Nationalism and private law in Europe
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The nature and content of nationalist ideology will be the focus of this chapter prior to an analysis of the impact of nationalism on the processes of nationalisation and the Europeanisation of private law. Provisionally, nationalism can be understood as the ideology, which aims ‘to give the state a national foundation’.\(^1\)

The general introduction proferred views as to how nationalism can be considered to be a very topical ideology with assumptions that exercise an influence on the development of political and legal systems, while the primary aim of this chapter is to understand what the theoretical and normative foundations of nationalism as a political principle are and to provide the analytical tools necessary to further investigate the phenomenon, rather than to expose the evolution of the nationalist phenomenon. The vagueness and flexibility of the concept make it necessary to delimit the field of examination, by first providing a definition of nationalism.

The chapter is thus organised as follows: the first part deals with some methodological problems with regard to the study of nationalism and pays particular attention to the juxtaposition between two analytical approaches widespread amongst members of the political science community. The second part will take a theoretical definition of nationalism as starting point and will analyse its constitutive elements, putting particular emphasis on the central concept of ‘nation’. The last part specifically analyses the theoretical normative foundations of the nationalist political principle introducing the main arguments that are employed by advocates of nationalism, mainly referring to the work of liberal nationalist authors, to justify such ideology as well as the recurring criticisms to those.

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I.1. Approaching Nationalism

The study of nationalism presents difficulties that have been debated by political scientists for decades. The first of these difficulties derives from the fact that nationalism has historically manifested itself in very different forms so that doubt can arise as to whether it is really possible to speak in general terms of nationalism as an ideology which covers so diverse manifestations. The second methodological problem is that two main ‘schools of thought’ can be distinguished in a study of nationalism, whose basic assumptions appear to be opposite and to some extent irreconcilable. They offer different answers to the fundamental questions as to how, when and why nation-states developed. As a result of these alternatives, it is clear that the choice for one of these approaches may strongly condition the way in which nationalism will be intended. In the following pages the main differences and convergences between those positions will be expounded upon, since such scrutiny is necessary to critically examine some of the assumptions and sometimes contradictions of the nationalist theory.

I.1.1. How many nationalisms are there?

Nationalism is one of the most discussed notions in the field of political science and one of the most complex and many-sided doctrines of the last decades. As Hans Kohn pointed out,

‘Nationalism has been one of the determining forces in modern history [...] but [it] is not the same in all countries and at all times. It is a historical phenomenon and thus determined by the political ideas and the social structure of the various lands where it takes root’.

But exactly such a multiplicity of nationalist forms represents an obstacle if the ideology were to be sketched in its entirety, for ‘although it may be correct to talk of a general theory of nationalism, nationalisms on the ground are quite different from each other’. Should the aim of coming up with a general definition of nationalism be abandoned? This problem is well-known to political scientists, who are still wavering between two opposite solutions to the problem. If one admits that it is only possible to discuss single types of nationalism (nationalisms in the plural form), since ‘no single, universal theory of nationalism is possible’, it will be necessary to distinguish and focus on each of them, putting emphasis on the difference and perhaps building a bipolar system of contrapositions. A discontinuity will emerge between different nationalist manifestations and the impossibility to trace them back to a general structure. For example, if one discusses the German historical experience, it will be

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impossible to consider Nazism and German Romanticism as equally nationalist, two sides of the same coin, since the former was a political movement which aimed to the submission of other nations, whereas the latter was just a cultural movement which occasionally contributed to the spread of a sentiment of unity in the German nation. Otherwise, it would be possible to focus on the common aspects between different experiences in order to find a guiding principle, one could for example underline certain continuity between Romanticism and Nazism, almost as completely different manifestations of the same phenomenon,\textsuperscript{6} stressing for instance the telling and frequent references to Blut und Boden in the speeches of both Herder and Hitler.

