Nationalism and private law in Europe
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Introduction

The discipline usually referred to as law, which in many countries even bears the demanding title of ‘science’, is particularly ancient, renowned and widespread, nonetheless, even in an increasingly globalising world, it still remains desolately linked to a given territorial unit, quite often a small one on the world map; such territorial unit is mainly the nation.\(^1\) This book describes the relation between private law and the concept of the nation, portraying the scenario in which the actual situation characterised by a coincidence of private law and nation originated and describing how and in what measure this picture is undergoing a complicated modification specifically in the European context, in which plans for legal Europeanisation are confronted with instances of resistance from different actors within the nation states. The narration of this story specifically focuses on one fundamental protagonist in this development: the ideology of nationalism.

It was indeed the influence of nationalism – the political principle sustaining the necessity of a coincidence of nation and state\(^2\) – that led to the destruction of something similar to a legal tower of Babel and hence the nationalisation of private law – the branch of the legal system governing the relations between citizens. In addition, it is exactly when the political strength of nationalism was the weakest that important steps were taken in the direction of a denationalisation and, in the specific context of Europe, an Europeanisation of law. It has been said that the last centuries of the history of mankind would be incomprehensible without some knowledge of the idea of the nation\(^3\) and in this sense nationalism can also contribute to shedding light on the development and perhaps possible evolution of modern legal systems. But what is, therefore, the influence of nationalism on private law? What are more specifically the implications of this relation for the further development of a private law for Europe?

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Nationalism and Private Law in Europe

While the trends of globalisation and Europeanisation seem to alter the traditional configuration of national private law, a certain degree of ‘resistance to change’ to this modification can be detected. Also the observer not familiar with the technicalities of law can easily note a tension, which already became particularly manifest in the past with regard to various institutional issues. Indicative in this sense is the well-known history of the proposed European Constitution, as well as the never-ending arm-wrestling opposing the Court of Justice of the European Union on the one side and the constitutional and highest courts of several member states on the other. Away from the spotlight, nonetheless, the development of a European private law has also run into certain resistance. So for example, the young history of European private law has already experienced several abandoned proposals of directives and regulations that did not survive the incurable contrasts between national interests, rules issued at the European level that got ‘renationalised’ when member states implemented them, and even more clearly, many a legal scholar has expressed numerous arguments to halt the process of Europeanisation. The dimension of the nation continues to dominate any legal discourse and even the very debate on European private law, that should be transnational in nature, has become increasingly nationalised over the years, with several authors showing little propensity to refer to the work by foreign colleagues. At the same time, law students ‘are marked by a nationalism which is unknown in other sectors of higher education’, while legal scholars take an internal perspective that contributes to making legal studies inherently national. If all this were not sufficient, in a context characterised by a growing ‘competition’ between legal systems, national legislators find incentives for promoting the use and ‘exportation’ of their own national rules—every so often presented as part of a national tradition—while even the projects of Europeanisation occasionally seem to be more or less knowingly steered in a direction which is more in line with the national traditions of those states that managed to express the strongest influence on the decision making process. Resistance to Europeanisation may indeed take place not only opposing the influence of Europe on national law but also, and probably more effectively, exercising a higher influence on European law. A non-European observer, in this sense, has received the impression of a growing rhetoric of the specificities of the national legal tradition among the European countries, which can be promoted as playing up ‘the idea of a European legal tradition in order to constitute a transnational space within which, working as cosmopolitans, they have a chance of exercising more influence than would be possible in a world of dispersed national systems’. On the other hand, advocates of Europeanisation may easily give in to the temptation of accusing their opponents of merely being

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conservative and scared of anything new or plainly nationalistic, of course implying that such nationalism is an inherently negative intellectual attitude. The significance of considering nationalism as an element possibly relevant to the processes of the internationalisation of private law emerges at this point clearly. But precisely because of the sometimes dramatic weight of that ideology in history and contemporary societies, a particular care in the use of the term is required. If one intended as nationalist any argument aimed at opposing an attribution of competences at a non-national level, for sure, blaming Eurosceptic arguments of being nationalist would amount to a truism and academic disputes could turn into a series of more or less veiled reciprocal personal attacks, so that this book could come to an end now. It is on the contrary opportune to adopt a more objective standpoint, verifying the normative contents of the nationalist political principle and looking for its influences in the legal discourse.

