, the Court has consistently upheld the need to avoid *excessive rigidity* in order to keep pace with changing circumstances, which implies that some laws need to be vague.<sup>43</sup> This applies even to criminal laws, which in theory must live up to more stringent requirements of foreseeability than other norms interfering with the enjoyment of fundamental rights. That is, the requirement of clarity of the law applies in two different contexts in the Convention. First, Article 7 requires clarity in the definition of proscribed criminal behaviour in penal statutes in the sense of the ‘void for vagueness’ doctrine.<sup>44</sup> And second, clarity is required from any other norm that interferes with the enjoyment of fundamental rights (especially those protected in Articles 8 to 11 ECHR).

In principle, the requirement of foreseeability set forth by the Convention and by the Court’s case-law is weaker in the case of non-penal laws (e.g., in disciplinary proceedings against government employees) because, among other reasons, ‘it would scarcely be possible to draw up rules describing different types of conduct in detail’.<sup>45</sup> Thus, ‘disciplinary law is necessarily drafted in general terms’.<sup>46</sup> However, the same reasoning applies to penal statutes.<sup>47</sup>

In particular, the Court has repeatedly held that in criminal law, like in any other type of law, there is always an inevitable imprecision accompanied by a strong element of judicial interpretation and that, even if certainty is highly desirable, excessive rigidity must also be avoided in criminal law to allow judges to keep up with

1998) para 40; *Hashman and Harrup v the United Kingdom* [GC] App no 25594/94 (ECtHR, 25 November 1999) para 31.

<sup>39</sup> *Vogt v Germany* App no 17851/91 (ECtHR, 26 September 1995) para 48.

<sup>40</sup> *Gorzelik and Others v Poland* [GC] App no 44158/98 (ECtHR, 17 February 2004) para 64.

<sup>41</sup> *Ibid* (emphasis added).

<sup>42</sup> See *Rekvényi v Hungary* [GC] App no 25390/94 (ECtHR, 20 May 1999) para 34 (emphasis added).

<sup>43</sup> *Gorzelik and Others v Poland* (n 40) para 64.

<sup>44</sup> *Kokkinakis v Greece* App no 14307/88 (ECtHR, 25 May 1993) paras 13-20.

<sup>45</sup> *Vereinigung demokratischer Soldaten Österreichs and Gubi v Austria* App no 15153/89 (ECtHR, 19 December 1994) para 31.

<sup>46</sup> *Haseldine v the United Kingdom* App no 18957/91 (ECtHR, 13 May 1992) p 231.

<sup>47</sup> See *Advisory Opinion on the Applicability of Statutes of Limitation to Prosecution, Conviction and Punishment in Respect of an Offence Constituting, In Substance, an Act of Torture* request no P16-2021-001 (ECtHR, 26 April 2022) paras 67-69.

changing circumstances.<sup>48</sup> Moreover, the Court has stated that ‘the progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen’.<sup>49</sup>

Of course, the Court has established certain formal criteria to assess the compliance of domestic laws (and case-law) with this standard of foreseeability. More specifically, the level of precision required depends on ‘the content of the instrument considered, the field it is designed to cover, and the number and status of those to whom it is addressed’.<sup>50</sup> Yet, these criteria further refer us to other vague standards so that in practice, as far as the Convention rights are concerned, the scope of the concept of foreseeability and the principle of legal certainty depend on the Court’s own judicial discretion and interpretation of social context.<sup>51</sup> In other words, the vague standards relative to the content, object and addressees of a norm as well as to the ‘changing circumstances’ of society and the ‘interest of justice’ allow for a wide variety of factors to be considered in the Court’s evaluation of the legal certainty principle and the foreseeability standard.

This flexibility is fully in accordance with the role of the Court and the diversity of situations and contexts in which issues of legal certainty and foreseeability may arise from Portugal to Sweden to Bulgaria, where the degree of foreseeability expected or required by social actors may vary considerably. Yet, in line with the above described assumption of cultural homogeneity in Europe, the Court has never taken factors of cultural difference into account even if relatively obvious connections to existing research and knowledge from different areas of cross-cultural studies are readily available. However, there are several reasons for the Court to move in this direction.

## 2.2. Adding shades of social legitimacy to the ECtHR’s assessment of foreseeability

There is little doubt today that legal certainty, understood as the requirements of legal formality and the foreseeability of law and its consequences, needs to be defined in close connection to the social circumstances in which they are applied. In this sense, some noted theoreticians of the rule of law have observed that there are several social contexts in which a strict legal certainty standard is problematic –for instance, ‘in

<sup>48</sup> See *Del Río Prada v Spain* [GC] App no 42750/09 (ECtHR, 21 October 2013) para 92.

<sup>49</sup> *Bavčar v Slovenia* App no 17053/20 (ECtHR, 7 September 2023) para 144; *S.W. v the United Kingdom* App no 20166/92 (ECtHR, 22 November 1995) para 36; *Streletz, Kessler and Krenz v Germany* [GC] Apps nos 34044/96, 35532/97 and 44801/98 (ECtHR, 22 March 2001) para 50.

<sup>50</sup> *Chorherr v Austria* App no 13308/87 (ECtHR, 25 August 1993) para 25. See also ECtHR (n 47) para 68.

<sup>51</sup> *Advisory Opinion on the Applicability of Statutes of Limitation to Prosecution, Conviction and Punishment in Respect of an Offence Constituting, In Substance, an Act of Torture* (n 47) paras 70-78. As to the central importance of the Court’s own discretion with regard to the application of these standards, see e.g. the strong contrast between the opinion of the majority and the Dissenting opinions in *Maestri v Italy* (n 37) joint dissenting opinion of judges Bonello, Strážnická, Birsan, Jungwiert and Del Tufo; and dissenting opinion of judge Loucaides joined by judge Birsan.

small-scale communities with a strong communitarian orientation... adherence to formal legality, to rules by rules, might be harmful'.<sup>52</sup>

This insight overlaps with certain proposals geared to improve the application of the principle of legal certainty in cross-national normative contexts. For example, in view of the somewhat erratic case-law of the Court of Justice of the EU regarding legal certainty, some scholars suggest that the analysis and application of the principle in EU law should be approached from the main promise it contains. More specifically, '[l]egal certainty involves the subjective acceptability of a concrete legal decision, which looks at its justification according to the shared values of the legal community (legal reasoning and argumentation)'.<sup>53</sup>

In other words, the assessment of the legal certainty principle requires the acceptability of acts of law-application within the community in which they are performed. Thus, the ultimate test of the principle is the ability of legal justifications (reasoning, argumentation) to reflect the values shared by that community of reference. This insight overlaps with the legal philosophical and epistemological approach of this work. That is, if legal decisions are not determined by legal texts, then the actual stability of meaning and the relative predictability of legal decision-making stem from the collective tendencies and values of specific interpretive communities. These values emerge as a crucial element of legal knowledge and call for special scrutiny to guarantee their legitimacy.

However, if the 'community of reference' whose values must be reflected in judicial practice is not reduced to an elite of legal professionals and is extended to encompass the society at large (or at least to broader groups within it), then intercultural research, which provides a better understanding of cultural differences within the European society, is key to improving the social acceptability and legitimacy of European courts' decisions, bringing them closer to the communities they affect. Adding cultural knowledge about the societies and groups in which norms are to be applied can help law-appliers, European courts in particular, to become more sensitive towards the expectations and value-orientations of the communities they deal with in each case, increasing also the legitimacy of law application in different social contexts.<sup>54</sup> As an example of this argument, the next section explores intercultural knowledge about certain cultural dimensions and connects them to the ECtHR's legal certainty doctrine.