The choice for one of these approaches could also be influenced through ideology; in particular when it is politically convenient for a nationalist movement to take some distance from unfavourable historical antecedents, even in the substantial identity of the employed arguments or the pursued aims. Closer analysis shows that even the numerous forms of nationalism described in the literature are not always different phenomena but rather the same one considered from different macro or micro-perspectives and sometimes seen through lenses coloured by ideology or economic considerations. Such confusion increases because, to cite the words Haas uses to refer to Anderson,\textsuperscript{7} Gellner,\textsuperscript{8} Seers\textsuperscript{9} and Smith\textsuperscript{10} – ‘authors fail to make any serious effort to acknowledge or use, leave alone integrate, the plethora of existing work on the subject’.\textsuperscript{11} If one accepts this premise, one can more easily support the view that ‘while nationalism changes with the time, place and culture, it does have characteristics that can be identified’.\textsuperscript{12} It seems opportune to focus on those common characteristics, looking first and foremost at theory but considering the practice, without which one would not be able anymore to grasp the necessary differences between nationalist manifestations and, enraptured by the systematic order of theory, lose of sight reality, because ‘Fichte or Gandhi are not Bismarck; Bismarck or De Gaulle are not Hitler’ and ‘[w]e have no right whatever to equate the nationalism of the dominant with that of the dominated, the nationalism of liberation with the nationalism of conquest’\textsuperscript{13}

In order not to confuse different types of nationalism and avoid a situation in which the characteristics of a particular historical type are extended to the whole phenomenon\textsuperscript{14} another distinction can be already made. As Gellner put in, nationalism

\begin{footnotesize}
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\item T Nairn, \textit{Forces of Nationalism: Janus revisited} (London: Verso, 1997)
\item D Seers, \textit{The Political Economy of Nationalism} (Oxford: Oxford University Press, 1983)
\item AD Smith, \textit{Nationalism in the Twentieth Century} (New York: University Press, 1979)
\item ER Balibar and IM Wallerstein, \textit{Race, nation, class: ambiguous identities} (London: Verso, 1991) at 45.
\item EB Haas, ‘What is Nationalism and Why Should we Study it?’ at 716 criticizes A.D. Smith’s \textit{Nationalism in the Twentieth Century} for ‘[i]t is impossible to tell whether nationalism refers to an ‘ideal,’ the actual modal beliefs of a ‘movement,’ a typical historical pattern of development, or an inescapable state of affairs, because the author uses all these meanings interchangeably’.
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can be seen as a sentiment and as a movement\textsuperscript{15} as well as a political principle (it could also be said, an ideology). In this sense, the mere fact that a particular historical form of nationalism has manifested itself in an authoritarian and violent way should not be considered a sufficient reason to sustain that the ideology, by which the movements are inspired, is violent in the same way. Nationalism should therefore be primarily understood as an ideology, while references to nationalist movements in this book will be made only in order to clarify some aspects of the ideologies. Adopting this view it becomes clear that, although nationalism has manifested itself in a multiplicity of historical movements, the essential assumptions on which its ideology is based basically remain the same. In this sense, it becomes possible to speak of a general theory of nationalism – even at the cost of resorting eventually to a long series of further specification and distinctions.

I.1.2. Interpreting nationalism: primordialism and modernism

Contemporary studies on nationalism have been characterised by the juxtaposition of two analytical approaches:\textsuperscript{16} the classic ‘primordialist’ – which sustains an ancient nature of the nations – and the ‘modernist’ – which more critically believes the nation to be a modern phenomenon somehow constructed by the nationalist ideology. To simplify the juxtaposition between the two schools of thought – which in political science are also occasionally identified with different denominations\textsuperscript{17} – one could say that the primordialist posits that nations pre-exist nationalism, whereas the modernist claims the opposite notion: nationalism makes nations. While the primordialist approach takes the existence of nations as an almost ‘natural’ fact, the modernist approach intends it as an artificial fact and more problematically lets further questions arise, in particular what the means of and the reasons for such an ‘invention’ are.