To describe the development of private law in Europe and, in a way, the private law of Europe, this book looks at both the past and the present from a broader perspective. A perspective which looks at a positive legal order from the ‘outside’, instead of describing it from the ‘inside’ of its more or less coherent structure, means of course losing sight of the technical aspects and the mechanisms through which a jurisdiction works and that the lawyer is able to handle, but at the same time appears as the only capable means to make the political and ideological dimension of positive law come to the fore. The book therefore aims to contribute to a better understanding of the political dimension of private law and to introduce a new perspective in the ongoing debate on European private law. Given the multidisciplinary nature of this study, which aims to integrate the insights of political science as well as European private law within a coherent narration, some clarifications will be first indispensable. It is necessary to set the scene addressing in what sense nationalism can still represent a significant ideology capable of influencing the institutional development of Europe and, therewith, the evolution of a private law for Europe. A few introductory remarks on the process of Europeanisation of private law also seem opportune in this place.

1. Nationalism

Although nationalism can be seen as a recent historical phenomenon, being a ‘doctrine invented in Europe at the beginning of the nineteenth century’, it has had a vast relevance in the evolution of political institutions in the past two centuries, contributing to forge the contemporary political consciousness and already undergoing several important transformations in that period. In general terms and provisionally, it is useful to distinguish different phases in the evolution of the phenomenon. During a first phase, from the eighteenth to the beginning of the twentieth century, nationalism was mainly a progressive movement aimed at the formation of independent and primarily democratic nation-states. Nationalism was in this period a liberal phenomenon, which could even coexist with the aspiration to a

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European unity, while the natural division of people among different nations was considered to be essential for maintaining international peace. Subsequently, once the aim to form nation-states was achieved in most European countries, the ideology took a conservative and occasionally aggressive connotation, inspired by the intention to exclusively promote the national interest and safeguard national homogeneity, often intended in ethnic terms. This shift very soon led to the bloody events of world conflicts. In light of those events, even today nationalism is mainly associated with chauvinism if not directly with fascism in the common language, though this reductive and inaccurate interpretation is normally rejected in particular by those who underline the liberal aspects of that ideology. The role played by the world conflicts – and in particular the Second World War – in the development of nationalism is however of pivotal importance as the world scenario has deeply changed afterwards.

1.1. From nationalism to supranationalism

Right after the end of the Second World War, the awareness of the dangers inherent to nationalist ideology considerably increased. In order to reduce the likelihood of a reoccurrence of the disasters particularly associated with this war, a limitation of the omnipotence of the nation state was identified as a possible solution. Already from a Hegelian perspective, war appears as the only way – though a particularly painful one – to settle conflicts between states when every attempt to reach an agreement has failed in a scenario characterised by the inefficiency of international sanctions; consequently, the edification of an institutional scenario in which states are legally obliged to negotiate instead of resort to violence should chase away the eventuality of a war.

It is against this background that the United Nations was created and in Europe six states initiated a whirling integration process, while the new constitutions of several European states that had just experienced the horrors of war explicitly accepted that under strict conditions national sovereignty could be limited in favour of international organisations. In a strict positivistic perspective, these provisions did not signify the end of the idea of state sovereignty – as the limitation of powers is only possible if the state itself agrees to it – but in a broader sense they marked a considerable switch from the traditional Bodinian view of a sovereign who cannot even tie his own hands. Even philosophers of law now dismantled the dogma of the omnipotence of the state by downplaying the importance of the notion of independence and sovereignty, a political formula unable to grasp the complexity of an international order where every state depends upon others for numerous factual reasons. In more recent years, the possibility for some international institutions to adopt a measure on the basis of a mere majority of votes instead of the unanimity dealt the classical conception of sovereignty another blow, so that in the European

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10 The link between nationalism and Europeanism will be deepened in the fourth chapter.
11 T Schieder, Staatsensystem als Vormacht der Welt. 1848-1918 (Frankfurt am Main: Propyläen, 1977) at 81.
12 GWF Hegel, Elements of the Philosophy of Right, edited by A Wood and HB. Nisbet (Cambridge: Cambridge University Press, 1991) at 368.
context, member states in the end seem to share a ‘pooled sovereignty’. The realist conception of international relations lost significance in favour of a new functionalist approach that underlined the growing interdependence between states – as a positive condition to reduce the risk of military conflicts – as well as the emergence of the civil society as a distinct actor in the international arena beside the states. The revolutionary capacity of the European institutions to adopt acts that directly bind the citizens is evidence of such a trend. A theoretical cosmopolitanism and a practical internationalism seemed to have finally cured the world of its ‘infantile sickness’, as Albert Einstein famously characterised nationalism.

But this is a too optimistic and sweetened narration. Yet, today, while the institutional architecture of supranational organisations starts to show its limits, nationalism seems to have made its spectacular come back in the international arena.

1.2. The persistence of nationalism

Paradoxically, although nationalism acquired a bad name after 1945, it became at the same time the dominant political attitude that the ‘whole of mankind has accepted’. The most evident clue of such a return to nationalism is provided by a simple empirical datum: although the imminence of ‘the end of the nation state’ has become an abused leitmotif in the field of political science and political discourse, the number of nation states in the world has increased instead of diminished in the second half of the twentieth century. Particularly important in this perspective are the events linked to the cold war.