<sup>52</sup> Tamanaha (n 34) 121.

<sup>53</sup> P Martín Rodríguez, 'The Principle of Legal Certainty and the Limits to the Applicability of EU Law' (2016) *Cahiers de Droit Européen* 115, 119.

<sup>54</sup> In other words, insofar as the immediate purpose of this study is to improve law-application processes, the immediate audience of this work are lawyers (especially courts and other law-applying institutions); yet, the ultimate rationale and target of the approach is to connect law-application with the cultural expectations of larger social groups (be these national communities, minorities, groups of migrant persons, etc.). About the prospects and further developments propounded to improve current intercultural knowledge and its combination with law-application in this regard, see sections 4 and 5 below.

### 3. The cultural dimensions of legal certainty

As explained above, this article argues that the use of cultural dimensions in legal work offers insights about European cultural differences that can improve substantially our understanding and operation of key European legal concepts and regimes. The rest of this section explores which specific insights can be gained from the intercultural analysis of legal certainty and how they can be translated into recommendations for European legal decision-makers, the ECtHR in particular. For this purpose, this section first introduces the general notion of cultural dimensions. The rest of the section delves into the cultural dimensions that are more directly relevant to the cross-cultural study of legal certainty –i.e., uncertainty avoidance and individualism/communalism.

Note that, according to the heuristic nature of the approach proposed, the selection of relevant dimensions begins with the intuitive connection between the issue of legal certainty and the uncertainty avoidance index, from which further connections to other intercultural dimensions are explored (see this section below). Of course, in practical terms, this step requires previous knowledge of the definitions of different intercultural dimensions and practice in their application—which implies previous training and access to the relevant tools (see e.g. the surveys and tools mentioned in the introduction and the observations in section 4). Furthermore, the larger the list of dimensions we know about, the easier it will be to establish such initial intuitive connections from which the argumentation can proceed.<sup>55</sup>

#### 3.1. The study of culture through cultural dimensions

Cultures can be generally defined as systems of values, attitudes, and norms shared by a group of people about how to behave appropriately in a given situation.<sup>56</sup> In this sense, culture informs our beliefs and expectations about social roles and interactions and shapes our feelings and behaviour towards others. It works as a map of meaning shared by a community that is essential for our making sense of the world. From the viewpoint of the individual, the values that make up culture are (conscious or unconscious) abstract guiding principles that regulate relevant aspects of social life. These abstract values and norms help members of a group interpret events and orient their behaviour to achieve individual and collective goals.

Needless to say, different cultural systems give different importance to different values, even when they share some of them. In order to study such differences, cross-cultural researchers have developed the notion of cultural dimensions which can be defined as conceptual categories that help to identify and explain common areas of human

<sup>55</sup> On the other hand, the existing dimensions may not suffice or be adequate to some legal questions. In such cases, the development of new dimensions adapted to such legal questions offers new avenues for further research. See sections 4 and 5 below.

<sup>56</sup> See generally S Rathje, 'Der Kulturbegriff – Ein anwendungsorientierter Vorschlag zur Generalüberholung' in A Moosmüller (ed), *Konzepte kultureller Differenz – Münchener Beiträge zur interkulturellen Kommunikation* (Waxmann 2009) 83.

life usually addressed by every cultural system –e.g., dealing with time, communicating with each other, relating to power, etc.<sup>57</sup> To help understand and compare the cultural component of human actions, these dimensions –like the categories of grammar– focus on the regularities of culture understood as value systems or ‘think models’.<sup>58</sup>

The dimensions create ideal value oppositions, i.e., ideal and extreme poles (e.g., low- vs high-context communication, low vs high power distance, flexible vs linear time perception) between which individuals and groups can be located.<sup>59</sup> Working as broad coordinates, cultural dimensions offer a structured basis to approach cultural systems analytically. They provide a cross-cultural orientation map with information about the general features of these systems. The application of cultural dimensions as a tool enables us to understand in more complex terms the viewpoint of others and facilitate a change of perspective.

Attempts to identify and describe differences in cultural assumptions and values through cultural dimensions include the work by psychologists and organizational theorists on the relation between culture and psychological processes such as independent versus interdependent self-construal, analytic versus holistic systems of thought, and the role of face across cultures.<sup>60</sup> Additional insights into cultural differences come from large-scale, longitudinal projects such as the World Values Survey (WVS) and the European Values Study (EVS).<sup>61</sup>

From this vast array of sources, this article strongly relies on Hofstede’s work.<sup>62</sup> As one of the pioneers in this field, Hofstede’s contribution is still widely recognized and, more importantly, features cultural dimensions that are directly or intuitively applicable to the issue of legal certainty. In addition, the empirical studies that give basis to Hofstede’s cultural dimensions have been translated into different virtual tools for country comparison which make interdisciplinary exchange more accessible for experts from other areas of research, including legal studies.<sup>63</sup> While the use of such online tools is not essential to the approach proposed here, it is convenient for explanatory purposes.

<sup>57</sup> M Minkov, ‘Cultural Dimensions across Modern Nations’ in M Minkov, *Cross-cultural Analysis: The Science and Art of Comparing the World’s Modern Societies and Their Cultures* (SAGE 2013) 199.

<sup>58</sup> C Tuschinsky, ‘Kulturgrammatik’ in J Roth, C Köck (eds), *Culture Communication Skills – Interkulturelle Kompetenz* (Bayerischer Volkshochschulverband 2004) 75.

<sup>59</sup> W Dreyer, ‘Hofstedes Humbug und die Wissenschaftslogik der Idealtypen’ in U Hoessler and W Dreyer (eds), *Perspektiven interkultureller Kompetenz* (Vandenhoeck & Ruprecht 2011) 82.

<sup>60</sup> See e.g. Kitayama and Salvador (n 10) 495-526; and C Hampden-Turner, F Trompenaars, *Building Cross-Cultural Competence: How to Create Wealth from Conflicting Values* (Wiley&Sons 2000).

<sup>61</sup> *European Values Study* (1981-2020), at europeanvaluesstudy.eu. About other studies like the WVS see above.

<sup>62</sup> See generally G Hofstede and GJ Hofstede, *Cultures and Organizations* (McGraw-Hill 2005); and G Hofstede, *Culture’s Consequences: Comparing Values, Behaviours, Institutions, and Organizations Across Nations* (SAGE 2001).

<sup>63</sup> This article, e.g., relies on The Culture Factor’s, *Country Comparison Tool*, at [www.theculturefactor.com](http://www.theculturefactor.com).

### 3.2. Uncertainty avoidance and legal certainty

By looking at cultural dimension studies in relation to Europe, one can immediately spot cross-European cultural differences which are likely to have a strong impact on the understanding of fundamental legal notions and principles. In particular, the meaning and practical application of the fundamental notion of legal certainty depends to an important extent on how we feel about and deal with uncertainty which, as this intercultural research shows, is a culturally relative matter.