This juxtaposition can be collocated in a specific historical context: the primordialist understanding of nations which underline the ‘positive’ nature of nationalism was widely spread in particular in the era of the formation of the first nation-states and inspired the drawing of state boundaries in Europe. We can therefore find strong primordialist rhetoric in the discourses of the eighteenth and nineteenth century patriots who strove for national unity. A notable example is provided by Johann Gottfried Herder, who aimed at the unity of all Germans in a single state. Modernist theories have on the contrary spread in the academic circles in particular after World War II, the historical event that more clearly showed the world the destructive potential of nationalism and that contributed to give nationalism the bad

\textsuperscript{15} E Gellner, Nations and Nationalism, at 11.
\textsuperscript{17} For example, essentialists and constructivists, and so on. (see Hroch, Das Europa der Nationen, p. 8). In this book, the most recurring denomination primordialism and modernism is adopted, since this puts more emphasis on the most relevant divergence between the views, which refers to the historical moment in which nations arose.
name that the common language usually links to the word, usually replaced by functional synonyms like patriotism\(^\text{18}\) or blurred ‘politically correct’ specifications.\(^\text{19}\)

The heyday for critical studies on nationalism was most probably in 1983, \(^\text{20}\) when the fundamental works of Gellner,\(^\text{21}\) Anderson\(^\text{22}\) and Hobsbawm & Ranger\(^\text{23}\) were published. Nonetheless, ‘modernist’ positions are much older in the scientific debate.\(^\text{24}\) Their basic assumption that nations are pure artefacts can be seen in the light of the state of the cultural studies of the period, which moved ‘from the representation to the construction’\(^\text{25}\), new constructivist theories adopted a critical approach to reality and led to extreme consequences the consideration that it is the human observation that determines the observed object.\(^\text{26}\) In the same way in which reality is determined by the observer, nations are created through the imagination of people. Several modernist authors adopted a social and economic approach, a consequence of their Marxist background, which widened the perspective on the phenomenon providing new theoretical instruments that could be used to comprehend the historical events.

Since then, modernist positions have become predominant in the historiographical debate and could be said to represent the dominant trend in the study of nationalism. It is nonetheless necessary to note that outside the restricted academic circles, ‘popular discussions in the media often seem to uncritically invoke primordialist assumptions’.\(^\text{27}\) The doubt seems then justified, that even in other scientific areas – like the legal studies – nations are still intended more in primordialist than modernist terms. What is more and coherent with the nationalist revival of the latest years, modernist positions have more often come to be criticised while neo-primordialist positions have been at least in part assumed by several scholars. In this context, in particular the perspective of so-called ethno-symbolists\(^\text{28}\) has to be mentioned, in which the importance of both ethnic and cultural-symbolic elements of the nation is underlined while some modernist points are rejected.\(^\text{29}\) These authors have blamed the economic approach of modernists for being unable to grasp most of the fundamental questions about nationalism.

Yet, one should not get the impression that these approaches are ideologically biased per se, concluding that nationalism seems ‘good’ to primordialists and ‘bad’ to


\(^{19}\) Wouter Bos, then leader of the Dutch Labour Party, spoke of the necessity of developing a ‘beschaaflde vorm van nationalisme’ (civilised form of nationalism), in NRC Handelsblad, 30 January 2009.


\(^{21}\) E Gellner, Nations and Nationalism

\(^{22}\) B Anderson, Imagined Communities

\(^{23}\) EJ Hobsbawm and T Ranger (ed), The Invention of Tradition (Cambridge: Cambridge University Press, 1983)

\(^{24}\) M Hroch, Das Europa der Nationen, at 201.


\(^{26}\) P Burke, What is Cultural History?, at 85 ff.

\(^{27}\) J Hearn, Rethinking Nationalism, at XIII.

\(^{28}\) AD Smith, Nationalism and Modernism (London: Routledge, 1998) at 170 ff.