The collapse of the Soviet Union, one of the great ideological and military poles of the world, determined the dissolution of one of the constrictions on an international world order whose balances had been kept frozen for years during the cold war. Before the fall of the Soviet Union, the contrast between the two superpowers made it, on the one hand, hard for nationalist groups to claim political independence without altering the geo-political balances and without their claims being absorbed and exploited, militarily repressed or culturally denied by one of the superpowers; on the other hand, the contrast between a liberal West and a socialist East divided the world on the basis of a political criterion, overshadowing other possible distinctions not of an ideological nature and to which nationalist movements normally refer in order to build a collective identity. As soon as one of those blocks collapsed, independence movements could raise their voices. The disbanding of the Soviet Union indeed represented not only the decline of an ideological model but also

14 RO Keohane, ‘Ironies of Sovereignty: The European Union and the United States’ in JHH Weiler, I Begg and J Peterson (ed), Integration in an Expanding European Union. Reassessing the Fundamentals (Oxford: Blackwell, 2003) at 312: ‘Sovereignty is pooled, in the sense that, in many areas, states’ legal authority over internal and external affairs is transferred to the Community as a whole, authorizing action through procedures not involving state vetoes.’


18 As retrospective introduction to a paper presented at a conference held in Bulgaria in September 1970, W Connor, Ethnonationalism. The Quest for Understanding (Princeton: Princeton University Press, 1994) at 28 recalls that ‘[e]ven my very few, bland references to growing ethnic antagonisms within the Soviet Union were vehemently criticized’ by the many academicians from socialist countries who were present.
the end of a typically multi-national state, now replaced by an outburst of national and regional claims. The clearest example of these dynamics is nonetheless the gory disintegration of Yugoslavia, whose history should always be kept in mind as it warns against the risks and the costs that nationalism can demand for passing from theory to practice. Aside from those macroscopic examples – together with the less dramatic case of the split of Czechoslovakia – Europe is still crossed by old and new movements which can be considered nationalist and that normally prefer to claim a higher degree of autonomy instead of the more drastic solution of independence. In this context, the nation state appears once again as the most appreciated system of community organisation.

In a dramatically changed world scenario, even the international-oriented interpretation of national constitutions is criticised and, in order to solve the contrast between security and freedom giving more attention to the former, some claim that even constitutional rights have a merely domestic projection, so that the nation state is bounded by its constitution only in its internal relations with its own citizens but not in the international relations. At the same time, from an external perspective, American commentators have exposed the alleged rhetorical character of European references to internationalism, critically pointing out that ‘Europeans obey international law when it advances their interests and discard it when it does not’.

Already in the period of its foundation, the European Union was proceeding toward a federal form in its legal perspective while in the political realm it strayed progressively from that institutional model. On a closer look, sovereignty has not been given up but merely and partially transferred to a different level where it continues to be exercised by the nation-state in accordance with other fellow member states on the basis of a voluntary act. Thus the notion of pooled sovereignty ‘seems to miss important features of the EU as a multi-level system of governance, namely that sovereignty resides at various levels including the supranational level’, and indeed ‘it makes a difference whether states transfer legal authority to the supranational level, and thus accept the jurisdiction of an external authority in their internal order, or whether they jointly exercise sovereignty, including accepting that they may be overruled by majority decisions’. In the end, nation-states remain the ‘masters of the treaties’ even entitled to step out of those treaties if they wanted to.

Nevertheless, the exercise of sovereignty at the European level is much more complicated than it is at the national one, since a compromise is required between different members that can have diverging national interests. This situation brings about a tension between the European Union and nation-states, which still remain

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19 A Melucci and M Diani, Nazioni senza stato. I movimenti etnico-nazionali in Occidente (Milano: Feltrinelli, 1992) at 120-121.
24 German Constitutional Court, Maastricht [1993] BVerfGE 89, 155.
25 The Treaty of Lisbon, just like the proposed European Constitution, explicitly contains an ‘exit clause’, probably adopted in order to break some resistances coming from the nation-states, although a right to abandon the Union was already granted to member states.
jealousy anchored to their national competences.\textsuperscript{26} In a broader perspective, such tension could even be linked to the more general contrast between the trends of globalisation on the one hand and the growing national consciousness of the modern communities that, put into contact with different economic and social organisational models, rediscover (or re-invent) their own institutions, values and traditions. These dynamics inexorably become patent in times of economic and consequently political crisis. The cracks in the European building – often deliberately created by those who feared the making of a building much more imposing than that of the nation-states – become more evident, leaving margin for new forms of interstate cooperation to develop outside the supranational institutions in a worrying lack of shared rules.