Uncertainty avoidance is one of the cultural dimensions most commonly used in the study of cross-cultural relations and, according to the heuristic nature of the approach proposed here, it is explored first as the most directly and intuitively applicable to the issue of legal certainty. Although the term uncertainty avoidance originates in American organizational psychology, it is the social psychologist Geert Hofstede who most famously develops and applies the concept as a broader cultural dimension to measure cultural differences. In the main, Hofstede's Uncertainty Avoidance (UA) dimension expresses different levels of tolerance towards the ambiguous and the unpredictable, i.e., the degree to which the members of a cultural group feel uncomfortable with uncertain situations.<sup>64</sup>

Uncertainty avoidance, thus, refers to a feeling: the subjective experience of anxiety about the unknown future. As Hofstede notes, the future is ambiguous, and uncertainty about it creates unbearable anxiety.<sup>65</sup> These feelings, however, are not just personal; they are widely shared with other members of a cultural group because both the perception of uncertainty as well as the strategies for dealing with the anxiety it produces are socially construed and learned. They belong to the *cultural heritage* of social groups who reproduce these collective values or patterns of behaviour through social institutions.<sup>66</sup>

The degree to which a cultural group tends to feel threatened by ambiguous or unknown situations is related to different levels of anxiety and different needs for predictability. That is, some cultures are more anxious about the future than others and, therefore, prefer types of institutions and relations that render events more predictable.<sup>67</sup> This is expressed in Hofstede's Uncertainty Avoidance index (UAI), which measures the degree to which people try to control the future or just let it happen. The UAI gauges the need for predictability in a specific group of people—and indicates the levels of collective anxiety about the future. Groups scoring higher in the UAI need more predictability and, thus, seek to avoid the uncertain by upholding beliefs, structures and institutions that help them alleviate the collective nervous stress caused by uncertainty.<sup>68</sup>

By assessing and giving values to the attitudes and reactions of different people towards uncertainty, the UAI can be presented as a numerical index that Hofstede and others have expressed in country values from 0 to 100.<sup>69</sup> These values can be

<sup>64</sup> Hofstede and Hofstede (n 62) 165.

<sup>65</sup> *Ibid* 165.

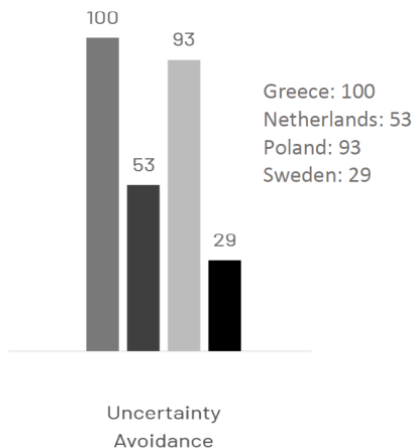
<sup>66</sup> *Ibid* 165-166.

<sup>67</sup> *Ibid* 170-172.

<sup>68</sup> *Ibid* 167.

<sup>69</sup> *Ibid* 18-36. See also WVS, EVS and GLOBE Project indexes.

compared in order to draw some hypotheses about the differences and similarities of UA cultural orientations in different countries. For the sake of explanation and in order to emphasize cross-European differences, the following compares different selections of countries with more clearly diverging scores.



**Figure 1.** Example of UAI comparison (adapted from The Culture Factor's country comparison tool).<sup>70</sup>

In this example (see fig. 1), Greece and Poland score very high on UA, which indicates a lower tolerance for uncertainty and a greater need for predictability. In contrast, the Netherlands and Sweden score low or very low on UA.<sup>71</sup> The latter cultures accept and feel more comfortable in unstructured situations or changeable environments, they tend to be more tolerant of change as the unknown and unpredictable are more openly accepted.<sup>72</sup>

Of course, different cultural groups adopt different strategies to handle uncertainty and mitigate the anxiety it creates. The question then becomes: How does a specific group deal with the fact that the future can never be known? In this context, law can be understood as a social strategy to reduce uncertainty about people's behaviour. The specific link between UA and the legal certainty issues discussed above becomes now more apparent. A higher UA score correlates with a stronger need for predictability and a collective preference for practices and institutions that render future events more clearly interpretable. In particular, this includes a stronger need

<sup>70</sup> See reference at n 63.

<sup>71</sup> The results for the four countries presented here significantly correlate with the results of other studies like GLOBE, at [globeproject.com](http://globeproject.com).

<sup>72</sup> Note how the definition of high or low scores is also relative to the different pairings chosen in the comparison. Thus, the Netherlands scores relatively low in relation to Greece, but high in relation to Sweden.

for more detailed written rules. As Hofstede observes, high UA countries tend to produce more laws and more precise than low UA countries.<sup>73</sup>

For the countries compared in this section (fig.1), for instance, this means that laws will be expected to be more precise in Greece and Poland as a cultural strategy to satisfy a stronger need for security vis-à-vis future events (even when they are not always applied).<sup>74</sup> In Sweden and the Netherlands, on the other hand, the level of precision expected from laws will be comparatively lower and the drive to regulate all possible aspects of life will also be weaker.

In this sense, the UA dimension seems useful to explain and take account of different cultural expectations concerning predictability and legal certainty as one of the central aspects of the ECtHR's standards regarding the quality of laws. But the way the need for predictability is reflected in levels of legislative proliferation and/or textual precision does not depend on one cultural dimension alone. UA interacts with other cultural dimensions some of which deserve special attention in the context of this analysis.

### 3.3. Individualism and legal certainty

As Hofstede suggests, in order to understand possible cultural expectations about law and legal form, the level of individualism in a cultural group is also an important factor. The dimension of individualism mirrors the universal dilemma about the role of the individual vis-à-vis the role of the group in human societies.<sup>75</sup> According to Hofstede's individualism-vs-collectivism scale or individualism index (IDV), societies where the interests of individuals tend to prevail over those of the group are defined as individualist; and societies where the interests of the group tend to prevail over those of individuals are defined as collectivist.<sup>76</sup>

Collectivism, however, does not refer here to the role of the state in society, but to another type of group relations from which individuals in culturally collectivist societies draw identity and protection as members of an in-group. More specifically, the members of collectivist societies share a strong 'we' identity and normally maintain strong relations of loyalty, dependence and trust with their in-group.<sup>77</sup> Members of individualist societies, on the other hand, believe in their sharp separateness from the group, they have a stronger individuality, base their identity on the idea of an 'I' clearly distinct from the group and, thus, see themselves as independent from the group with which they tend to maintain more limited and looser bonds.<sup>78</sup>

<sup>73</sup> Hofstede and Hofstede (n 62) 190.

<sup>74</sup> *Ibid.*

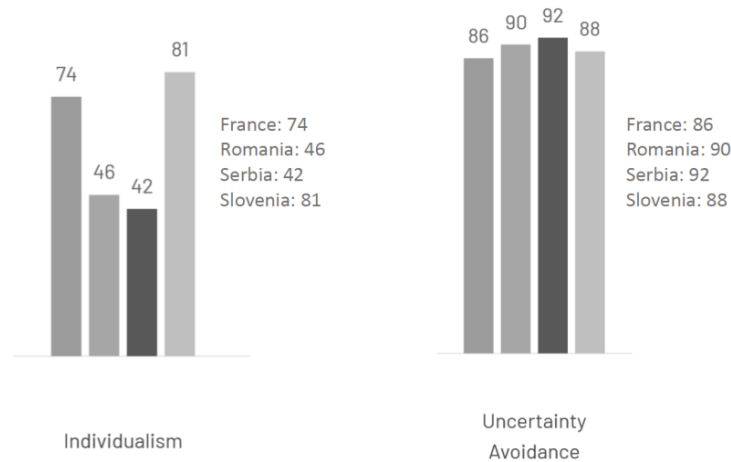
<sup>75</sup> This dimension is also included in most of the surveys and studies cited above, e.g. Hampden-Turner, Trompenaars (n 60) 68-97.