\(^{29}\) See J Hearn, Rethinking Nationalism, at 172 ff. AD Smith, ‘A Europe of Nations. Or the Nation of Europe?’ (1993) 30 Journal of Peace Research, 129-135 at 130, for instance affirms that ‘Historically, the nation is a subvariety and development of the ethnie, though we are not dealing with some evolutionary law of progression, nor with some necessary or irreversible sequence. While the ethnie is an historical culture-community, the nation is a community of mass, public culture, historic territory and legal rights. In other words, the nation shifts the emphasis of community away from kinship and cultural dimensions to territorial, educational and legal aspects, while retaining links with older cultural myths and memories of the ethnie’.
modernists. In fact, the aim of modernist authors is not to disqualify the nationalist ideology *tout court*, with the intent of showing its radical irreconcilability with democratic, socialist or liberal principles. Looking at some of the writers whose name is commonly associated with modernism, we discover that Plamenatz could not see anything non-liberal in cultural nationalism, whereas Anderson later clarified that he does not think of nationalism as an ‘ugly’ ideology and even referred to its positive aspects. By the same token, primordialists cannot be considered all dedicated nationalists considering the identity with their co-nationals as something self-evident. Both approaches aim to explain reasons and dynamics of the development of nations, adopting two diametrically opposed analytical perspectives, and cannot be reductively considered as the theory ‘in favour’ and the theory ‘against’ nationalism. Furthermore, there is no essential incompatibility between the two approaches.

I.1.2.1. The awakening of the nation: primordialism

According to the primordialist view, the nation is a natural phenomenon and its origins have to be investigated through a historical analysis going back to ancient history. Nationalism ‘awakened’ an already existing national awareness, thanks to cultural elites that stimulated a sleeping national consciousness drawing on an already existing repertoire of ethnic symbols, myths and memories. Such an understanding of the nation, that today’s scholars might consider rhetorical, was the predominant approach in the eighteenth and nineteenth century.

The ‘natural’ character of the nation claimed by primordialists is highlighted by describing nations as a kind of ‘fully extended family’ where ‘members are brothers and sisters, or at least cousins, differentiated by family ties from outsiders’ and that respond to the innate human need of staying together with their fellow men. Considered almost as a collective organism, the nation undergoes a process of anthropomorphisation, almost an autonomous biological organism with its own date of birth, history and qualities that are even innate. Nationalities are compared to animals or plants, with an autonomous life and spirit – the *Nationalgeist*. Belonging to a nation is therefore a natural and ‘objective’ matter that is not an issue of free

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31 In an interview in 2005, to the question whether he was a little nationalistic despite the ‘revealing books’ he wrote on the subject, Anderson answered: ‘Yes, absolutely. I must be the only one writing about nationalism who doesn’t think it ugly. If you think about researchers such as Gellner and Hobsbawm, they have quite a hostile attitude to nationalism. I actually think that nationalism can be an attractive ideology. I like its Utopian elements’, Benedict Anderson: ‘I like nationalism’s utopian elements’ interview by L Khazaleh, www.culcom.uio.no/english/news/2005/anderson.html (last consulted 25.5.2011).
choice of the individual: choosing one’s own nationality would be as foolish as thinking of being able to choose one’s own parents. If the nation has these characteristics, it can only be ancient: the roots of modern nationalism can be already found in ancient Greece, and around the year 1000 it was already possible to perceive the existence of French, German and English nations in Europe.\(^{39}\) In this perspective, it was just a matter of time before a ‘spring of nations’ would have given nations a political representation. Consequently, from a primordialist perspective, any serious study on nationalism should start at least from the Middle Age,\(^ {40}\) analysing the evolution of nations over *la longue durée*.

In contrast with the modernist approach, authors close to primordialist positions insist on the irrational character of the sense of belonging to a nation, which leaves economic and other utilitarian arguments out of consideration. The way in which mechanisms of collective identification work remains at a deeper and inscrutable level and as a consequence thereof, there is a tendency to neglect the study of economic factors in the formation of nation-states. It is argued that a merely economic approach is not viable in order to comprehend many aspects of the nationalist phenomenon since it still leaves important questions unanswered. For example, ‘if ethnonational competition is fundamentally economic in causation, then *substantial* changes over time in the economic relationship should come to be reflected in the ethnonational relationship’, but since comparative empirical data does not support this assumption, we should conclude that the proposition is false and that ethno-national conflicts are independent of economic considerations.\(^ {41}\) These points remain nonetheless controversial. Quite curiously, for instance, the mere fact that people are ready to die for their country – totally putting out of their mind their personal interest with regard to the maximisation of welfare – does not even demonstrate the irrationality of that ‘nationalist behaviour’ but instead can be interpreted as a quite bizarre economically rational action itself, asserting for instance that national martyrs seek to increase their own ‘symbolic utility’.\(^ {42}\)