Against this background and more than sixty years after the presumed historical defeat of nationalism, these considerations led us to reconsider that ideology in order to better understand the dynamics of the process of Europeanisation; indeed the European Union does not appear as a simple and reassuring expression of post-nationalism, but ‘[r]ather it is a context, or theatre for another form of nationalism, or, advancing national interests by other means, filtered through and enacted by political, diplomatic and bureaucratic representatives of national populations in multilateral arrangements’.\textsuperscript{27}

2. Private law in Europe

The establishment of the European Communities first and the European Union later has been of pivotal importance for the development of private law: as a matter of fact, some of the most important innovations in the legal systems of the European countries have been adopted under European obligations. In this sense, although the current state of private law remains primarily national, there are trends that point to a gradual alteration of this situation in Europe. A considerable and highly important corpus of private law rules has been created at a non-national level and the European institutions continue elaborating new projects for legal harmonisation. Over the years, a long series of regulations and directives in the field of private law have been enacted with the declared aim of removing the major obstacles to the establishment of a well-functioning common market.\textsuperscript{28} This corpus of rules – usually referred to by the French expression \textit{acquis communautaire} – has contributed to the edification of a branch of the legal order that was new for numerous member states, Consumer law, and the establishment of a new field of investigation in academia, European private law.

\textsuperscript{28} Here, it is convenient to mention only a few of them, the most important directives. These include the Doorstep Selling Directive (85/577/EC), the Distance Selling Directive (97/7/EC) and the related Distance Marketing of Financial Services (2002/65/EC), the fundamental Unfair Contract Terms Directive (93/13/EEC), the Package Travel Directive (90/314/EEC), the Timeshare Directive (94/47/EC), the Sale of Consumer Goods and Associated Guarantees Directive (99/44/EC), the Consumer Credit Directive (87/102/EEC, repealed by the new 2008/48/EC).


2.1. The acquis communautaire

Despite the heterogeneous nature of the topics regulated, European directives have certain common characteristics, first and foremost their ‘pointillistic’ nature. Since the regulatory competences of the Union are limited to a number of areas as to which powers have been conferred by the member states, directives only address some specific issues which can represent a relevant hindrance – as later specified by the Court of Justice – for the proper functioning of the common market, renouncing to a systematically coherent regulation. Directives are therefore characterised by an economic functionalist approach: their fundamental aim is the establishment of the common market and any other objective is subordinate to the former. The policy aim of consumer protection, for instance, has long been considered only as an instrument necessary to the market, so that the consumer has been chiefly intended just as an economic actor. Over the years through a series of new treaties, the European communities have moved toward a stricter political unit which has resulted in the extension of their competence, but despite these institutional developments the approach of the directives has remained chiefly functionalist, which has once again led to fierce criticism also from those more interested in the consideration of further dimensions in contract law such as social justice.

The imprecise and sketchy nature of the first directives had also led to several interpretative problems, while their spare content, interwoven with the peculiarities of the single member states, resulted in new diversities totally in contrast with the original aim of bringing about convergence in those areas. The nature of the directives has therefore undergone a gradual but evident change over the years. Both the number and the length have notably increased ever since the first directives were published in the eighties, while the later examples, adopted under a majority rule, have become more and more detailed and accurate. The consequence of this development is that the leeway of member states – that are still requested to implement the directive ‘translating’ it into their legal orders – is diminished.

2.2. Plans for further Europeanisation

Several solutions have been envisaged by the European institutions to foster an economic integration which at times appears to be jeopardised by legal diversity as well as to cope with the technical problems linked to the pointillist approach to harmonisation. Intuitively, the more logical solution in this sense would be to move from a simple harmonisation to a more radical unification of private law in Europe, perhaps by means of a mandatory instrument like a code. This solution was first proposed by the European Parliament in two resolutions of 1989 and 1994. The European Commission had initially been at least willing to discuss this possibility. In

30 ECJ Tobacco (C-380/03)
order to investigate the needs and opinions of stakeholders, the European Commission started up a series of consultations to determine the best way to cope with the problems posed by the fragmented harmonisation of contract law in 2001. In a famous communication\textsuperscript{33} the Commission presented four options to the stakeholders. The first option consisted of a simple inactivity of the European institutions: solutions to possible problems would have been solved automatically by the market itself. In the second place, the elaboration of common contract law principles that would have in the end led to a convergence of legislation could have been promoted. The third option consisted in an improvement of the quality of the \textit{acquis communautaire}, while the last option presented was the most controversial, as it consisted in the elaboration of a new European instrument containing both general and specific rules on contracts and that could have been adopted as a mandatory or an optional instrument. It emerged from the responses that, while the \textit{laissez-faire} option gained little support, particular interest existed for the second and the third option. The need for a new instrument – in particular a mandatory one – was not felt as particularly compelling by the respondents.