<sup>76</sup> Hofstede and Hofstede (n 62) 74-75.

<sup>77</sup> *Ibid* 75-76.

<sup>78</sup> *Ibid.* Note that, according to the studies cited here, most societies in the world are collectivist, whereas individualism is an exception, *Ibid* 79.

When considered together, UA and the individualism-vs-collectivism dimension can reveal interesting insights about cultural preferences regarding legal predictability and the quality of the law. For instance, societies that score high both in UA and IDV tend to expect more explicit written rules, whereas people from countries that score high in UA and low or very low in IDV (that is, high in collectivism) tend to accept norms that are more rooted in implicit collective understandings.<sup>79</sup>



**Figure 2.** UAI and IDV comparison (adapted from The Culture Factor’s country comparison tool).

Despite the high scores in UA of all the countries included in this example (fig. 2), the comparatively more collectivist cultures of Romania and Serbia would tend to temper the requirements of UA in terms of normative precision as the stronger collective bonds in these countries allow individuals to make sense of less explicit rules. In countries like France and Slovenia, in contrast, the high or very high IDV reinforces the effect of high UA scores and indicates a strong preference for more precise and explicit norms. In sum, UA can be modified by the cultural requirements of stronger or weaker relations of mutual reliance, preference for group or individual goals, etc.

Finally, while there are other cultural dimensions that may affect the cultural expectations about legal predictability and the quality of laws, UA and IDV are on closer examination the most relevant ones among the palette of dimensions available from the studies and sources relied upon in this work.<sup>80</sup> The next section explores

<sup>79</sup> *Ibid* 190-191.

<sup>80</sup> Although the dimensions of Power Distance and Low-vs-High Context communication are linked to the issue of legality, Hofstede’s analysis makes clear that their connection is vague and remote and, thus, can be disregarded when studying legal certainty. In particular, differences in Power Distance are

their applicability to the specific substantive and institutional context of the ECtHR and its legal certainty doctrine.

### 3.4. UA and IDV in the ECtHR's case-law on legal certainty

As already noted, this article deals not with how laws should be worded in order to be better aligned with the cultural expectations of different European countries. Of course, it is a key aspiration of any democratic rule of law system to produce laws that can be potentially understood by every affected person. The ECtHR's case-law also points in this direction when referring to the need for professional legal advice not as a principle, but as a practical need that must be accepted for want of better solutions ('if need be').<sup>81</sup> That is, even if it is not always a reality that laws can be directly understood by citizens, this is at least the implicit ideal towards which a rule of law system should strive as far as possible.<sup>82</sup>

Moreover, cross-cultural knowledge may play an important role in orienting initiatives that aim to improve the wording of legislation. Yet, this article takes a different approach and focuses on how European cross-national norms can be applied in order to be better aligned with the different cultural understandings of diverse cultural groups in Europe. In this sense, several ideas can be advanced regarding the UA and IDV dimensions in relation to the ECtHR's case-law on legal certainty.

First, it is interesting to look at the ECtHR's general doctrine on legal certainty and the cultural preferences it seems to reveal. Broadly speaking, the ECtHR's doctrine is open-ended and flexible. In view of its goal to allow for the adaption of law-application to changing circumstances, the Court's doctrine can support different (cultural) outcomes depending on the context. Thus, the Court may accept solutions better aligned with high UA cultures.<sup>83</sup> But the strong emphasis on the prevention of excessive rigidity and the wide acceptance of textual vagueness, even in criminal law cases, suggest an in-built preference for solutions more compatible with low UA cultures.<sup>84</sup>

Given that the ECtHR does not include cross-cultural knowledge in its reasoning, potential alignments or misalignments between the Court's decisions and a country's or an applicant's broad cultural expectations can be seen as purely coincidental. Yet, in the case of legal predictability, cultural misalignments are more likely to occur, especially because most European countries are high or very high in UA and will probably

connected rather to how individuals relate generally to laws as expressions of political power and to expectations about law's content than to legislative styles, *Ibid* 58-62. As for differences in communication styles, these overlap with the IDV dimension and, thus, need no separate examination, *Ibid* 92-96, 190.

<sup>81</sup> The disclaimer 'if need be, with appropriate advice' is consistently inserted by the ECtHR in its legality tests since the 1970s, see e.g. *The Sunday Times v the United Kingdom (no. 1)* (n 38) para 49; and *Larissis and Others v Greece* (n 38) para 40.

<sup>82</sup> Even if for practical reasons (administrative, technical, economic, etc.), law is not always expected to be really read and understood directly by citizens, see e.g. Fuller (n 34) 50-51.

<sup>83</sup> See e.g. *Maestri v Italy* (n 37) paras 37-42.

<sup>84</sup> Although the present analysis is not based on a quantitative analysis, the vast majority of cases reviewed here would support this view.

expect less flexible foreseeability standards.<sup>85</sup> Misalignment with the general UA index of a given country means that the Court's inbuilt preference or tolerance for less detailed and explicit rights-limiting norms may be at odds in some cases with legitimate cultural expectations of the country where the norms have to be applied.<sup>86</sup> Such misalignments may be tempered sometimes by varying degrees of IDV, but this will always represent a coincidental result within the traditional legal methodological framework.<sup>87</sup>

Alternatively, however, the Court could easily rely on interdisciplinary knowledge to produce hypotheses about the optimal levels of foreseeability and legal precision that are better suited to the cultural groups it is dealing with in each case. Technically speaking, this interdisciplinary leap should not be especially complex in view of the Court's own flexible approach. Relying on its own doctrine, the Court is relatively autonomous to estimate what 'sufficient precision' means depending on what is 'reasonable in the circumstances' or, otherwise, by focusing on the needs and expectations of the addressees of the norms in question.

For instance, in *Maestri v Italy* the Court upheld a rather high standard of legal precision and declared the violation of Article 11 of the Convention by Italy in a case where the applicant, an Italian judge, claimed to be unable to foresee the sanction imposed upon him based on a normative regime contained in the Constitution, a statutory law, a Legislative Decree and two Directives of the National Council of the Judiciary.<sup>88</sup> Because of the professional status of the applicant and the traditional tolerance of the Court towards relatively imprecise laws, among other reasons, this judgment was received with harsh criticism, especially expressed by six judges of the ECtHR in two Dissenting Opinions.<sup>89</sup> The contextualization of this decision in an intercultural setting may have helped the Court's position seem more plausible and understandable as people in Italy tend to be in average relatively high in UA (75) and IDV (53), i.e., they tend in general to expect more precise types of laws –as the Court concluded.

In other words, when considering what is 'reasonable in the circumstances' of the case in order to define what is 'sufficient precision', the Court may easily refer to the role that cultural expectations could play in the event. The purpose of such

<sup>85</sup> Low or very low UA is more typical of the North and West of Europe, while high or very high UA is prevalent in the South and East of Europe. Yet, there are exceptions to these geographical groupings. In Hofstede's survey, for example, Slovakia scores relatively low in UA (51) and Belgium very high (94).

<sup>86</sup> See e.g. the critique by Ukrainian scholars in O Shcherbaniuk and T Bohdanevych, 'The Doctrine of Excessive Formalism in the Legal Theory and Practice of the European Court of Human Rights' (2024) *Frontiers in Law* 15.

<sup>87</sup> For instance, Croatia and Bosnia and Herzegovina score high or very high in UA (80 and 87 respectively), but they are low in IDV (42 and 40 respectively). Although their UA scores suggest a preference for more precise/explicit norms and less tolerance towards vagueness, their low levels of individualism (or relatively high levels of collectivism) would be compatible with the ECtHR's flexible solutions.

<sup>88</sup> See *Maestri v Italy* (n 37) paras 17-22, 30-42.

<sup>89</sup> *Maestri v Italy* (n 37) joint dissenting opinion of judges Bonello, Strážnická, Birsan, Jungwiert and Del Tufo; and dissenting opinion of judge Loucaides joined by judge Birsan.

reference would be to deepen the Court's (and the readers') understanding of the actions of the relevant actors in that situation. To that end, the UA and IDV dimensions can be relied upon as relevant knowledge to formulate hypotheses about the situation, that is, not as causal laws of social interaction that would determine and predict human behaviour. It is important to insist that the heuristic nature of the approach rejects any sort of determinism or stereotyping by excluding the hermeneutic exclusivity of the dimensions. In this sense, cultural considerations in the ECtHR's reasoning could never exclude other contextual and individual factors in the Court's evaluation, particularly in its proportionality assessment.<sup>90</sup>

Following the Court's own doctrine, the reasonable level of precision depends on open-ended criteria like the content of the norm, the field regulated, the number and status of the persons addressed and, more broadly, the circumstances of the case. Therefore, alongside cross-cultural factors, a number of other aspects needs to be weighed and balanced by the Court to reach a conclusion. The cultural dimensions of law are only one factor in the assessment of such complex issues, never the only or determinant element in the final decision.<sup>91</sup>

As a different example, in *Kokkinakis v Greece* the Court applied an extremely low standard of precision accepting as compatible with the principles of legality and legal certainty a complex constellation of vague legal provisions and a plethora of court cases that referred forth to vague notions and multiple factual situations.<sup>92</sup> According to this regime, the applicant and his wife were arrested and sentenced to four months of imprisonment and a fine of 10 thousand drachmas. The Court dismissed the arguments about legality on the grounds that the case-law was settled, published and accessible.<sup>93</sup> In this case, given Greece's very high UA (100) and high IDV (59) scores, the addition of intercultural knowledge to the ECtHR's assessment could have provided the Court with valuable information about general cultural expectations that point at a strong need for higher precision and clarity of restrictive norms than the relevant state norms allowed for. Being Mr. and Mrs. Kokkinakis's arguments about

<sup>90</sup> As to the inherent open-endedness involved in proportionality reasoning, see JJ Garcia Blesa, 'Neoliberal Rationality and the Rhetoric of Sacrifice in the Construction of Proportionality Discourse: A Case-Study from the European Court of Human Rights' (2024) *The International Journal of Human Rights* 969, and JJ Garcia Blesa, 'Proportionality Rhetoric and Neoliberal Rationality in the "Fundamental Social Rights" Adjudication of the Court of Justice of the European Union' (2023) *London Review of International Law* 159.

<sup>91</sup> Again, in line with the basic postulates of the approach proposed (see above), the purpose and intended effect of this operation is to improve cross-European judicial decision-making and enhance its social legitimacy by becoming more persuasive vis-à-vis broader audiences, not to achieve intellectual compulsion through demonstration—which is not available with regard to these matters.

<sup>92</sup> *Kokkinakis v Greece* (n 44) paras 13-20.

<sup>93</sup> *Ibid* paras 40-41.

the vagueness and lack of clarity of the applicable normative regime generally plausible, the information provided by the approach proposed could support a more protective thrust to the Court's judgments vis-à-vis religious freedom in Greece.<sup>94</sup>

A particularly complex type of case is that where restrictive legal norms are contested by foreign citizens or organizations.<sup>95</sup> In such cases, it may happen that both the foreign citizen's and the host country's cultural expectations are consistent with each other—that is, the precision level of the norm under scrutiny may be equally in accordance (or at odds) with the cultural expectations of both. But in other cases, the cultural expectations about normative foreseeability of a foreign citizen and their host country may differ significantly. Should the local culture prevail?<sup>96</sup>

Following again the Court's doctrine, a solution can only be reached on a case-by-case basis. Yet, several criteria may help the Court to articulate a structured (though necessarily flexible) response. First, the above-mentioned ethical principles of neutrality and 'do no harm' must be kept in mind. The use of intercultural knowledge in the context of law-application—particularly in human rights adjudication—should be applied to correct structural imbalances (i.e. power asymmetries between the parties) not to justify them. In the case of persons living in a foreign jurisdiction, it is the power of the majority that might need to be counterbalanced, not reinforced. This may be veiled by the notion of vulnerable groups in the ECtHR's case-law.<sup>97</sup> Other criteria, like the type of restrictive norm and the rights affected, may provide some guidance.

For instance, in *Dallas v United Kingdom* a Greek citizen living in the UK was called to serve as a juror in a criminal case and was eventually convicted for contempt of court due to an unauthorized internet search to obtain information about the

<sup>94</sup> *Ibid* para 38. Note that in this case the Court declared a breach of the Convention but did not condemn Greek law, something that religious minorities in Greece resent still today. See e.g. the complaint of Evangelical communities about how Greek law on proselytism 'is defined in very vague terms', at [worldlea.org](http://worldlea.org). See also the critique of Greek legal scholars about the insufficient precision of the Greek criminal law on proselytism, in KN Kyriazopoulos, 'Proselytization in Greece (Kokkinakis Judgment): Criminal Statute vs. "Nullum crimen nulla poena sine lege certa"' (2006) *Anuario de Derecho Eclesiástico del Estado* 357. See also Written observations submitted by the European Centre for Law and Justice to the European Court of Human Rights in the case of *Emmanouil Damavolitis v Greece* App no 44913/14 (ECtHR, decision of 22 October 2022) pp. 6 and 12; and the Partly dissenting opinion of Justice Repik in *Larissis and Others v Greece* (n 38) about the "chilling effect" of imprecise laws in this matter.

<sup>95</sup> This point is also crucial in judgments of the European Court of Justice, e.g. case C-341/05 *Laval un Partneri*, ECLI:EU:C:2007:809.

<sup>96</sup> Note that migrant persons are distinguished here from local minorities for illustrative purposes due to the more immediate availability of country scores for foreign nationals and the need for further research on the specific cultural dimensions of certain minorities (e.g. Roma, Sinti, etc.). The approach to local minorities, however, mirrors the heuristic approach to migrant persons in this case. That is, the cultural preferences of different types of local minorities (religious, ethnic, etc.) may or may not differ from those of the majority of the societies they live in. In the *Kokkinakis* case, for example, the applicants belonged to a religious minority, but their expectations regarding UA and IDV, as expressed in their complaint, seemed to align with those of the religious majority. Thus, the specific features of each case must be carefully assessed. For further discussion on the issue of minorities, see sections 4 and 5 below.

<sup>97</sup> L Peroni and A Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' (2013) 11 *I•CON* 1056–1085.

criminal case outside the evidence allowed by the judge.<sup>98</sup> However, there seemed to be legitimate doubts as to whether Mrs Dallas had actually understood not only the textuality of the judge's oral directions about the use of internet, but also the legal status and consequences of such directions.<sup>99</sup> In this case, the comparison of UA scores of both Greece (100 –the highest in Europe) and the UK (35 –one of the lowest) could explain, at least in part, Mrs. Dallas's actions and the way she tried to justify them before the local authorities as related to different cultural expectations about legal form and precision. This could have provided the ECtHR (and perhaps British courts as well) with a more nuanced understanding of the facts of the case.