On the basis of these results the Commission outlined an action plan for improving the ‘coherence of European contract law’ in a new communication of 2003, in which the instrument that would achieve the objectives laid down in the option three and four of the previous communication was chiefly identified in a ‘Common Frame of Reference’ (shortened in CFR). Such an instrument, with its aim of ‘establishing common principles and terminology in the area of European contract law’,\textsuperscript{34} would have different functions: it could serve as a ‘tool-box’ for the European legislator, that could refer to the principles and terminology of that instrument to achieve a higher coherence while improving the \textit{acquis}, but it could also be employed by national legislators to revise their own legislations, so that in the end a convergence between the different systems would be facilitated and, again, be employed by the European Commission as a base for ‘reflections’ on the convenience of elaborating a new optional instrument.\textsuperscript{35} The nature and objectives of a Common Frame of Reference were then deepened in a further communication of 2004 in which it was clearly stated that ‘The CFR will provide clear definitions of legal terms, fundamental principles and coherent model rules of contract law, drawing on the EC \textit{acquis} and on best solutions found in Member States’ legal orders’.\textsuperscript{36} In that communication, the Commission furthermore continued to express its own interest in the possibility of developing an optional instrument in the future\textsuperscript{37} and even sketched a possible structure for the CFR, which already resembles the one of a code.\textsuperscript{38}

In 2006, another Green Paper\textsuperscript{39} initiated a new consultation amongst stakeholders. From the new consultations, the Commission drew new directions for the development of consumer law, focusing more on the harmonisation of specific aspects of contract law that could represent a barrier to trade and favourably

\begin{itemize}
\item \textsuperscript{33} COM(2001) 398 final.
\item \textsuperscript{34} COM(2003) 68 final, 59.
\item \textsuperscript{35} COM(2003) 68 final, 62.
\item \textsuperscript{36} COM(2004) 651 final, 2.1.1
\item \textsuperscript{37} COM(2004) 651 final, 2.3
\item \textsuperscript{38} COM(2004) 651 final, Annex I.
\item \textsuperscript{39} COM(2006) 744 final.
\end{itemize}
considering the possibility of ‘full harmonisation’, in other words, issuing rules member states could not derogate from even in order to increase the level of protection acknowledged to consumers. The troubled work on a new directive on consumer rights was the first result of this new course. Against this background, the hypothesis of a European civil code, to be elaborated starting from the CFR, seemed to fade out as also the Commission later clarified.\textsuperscript{40}

In the meantime, the academic lawyers in charge of the preparation of a draft CFR, associated with the Study Group on a European Civil Code and the Research Group on EC Private Law, completed their activities and published their results – the Draft Common Frame of Reference (DCFR) – in two preliminary editions in 2008 and 2009 and finally – together with comments on the drafted model rules– in the definitive edition in late 2009.\textsuperscript{41} The work does not represent a creation \textit{ex nihilo} but draws on the legal traditions of the member states represented in study groups and, what is more, is clearly based on the previous works performed by the Commission on European Contract Law, best known as Lando Commission from the name of its chairman Prof Ole Lando, established in 1982 with the aim of drafting a set of principles of contract law common to all European member states (PECL).\textsuperscript{42} That initiative – financed by the European institution but born as a spontaneous academic endeavour – had also the aim of providing a set of model rules of \textit{lex mercatoria} that could be used by contractual parties in their international agreements.

The year after the final edition of the DCFR was published, the European Commission created a new Expert Group of European contract lawyers with the aim to ‘to assist the Commission in the preparation of a proposal for a Common Frame of Reference in the area of European contract law, including consumer and business contract law’\textsuperscript{43} as well as ‘restructuring, revising and supplementing the selected contents of the Draft Common Frame of Reference, taking also into consideration other research work conducted in this area as well as the Union \textit{acquis}'.\textsuperscript{44} In other terms, this should have opened the transition process from the academic to the political Common Frame of Reference.

Later that year, the Commission published a new Green paper with the purpose ‘to launch a public consultation to gather orientations and views from relevant stakeholders regarding possible policy options in the field of European Contract Law’\textsuperscript{45} and in which new possible strategies for the harmonisation of contract laws were outlined. Once again, the Commission presented and left several options open: the work of the Expert Group could be simply published and informally serve as a source of inspiration for legislators or as a compendium useful to promote the knowledge of contract law, something that, again, could produce a spontaneous