The questions discussed, however, point at a number of controversial aspects of the approach advanced in this paper. The following canvasses these issues before offering some final thoughts in the last section.

#### **4. Main theoretical and practical qualifications about the intercultural approach to law**

As mentioned in the introduction, this paper does not only aim at formulating an approach to the integration of cultural knowledge into European law-application; it also intends to keep an open and critical mind towards the improvement of this approach by explicitly pointing at avenues for further research.

To this end, the following expands on three questions that have been partially dealt with above. First, the assessment of a country's culture may stiffen assumptions about the uniform and static nature of such culture, thus risking the suppression of the internal cultural diversity and dinamism existing in every country. Second, there are certain limitations to the concept of cultural dimensions that condition their use as a tool for law-application and must therefore be borne in mind. And finally, there is an apparent tension between the resort to cross-cultural knowledge in law-application and the ideals of generality of laws, formal equality before the law and non-discrimination that inform liberal democratic rule of law theory. The following addresses these points in order to clarify the potential and the boundaries of the propounded approach.

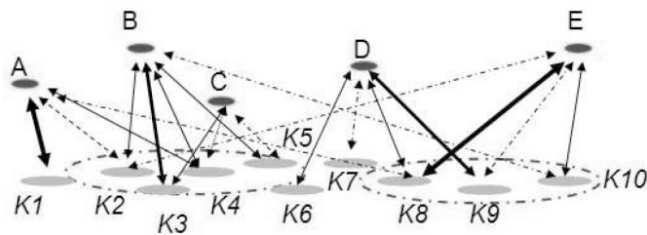
##### **4.1. The importance of adopting a nuanced cultural model: the 'fuzziness' of culture and the use of macro-level cultural knowledge**

As pointed out above, there are different and even conflicting ways of understanding culture. Thus, the attempt to identify or establish one 'correct', all-encompassing, and definitive notion of culture for all possible intents and purposes is pointless. In this

<sup>98</sup> *Dallas v United Kingdom* App no 38395/12 (ECtHR, 11 February 2016) paras 7-43.

<sup>99</sup> Especially when even the UK's Law Commission report on Contempt of Court had found that, given that 'there was no specific form of words that judges had to use' and that, '[a]s a consequence, the scope of the criminal contempt depended on the exact wording that each judge adopted in warning the jurors at the start of the trial', the Law Commission 'doubted whether, from the point of view of a layperson, it was obvious what "a contempt" was or what the implications of this were'. *Ibid* para 55.

sense, traditional theories of culture tend to assume a relatively high degree of cohesion within cultural systems.<sup>100</sup> Usually focusing on national cultures, they simplify and reduce to nationality the number of cultural systems to which individuals actually belong. Against this, contemporary theories of culture try to accommodate the ‘multi-collective’ relations of individuals.<sup>101</sup> Especially interesting in this regard is Bolten’s notion of ‘fuzzy culture’.<sup>102</sup> This view of culture points at how that which we define as one cultural unit actually has rather heterogeneous contours and contains features which are also essential to other (supposedly disparate) cultures. The internal incoherence of cultural units mirrors the diversity of collectives to which individuals belong to and the varying degrees of intensity with which such belonging is experienced by each of them. The resulting model can be represented in visual terms as follows (fig.3).



**Figure 3.** The ‘fuzzy’ culture model (Bolten (2011), abb.1)

Intercultural actors (A, B, C, ...) participate simultaneously in different collectives or communities (K1, K2, ...) with diverse degrees of commitment (arrows). Due to the multi-collective relations of the actors, these collectives themselves are interconnected and permeable and so are their cultural dynamics. In Bolten’s example, K8 is characterized by a higher degree of involvement of actor E than D. Thus, D probably has a stronger influence on the cultural dynamic of the collective K8 than E, creating also a stronger interconnection between K8 and the other cultures D participates in (K2, K9, K10). Multiplied by the participation of many other actors, such impulses generate new dynamics that can enter in turn the cultural dynamic of other collectives.<sup>103</sup>

This dynamic quality of culture, which can also increase or decrease the cultural homogeneity within or among different collectives, *does not exclude the existence of cultural cohesion; instead, it encompasses it as part of the same model.* For instance, this could be expressed in the experience of two people, A and B, who share a high degree of commitment to the same professional culture, while coming from

<sup>100</sup> See generally Rathje (n 56) 83-84; J Bolten, ‘Unschärfe und Mehrwertigkeit: “Interkulturelle Kompetenz” vor dem Hintergrund eines offenen Kulturbegriffs’ in U Hoessler and W Dreyer (eds), *Perspektiven interkultureller Kompetenz* (Vandenhoeck 2011) 55-56.

<sup>101</sup> The question is also addressed as the ‘level of analysis issue’ or the different layers of culture in intercultural inquiry. See Hofstede and Hofstede (n 62) 5, 10-11, 82.

<sup>102</sup> Bolten (n 100) 57.

<sup>103</sup> *Ibid* 58.

extremely different religious backgrounds. In a professional context, both might experience a sense of belonging to the same community, sharing the same conventions and frames of plausibility.

If A, however, is invited to participate in a ritual of B's religious community with which A is not acquainted, the initial relation of 'culturality', i.e., of sharing the same professional culture, will move into the realm of 'interculturality'. On the other hand, due to other personal factors and their belonging to other collectives, B's commitment to their religious community is also variable, which causes A and B's relation to be fuzzy vis-à-vis religion without denying the sharp cultural difference between A's and B's religious groups. Thus, cultural collectives' cross-pollination makes the cultural element of human relations appear as *simultaneously homogenous and heterogeneous* to the observer depending on how closely we want to examine relations and collectives.<sup>104</sup> This idea is echoed by the shift in cultural psychology that acknowledges that culture extends beyond nationality and ethnicity, with other forms of culture such as social class, religion, and region also having an influence on how we feel, think, and act.<sup>105</sup>

In sum, from the perspective of the fuzzy culture model, both culture and interculturality are relational and relative. They do not allow for totalizing, closed conceptions, but should rather be apprehended as a process where –depending on the context, the issues, and the actors involved– communication can appear as intracultural and intercultural even at the same time (in the example above, B can perceive the professional relation with A as cultural, while A sees it as intercultural) and transform into more or less cohesive relations according to actors' perceptions, objectives and decisions.

The 'fuzzy culture' model, thus, provides a basis both for capturing the complexity of cultural systems and using macro-level knowledge in a nuanced and meaningful manner. This call for caution emphasizes the need for permanent updating and contextualization of the cross-cultural knowledge applied.<sup>106</sup> This model or similar models are, in sum, a necessary component within the heuristic approach proposed as they both offer a broader and flexible analytical framework and help lawyers to keep in mind the intrinsic limitations of the approach.

#### 4.2. Qualifications about the use of cultural dimensions

The notion and the use of cultural dimensions present similar risks that need to be discussed and addressed specifically. First, the underlying assumption that another culture can be grasped like a grammar by just identifying and applying some abstract

<sup>104</sup> *Ibid* 59-60.

<sup>105</sup> Cohen and Varnum (n 10) 5-9.

<sup>106</sup> See e.g. HS Park, TR Levine, R Weber, HE Lee, LI Terra, IC Botero, E Bessarabova, X Guan, SM Shearman, MS Wilson, 'Individual and Cultural Variations in Direct Communication Style' (2012) *International Journal of Intercultural Relations* 179.

categories to human interactions has proven to be only partially successful in practice. This is due to a variety of reasons. Especially, as mentioned above, cultural dimensions usually (but not always) reflect national cultures alone and are inspired by an either/or logic (either A or B, but not both) that implies strong and simplified value ascriptions.<sup>107</sup> Therefore, the rigid application of these categories entails a clear risk of generalization, simplification, and stereotyping.

The use of cultural dimensions can be helpful only if we remain critical of their limitations and prevent their rigid learning and application by legal decision-makers and educators. As explained above, for this purpose, the dimensions must be seen and used as heuristic instruments in line with Weber's ideal or pure type constructions whose purpose is not to reduce reality to laws, but to reach a deeper understanding of reality's unique and individual manifestations.<sup>108</sup> In this sense, cultural dimensions are neither empirically derived laws of social reality nor normative goals that intercultural actors should strive to achieve, but simply a necessary and rather imperfect benchmark to appreciate the particular and the idiosyncratic elements of reality.

So conceived, cultural dimensions are just sketches that try to construe a meaningful image of some aspects of reality. And, precisely due to their being ideal or pure constructions, the dimensions must consist of sharp distinctions because they must function as relatively clear benchmarks against which we can 'measure' and describe real occurrences with a view to getting a better grasp of the particular – always in merely approximate terms.<sup>109</sup> Since cultures are systems of meaning in a permanent process of change and adaption to shifting circumstances, we can say that people are conditioned by culture, but that they also remake culture every day. Therefore, we must also remain aware that, as cultures are in permanent transformation, the map of cultural values that the dimensions provide changes constantly as well.<sup>110</sup>

In addition, to make up for the cultural dimensions' excessive focus on national cultures, their application requires us first to explore and always bear in mind the different and fuzzy layers of culture that intervene in real cultural interactions, and use the dimensions merely as hypotheses that aid us in understanding some cultural grounds of individual behaviour, the meaning of which, however, is only approximately determinable.<sup>111</sup> In some sense, cultural dimensions seem to contradict the 'both/and' fuzzy logic (both A and B are simultaneously possible) underpinning the notion of fuzzy culture described above.<sup>112</sup> Such contradiction, however, is merely apparent as the fuzzy culture model concedes that binary distinctions may be possible in some contexts, i.e., both either/or and both/and logics are simultaneously possible.<sup>113</sup>

<sup>107</sup> Tuchinsky (n 58) 75-76.

<sup>108</sup> Dreyer (n 59) 90-91.

<sup>109</sup> *Ibid* 92-93.

<sup>110</sup> See e.g. the timeline of changes in the Inglehart-Welzel Cultural Map in the WVS.

<sup>111</sup> Tuchinsky (n 58) 76.

<sup>112</sup> Bolten (n 100) 56-57.

<sup>113</sup> *Ibid* 59-60.

In sum, within the approach proposed, cultural dimensions do not replace the necessary observation, curiosity, and respect for the individual case. The purpose of using the dimensions is to assist us in approaching the cultural groups and interactions we are actually dealing with, rather than ignoring or suppressing their specific features by boxing them in abstract categories. Ultimately, the successful application of cultural dimensions as an analytical tool can be measured only by how useful they are to us in understanding and respecting concrete and real persons so as to render transnational legal work more acceptable and legitimate for them.

#### 4.3. The question of the generality of norms and non-discrimination

As is well known, liberal democratic rule of law theory requires respect for the principles of generality of laws, equality before the law and non-discrimination.<sup>114</sup> The question may be raised of whether the approach outlined here could undermine such principles. This possibility, however, should be dismissed for several reasons.

##### 4.3.1. *The question of equality before the law and non-discrimination*

First, the notions of equality before the law and non-discrimination have multiple and evolving facets and manifestations in the ECtHR's case-law which link with the approach advanced here in different ways. Generally, the very idea of non-discrimination does not preclude non-arbitrary, differentiated treatment.<sup>115</sup> Thus, there is a general acceptance across all European countries and institutions of differentiated treatment on different grounds (also for ethnic minorities).<sup>116</sup> In this sense, the ECtHR has consistently ruled that differences in treatment (even in 'relevantly similar situations') can be lawful if they have a reasonable justification or legitimate aim and the measures adopted are proportionate to that end.<sup>117</sup> Moreover, the Court has repeatedly stated the view that '[t]he right not to be discriminated against in the enjoyment of the rights guaranteed under the convention is also violated when states without an objective and reasonable justification fail to treat differently persons whose situations are significantly different'.<sup>118</sup> That is, there is a positive obligation to take action, especially in relation to ethnic minorities.<sup>119</sup>

<sup>114</sup> E.g. Fuller (n 34) 46-49, 153; Raz (n 34) 215-216; Tamanaha (n 34) 94, 119.

<sup>115</sup> Raz (n 34) 216; Tamanaha (n 34) 94.

<sup>116</sup> C McCrudden and S Prechal, *The Concepts of Equality and Non-Discrimination in Europe: A practical approach* (European Commission Directorate-General for Employment, Social Affairs and Equal Opportunities 2009) 13, 30-48.

<sup>117</sup> See e.g. *Burden v the United Kingdom* [GC] App no 13378/05 (ECtHR, 29 April 2008) para 60; and *Guberina v Croatia* App no 23682/13 (ECtHR, 22 March 2016) para 69.

<sup>118</sup> *Thlimmenos v Greece* [GC] App no 34369/97 (ECtHR, 6 April 2000) para 44. See also *Hoogendijk v The Netherlands* App no 58641/00 (ECtHR, 6 January 2005) para 1 (pp 21-22); *Stec v United Kingdom* [GC] Apps nos 65731/01 and 65900/01 (ECtHR, 12 April 2006) para 51.

<sup>119</sup> *Chapman v United Kingdom* App no 27238/95 (ECtHR, 18 January 2001) para 96; *D.H. and Others v the Czech Republic* [GC] App no 57325/00 (ECtHR, 13 November 2007) paras 175, 181.

The above shows that the cultural differentiation that the intercultural approach advanced in this paper would introduce is in no way alien to the European legal system in general and the Court's interpretation of the Convention in particular. And more importantly, as critics show, the Court has neither been able to extricate itself from nor deal successfully with the relevance of cultural differences in the assessment of Convention breaches in the past –in part due to the lack of a clear and structured approach to the issue of cultural differences.<sup>120</sup>

In this context, the intercultural approach proposed would bring relevant information into the Court's assessment of legitimate socio-cultural differences that justify the differentiated application of the Convention, not only due to respect for European cultural diversity and the prevention of (judicial) ethnocentrism, but also to avoid individual injustices in the protection of human rights. This encompasses, for instance, the case of citizens living in their home countries whose cultural orientations are significantly different from those of other countries (or from the Court's) (in *Kokkinakis*, e.g. this would have prevented the application of cultural expectations about legal foreseeability to Greek citizens that are more typical of North-Western Europe); cultural minorities (e.g. Roma, Sinti, etc.); or migrant persons living in a foreign country (e.g., in *Dallas* or, more importantly, for vulnerable migrant persons).<sup>121</sup>

In any of these cases, however, according to the principle of neutrality and 'do no harm' in the use of intercultural knowledge in law-application, the approach could never work against the potential victims of a human rights violation stemming from the poor quality of the applicable law, but function only as a corrector of the negative effects of ethnocentrism in law-application.