\textsuperscript{40} COM(2007) 447 final, 11.
\textsuperscript{43} Commission Decision of 26 April 2010 setting up the Expert Group on a Common Frame of Reference in the area of European Contract Law, 2010/233/EU, art. 2.
\textsuperscript{44} Commission Decision of 26 April 2010 setting up the Expert Group on a Common Frame of Reference in the area of European Contract Law, 2010/233/EU, art. 2(b).
\textsuperscript{45} COM(2010) 348 final, 5
convergence in the long run. As a more incisive option and on the basis of the results of that study, the European institutions could issue an ‘instrument of European Contract Law’, the scope and purposes of which remain quite unclear, while various options are presented. For instance, a recommendation of the Commission to the member states could be issued whereby the adoption of the ‘instrument’ is suggested in addition or even replacement of national laws. This would signify the voluntary adoption of an optional or mandatory European civil code in some member states, while the Commission also alludes to the possibility of issuing such a code as an optional instrument that contractual parties would be free to adopt both in cross-border and domestic transactions. Again, the options presented became more audacious and the possibility of a unification by means of a regulation covering general contract law or even a European civil code covering ‘not only contract law, including specific types of contracts, but also tort law, unjustified enrichment and the benevolent intervention in another’s affairs’ is explicitly envisaged by the Commission. It is nonetheless the idea of an optional instrument of sales law that later gained momentum, so that the Commission presented a proposal for a regulation that would allow not only consumers but also small businesses to opt for a fully European set of rules to govern their transborder economic transactions. The process of Europeanisation of private law, in other terms, is still underway and possibly still far from its conclusion.

3. Methodology

3.1. Descriptive character

This book aims to highlight the theoretical relation between private law and the phenomenon of nationalism and, consequently, one aspect of the ideological and political dimension of the process of Europeanisation of private law. In doing so, it is only concerned with a description – or at least an interpretation of – an existing situation, without any intention of evaluating it in light of particular normative standards or recommending modalities in which that process should be continued or arrested. In other words, thus, the analysis performed here is of a descriptive rather than normative nature. Admittedly, that descriptive-normative distinction which can be formulated in clear-cut terms in the rational world of theory eventually tends to fade away when applied to the complexity of reality, and this holds particularly true for this book, in which descriptive and normative elements could easily come to merge given the political nature of the processes investigated. This makes some preliminary remarks on certain particular aspects compelling.

As already mentioned, since the end of the world wars, the term ‘nationalism’ has assumed a negative connotation which is even more perceivable in certain languages than in others and it has come to be intended as a reactionary idea linked to militarism and xenophobia. If one starts from this understanding, speaking of
nationalism in European private law could immediately sound confrontational and implicitly normative: if it were claimed that nationalist elements can be found in the European private law discourse, the soundest logical conclusion that one could draw is that these should be eliminated, and if nationalism were to be found as one of the reasons justifying resistance to the Europeanisation, an implicit counter-argument in favour of Europeanisation would naturally follow. This is not the point made in this book.

In the first place, the very idea that nationalism is per se a negative theory can be disputed: in recent years many attempts have been made to consider it as a politically neutral category to be employed in the analysis of historical and political events. The whole first chapter is dedicated to the deepening of the tricky concept of nationalism mainly as a political principle. It can already be said that the coincidence of nationalism and militarism or racial intolerance can be rejected at least in theory. Nationalism turns out to be a legitimated political set of ideas that cannot be simplistically equated tout court with some of its dramatic historical manifestations (whose link and coherence with the ideology cannot however be ignored). Consequently, even the affirmation that arguments employed in the discourse on European private law show contiguity with nationalist ideas should not be considered per se evidence of the insufficiency and censurability of those argumentations. Those can be convincing, disputable or incoherent, but in any case they cannot be deemed wrong. It goes without saying, the reader is more than able to make up his own mind, judging how persuasive those arguments are – reproving or accepting them – but such a conclusion is a further step that the author of this book has deliberately chosen not to take.

The reader could however get the impression that, at several moments, the book he or she is reading tends to abandon a neutral standpoint putting more emphasis on the limits of nationalism and the fallacies of the argumentations that are presented as connected to that ideology. These are indeed presented in a critical way, and various objections to those are presented. This operation is not aimed at throwing discredit on the nationalist political principle but is rather necessary for only through this methodological process the peculiarities of the nationalist arguments, as opposed to those of other political theories, can emerge. Only towards the end, the book employs some of the results of the previous parts to assess possible evolutions of the process of Europeanisation of private law.

In conclusion, though a considerable part of it is developed through a dialectic critical exposition this study does not generally aim at suggesting an answer to the most fundamental questions regarding the acceptability of the nationalist political principle in modern societies or the need for Europeanisation. More unpretentiously, it aims at presenting the process of Europeanisation from a different perspective, highlighting certain theoretical and political aspects of private law in Europe.