#### 4.3.2. *The question of the generality of legal norms*

Second, insofar as the approach proposed here is limited to the judicial application of legal norms, there can be no conflict between the approach and the traditional understanding of the principle of generality of legal norms. That is, according to current mainstream liberal legal theory in Continental Europe, judicial law-making

<sup>120</sup> See e.g. L Peroni, 'Religion and Culture in the Discourse of the European Court of Human Rights: The Risks of Stereotyping and Naturalising' (2014) 10 *International Journal of Law in Context* 195-221 (criticizing the Court's essentialism regarding Roma, Sikhs and Muslims). See also J Ringelheim, 'Chapman Redux: the European Court of Human Rights and Roma Traditional Lifestyle' in E Brems (ed), *Diversity and European Human Rights: Rewriting Judgments of the ECHR* (Cambridge University Press 2012) 426-444; EJ Ruiz Vieytes, 'Minority Marriage and Discrimination: Redrafting *Muñoz Díaz v. Spain*' in *Ibid* 401-425; and L Peroni, 'Erasing Q, W and X, Erasing Cultural Differences' in *Ibid* 445-469.

<sup>121</sup> In this sense, further research on the cultural dimensions of minority groups seems necessary to improve the approach, particularly in the case of certain minorities that display more obvious cultural (not political) differences vis-à-vis the social majority of the states they live in. Although not based on the study of cultural dimensions, other initiatives also point at the need for a better understanding of cultural differences in such cases, see e.g. the European Center for Minority Issues, at [www.ecmi.de](http://www.ecmi.de).

does not exist and judicial doctrine does not create law.<sup>122</sup> From this perspective, courts only produce discrete decisions that lack generality and, therefore, are mere expressions of the legitimate discretionality that is inherent in any legal decision-making process.<sup>123</sup> Judicial decisions are not expected to be general but specific.

Surely, there is an important jurisprudential strand within mainstream legal scholarship and European institutional practice that concedes a measure of judicial law-making.<sup>124</sup> However, according to the critical indeterminacy thesis that underpins this work, judicial law-making is no more determinate than statutory norms. That is, judicial doctrine may be intended to be general as a complement to statutory law, but, in its application to new contexts through the analogization of cases, both the rules it contains and the facts to which it could potentially apply are reconstrued in an open-ended process of argumentation that can yield different outcomes depending on the conceptual and factual frames adopted by the interpreter.<sup>125</sup>

Against this backdrop, this paper's claim that the ECtHR (and other European courts) should consider specific contextual information about European cultural differences is not only in line with the Court's own jurisprudential views, but also with the resulting need for more social legitimacy in supranational adjudication –e.g. through enhanced respect towards European cultural diversity. Moreover, the cross-disciplinary exchange suggested here can add more predictability to the application of the principle in judicial practice for it takes specific and stable social data into account rather than simply reflect the changing cultural preferences of a small judicial community that may or may not coincide with the cultural expectations of the communities to which the ECHR applies from Ireland to Russia.<sup>126</sup>

## 5. Final remarks

By focusing on the relationship between different cultural expectations about (un)certainty and the ECtHR's standards of normative precision and predictability, the previous sections explore the jurisprudential and practical viability of an interdisciplinary exchange with a specific body of cross-cultural knowledge, i.e., cultural

<sup>122</sup> Aside from the self-styled pragmatism of mainstream arguments about the 'unavoidable creative element of adjudication', the denial of judicial law-making—especially by judges themselves—is a defining characteristic of liberal legalism. See e.g. former ECtHR judge Nußberger, in A Nußberger, 'Justiz – die "sensible Gewalt"' (2020) *NJW* 3294, 3296. See also Kennedy (n 14) 192-194.

<sup>123</sup> See e.g. MacCormick (n 16) 170.

<sup>124</sup> This is the case of the ECtHR itself. See e.g. the ECtHR's doctrine on Art 7 ECHR cited above. Within this strand of legal thought, however, the acknowledgement that European courts make law is usually coupled with a call for the blank acceptance of their policies. See e.g. A Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press 2012) 9-11.

<sup>125</sup> The open-endedness of judicial doctrine has been extensively described in American critical jurisprudence, see e.g. J Jaff, 'Frame Shifting: An Empowering Methodology for Teaching and Learning Legal Reasoning' (1986) *Journal of Legal Education* 249.

<sup>126</sup> As pointed out above, despite the high UA scores of most European countries, there seems to be a broad tendency towards very low UA in most of the cases analysed here.

dimensions and the model of ‘fuzzy culture’. This final section expands on the advisability (or necessity) as well as the scalability (both substantive and geographic) of this approach and suggests further research steps in this direction.

First, provided that legal work takes notice of and acts upon the limitations discussed in section 4, the constructive potential of the approach proposed seems more likely to enrich the evaluation of the social contexts in which different fundamental legal principles and concepts of European law are applied than to undermine them. Clearly, the adaptation of the norms applied by international courts to the different contexts in which they operate is of paramount importance, particularly when vague legal notions need to be applied to more than 500 million people with considerably different cultural expectations.

But more importantly, in view of certain psychological and political aspects of the question, the interdisciplinary approach sketched here seems not merely appropriate, but also indispensable to safeguard the legitimacy of transnational law-application – and of the international rule of law. As cultural psychology research on culturally embedded biases shows, cultural bias is inbuilt in every human being.<sup>127</sup> That is, there is no culturally ‘unbiased’ position we (including European courts) can speak from.

Therefore, in the context of law-application, the refusal to consider the intercultural dimension of law simply opens the door to (conscious or unconscious) home-spun and potentially dangerous ideas about such a complex and delicate question. At a time when ever more numerous far-right governments in Europe are striving to seize and re-signify the topic of cultural difference for discriminatory, xenophobic and racist purposes, it is of paramount importance that this issue is addressed on the basis of verified socio-cultural research and for the purpose of safeguarding pluralism and human dignity.

Furthermore, in relation to the European integration (through law) process, the question of whether we prefer to apply European law in a culture-specific way or not becomes obsolete. From the methodological perspective advanced in this paper, mutually respectful integration between European peoples and countries can only stem from the awareness of our differences and the conscious negotiation of common strategies to accommodate such differences, never from false assumptions of homogeneity or silent cultural impositions from the economic/political center(s) on the periphery.

Finally, yet importantly, even if this piece concentrates on the study of cultural expectations regarding legal certainty, predictability, normative precision, etc. in European law-application, the approach presented and the general conclusions reached

<sup>127</sup> See e.g. MEW Varnum, I Grossmann, S Kitayama, RE Nisbett, ‘The Origin of Cultural Differences in Cognition: The Social Orientation Hypothesis’ (2010) *Current Directions in Psychological Science* 9; C Ma-Kellams, ‘Cultural Variation and Similarities in Cognitive Thinking Styles Versus Judgment Biases: A Review of Environmental Factors and Evolutionary Forces’ (2020) *Review of General Psychology* 238; D Moser, P Steiglechner, A Schlueter, ‘Facing Global Environmental Change: The Role of Culturally Embedded Cognitive Biases’ (2022) *Environmental Development* 100735.

here can be easily extended to other fundamental legal norms and concepts of European and international law. For this purpose, cultural dimensions other than those analyzed above also need to be explored so as to tap into existing intercultural knowledge about other aspects of cultural life. Alternatively, new cultural dimensions need to be developed in collaboration with the relevant cross-cultural research fields in order to tailor new intercultural knowledge to other legal areas. Further research in this sense shall concentrate on more specific ways of dealing with the limitations mentioned above and the development of a basic framework or tool-box of cultural dimensions that touch upon the most vital intersections between European law and cultural diversity across and within national borders.