49 It is bound to a particularly negative and ‘militaristic’ understanding in particular in some Slavic languages, see M Hroch, Das Europa der Nationen. Die moderne Nationsbildung im europäischen Vergleich (Göttingen: Vandenhoeck & Ruprecht, 2005) at 13.
3.2. European Union as multinational and multi-level system

A large part of this book, and more specifically of the third chapter, is dedicated to an analysis of some of the arguments that have been employed mainly by legal scholars to object to the process of (or at least, a particular kind of) Europeanisation of national private laws in light of the theories developed in the political and economic science concerning the role of nationality in political institutions. Those arguments have been developed and employed in very different social sciences and at a first sight they seem to be functionally very different from one another, so that such an association can be methodologically challenging. For this reason, it seems opportune to address this issue already in this place.

As an example take the arguments employed in the economic theory of federalism and later in law and economics sustaining that the decisional power in a multi-layer system should be allocated at the lowest possible governance level.\(^{50}\) These serve to determine whether a certain competence should be assigned at the federal or at the local level of the governance system, but in any case within an already formed and functioning federal state, regardless of whether this is also a nation or a multinational state. In this sense, those arguments are different from a structurally similar argument made by liberal nationalists to advocate a world order in which to each nation corresponds a state. Also liberal nationalists claim that the closer the regulatory power is to the citizen the more democratic and efficient will be the regulation, but in their perspective the point only serves the purpose of demonstrating that a smaller homogeneous nation state is a better form of political organisation than a larger multinational state. The perspective of liberal nationalists is therefore broader, since instead of inquiring what the perfect division of competences between the institutions of a given nation state is, they devote themselves to the preliminary question as to why these competences have to be acknowledged to a nation-state instead of a multi-national state in the first place. Is it therefore methodologically correct to affirm that both law and economics scholars and liberal nationalists base their assumptions on the same argument?

Despite these differences, there is nonetheless a link between these two approaches, that emerges if one considers that, among the various theories of federalism, it has been suggested that one of the necessary elements for different states to give rise to a political federation is that a ‘community of outlook based on race, religion, language or culture’\(^{51}\) exists. In other words, even the federal state can only function if it is also, somehow, a ‘nation’. This view has gained momentum and is now commonly supported by public law scholars, who point out how some kind of ‘cultural similarity’ among citizens is needed in order for a federation to properly function.\(^{52}\) Yet, this is still insufficient to affirm that a federalist theory necessarily

\(^{50}\) Further in the third chapter.


\(^{52}\) E McWhinney, ‘Re-thinking Federal Constitutional Law Theory: The contemporary limits of classical, juridical Federalism’ in *Toward Comparative Law in the 21st Century. The 50th anniversary of the Institute of Comparative Law in Japan* (Tokyo: Chuo University Press, 1998) at 495: ‘The classical federal system based on a juridical equality of the constituent units of the federal system without regard to their political-social differences in terms of population, territory and resources, adapts with extreme difficulty to any society characterised by fundamental cultural, linguistic religious or other similar divisions. The classical federal system seems most viable, as a paradigm or model, for culturally more or less homogeneous societies where the differences referred to can be more easily accommodated through the basic federal institutions and processes’.
presupposes a nationalist organisation of the state: it should be noticed that although political scientists have enumerated a long list of ‘essential conditions’ in order to speak of a political federation, it is commonly agreed that none of these is really essential or of universal application, as even a simple empirical analysis of the existing federalist states can reveal.\(^{53}\) What is more, federal structures could also be imagined as political compromises with the aim of making state unity possible in presence of particular ethno-nationalistic groups advancing autonomy or independence claims, thus already in a multinational state.\(^{54}\) However, the picture is made unclear by the vagueness implicit in a definition of nation: while some political proponents of federalist reforms tend to emphasise the lack of national homogeneity of their states, others underline that even apparently very inhomogeneous federalist states – like those where two or three languages are spoken – nonetheless share some common traits which permit to qualify those institutions as nation-states.

In the context of the European Union, to which the analysis of this book is limited, the two approaches come to an even clearer convergence. It is widely held that the European Union presents both traits of a state and of an international organisation. Such a hybrid nature makes possible that many of the argument used in a federal perspective can also be employed in a nationalist one. Although the European Union can be better described as a ‘supranational’\(^{55}\) rather than a federal form of organisation, the peculiarity that competences can be allocated at two different hierarchical levels justifies a functional comparison with an ordinary federal organisation: being normally less formalistic than legal scholars, political scientists can simplify the discussion: ‘although, after the implementation of Maastricht, the EU remains an unusual and still evolving political entity, it also qualifies as a species of federal state’.\(^{56}\)

In this sense, both the arguments developed with regard to the distribution of competences within a federal state and the arguments employed by nationalists to defend the nationalistic principle can be related and are both employable in the European scenario.

### 3.3. Considered countries

The title of this book calls for a preliminary clarification. Since each European country has one (and often more than one) private law system that would deserve a specific account, it is indeed unclear what ‘private law in Europe’ stands for. If this were not sufficient, not only private laws diverge in Europe, but even the historical developments associated with both the creation of the nation state and the organisation of the legal system are rather diverse. Even slight differences in the connotation of the word ‘nation’ in different languages reveal different historical paths. In this sense, clarification is needed as to which specific national context we refer to when speaking of nationalism.


\(^{54}\) On this aspect, see MG Forsyth (ed), *Federalism and Nationalism* (Leicester and London: Leicester University Press, 1985)


\(^{56}\) D McKay, *Federalisms and the European Union*, at 21.
The most accurate way to deal with these differences would consist in treating each European country separately, following its historical development, analysing its legal order with particular regard to its interactions with the law of the European Union, and of course looking at the academic debate in the leading legal journals of the country. Performing such highly demanding research is well beyond the possibilities and the aims of this book; more modestly – but at the same time probably more ambitiously – the aim here is rather to sketch general trends in the European context. In this sense, this analysis does not deal with the private laws of Europe, but rather with private law in Europe. Thus, the book adopts a broad approach which is more typical of an intellectual history focussing on the diffusion of a certain idea rather than of a monographic study providing an exclusive account of a given country or jurisdiction. It therefore offers a more comprehensive account of the developments that took and take place in Europe, whose specific manifestations usually diverge in different national contexts but still appear as interrelated components of a more general narration involving Europe. This does not mean that the discourse remains on an ideal and abstract ‘nowhere’ dimension; quite on the contrary, the book systematically refers to the laws of a number of European countries, chosen on the basis of the significance of their legal experience and the availability of information.

As a final but important clarification, it is also convenient to warn the reader that all considerations contained in this book refer to the European experience and cannot therefore be straightforwardly extended to other social and political contexts which may be very different under several points of view.

4. Structure and topics
The chronicle of the transformation of private law under nationalism and through Europeanisation evolves through different stages. One chapter is focused on each of these changes. The first chapter introduces and offers a theoretical portrayal of the individuated main ‘protagonist’ of this narration, the nationalist ideology. There, the phenomenon will be defined, contextualised in its empirical manifestations and analysed in its theoretical foundations as they have been described in that branch of the political science that has taken the name of ‘nationalism studies’. In the same chapter, the fundamental assumptions and political claims of that ideology are presented, discussed, and, at the same time, some of the recurring criticisms to them are also introduced.

Moving from a theoretical to a historical dimension, one can see that the rise of nationalism in Europe coincided with a particularly important stage in the history of private law as well. It is in this phase that the ‘nationalisation of private law’ took place. The narration and analysis of this particularly important moment in European

57 Furthermore, some studies addressing the (in a broad sense) nationalist tendencies of legal scholarship in certain countries already exist: with regard to France, see C Amadio, ‘Nell’occhio del ciclone. La Francia alla prova dei processi di denazionalizzazione del diritto’ (2009) 40 Politica del diritto 605-638; R Sefton-Green, ‘DCFR, the Avant-projet Catala and French Legal Scholars: A Story of Cat and Mouse?’ (2008) 12 Edinburgh Law Review 351-373.

legal and political history is set in the second chapter, which aims at reading known legal historical developments through the lenses offered by nationalism studies. A theoretical account on the function of private law as an instrument of nationalisation of societies is also provided. Progressively shifting the focus from the past to the present, the chapter addresses more recent developments of denationalisation and renationalisation of private law. In several ways, the process of denationalisation challenges the nationalist idea of law inherently linked to the nation, and it has already manifested itself in the specific form of Europeanisation. Nonetheless, the establishment of the European Communities and Union has not plainly led to a medieval-like state of private law, and a certain resistance to this process is given by several actors at the level of the member states, determining in practice a sort of ‘renationalisation’ of European law.

The third and longest chapter investigates the reasons behind such resistance looking in particular at the discourses of legal scholars. The process of Europeanisation has in fact given rise to a wide and multi-disciplinary debate among lawyers, in which several critical positions have been advanced and based on different arguments. The chapter looks in particular at three of these: the economic, the social justice, and the cultural argument. Each of these is specifically described and critically assessed, showing their possible links to the nationalist political principle as defined in the first chapter.

But nationalism could influence the evolution of private law in Europe also in a very different way. It is indeed imaginable that this multi-faceted and instable political principle can develop in Europe as a pan-nationalist form too, in other terms, as Euronationalism. Typically nationalist arguments can then be used not only to oppose, but also to sustain the need of unifying the laws of the European nations. The fourth chapter is dedicated to this scenario.

A brief final chapter draws on and summarises the main points developed in the previous chapters, formulating final remarks that are conclusive in the general framework of this book but, hopefully, introductory to further reflections, remarks, and criticisms by the reader.