### I.1.2.2. The invention of the nation: modernism

Modernist studies underline the nature of political artefact of modern nations. Nationalism is the ideology that led to the creation of them,\(^ {43}\) while the traditional primordialist perspective has been completely overturned. Modernist argumentations indeed start from a deep criticism of primordialist assumptions. In the first place, modernists openly reject as a simple supposition unsupported by facts the idea that nations are ancient because a national consciousness was already embryonic even before it found expression in a political organisation. It is almost impossible to be sure whether people in a certain period of the Middle Ages felt they were part of some kind of nation, and the problem persists when we focus on more recent years, since

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\(^{40}\) More references can be found in W Connor, *Ethnonationalism*, at 211.

\(^{41}\) W Connor, *Ethnonationalism*, at 149.


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the political and literary documents developing the idea of nation were produced by restricted elites. The main problem lies in the fact that, reasonably, ‘[w]hat Herder thought about the Volk cannot be used as evidence for the thoughts of the Westphalian peasantry’. What is more, we could even reach the opposite conclusion that in some contexts characterised by a strong political fragmentation, a national consciousness – even a dormant one – was totally nonexistent. For sure national rhetoric tends to present the history of the birth of the nation and the movements towards unification as a popular movement normally directed against some foreign power, but this interpretation neglects the strong political, social and economic tensions – which occasionally led to violence – that characterised those processes in several countries. Even acknowledging that forms of national consciousness already existed before nationalism, it is still hard to believe that people imagined being part of a community whose borders basically coincided with those of modern states. It is not disputed that people felt commitment to some kind of social organisation, but to sustain that this organisation should coincide with the modern idea of nation bears the risk of engaging in theoretical retrospection. The primordialist approach, in other words, seems to be characterised by a certain ‘methodological nationalism’, whereby old phenomena are seen as steps toward the present state of affairs. In the primordialist approach the bias toward continuity which is typical of social sciences is then evident.

The analysis of Hobsbawm put particular emphasis on the linguistic element to highlight the impossibility of a ‘natural’ national consciousness as supposed by primordialist nationalists. According to this view, it was impossible for a national consciousness to develop on the basis of a common language, since a common national idiom simply did not exist yet at the historical moment in which most nation-states were created. For example, to a speaker of Sardinian, the Venetian and the Swedish language would have sounded pretty much the same incomprehensible way, notwithstanding the link Sardinian and Venetian share with Latin. Considering that all of those regions were separate and distant political and economic units, why should a Sardinian have thought of being part of the same community of a Venetian and not of a Swede, developing an Italian consciousness?

By the same token, ‘There is no evidence whatever that the Balkan Slavs had ever considered themselves parts of the same nation, but the nationalist ideologues who emerged in the first half of the century thought in terms of an ‘Illyria’ hardly more real than Shakespeare’s, a ‘Yugoslav’

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45 CM Wieland wrote in 1793: ‘There are doubtless patriots of Brandenburg, Saxony, Bavaria, Württemberg, Hamburg, Nuremberg, Frankfort, etc., but German patriots who love the whole German empire as their fatherland, love it above anything else, and are willing to make considerable sacrifices not only for its preservation and protection against a common enemy, but also, after the danger has passed, for its prosperity, for the strengthening of its weakness, for its outward respect–where are they? Who will show them to me or at least name them?’, Sämtliche Werken, Vol 31 (Leipzig: Göschens, 1858) at 247, quoted by RR Ergang, Herder and the Foundations of German Nationalism, at 30.
46 U Beck, Der kosmopolitische Blick. Oder: Krieg ist Frieden (Frankfurt am Main: Suhrkamp Verlag, 2004) at 40.
47 The linguist T De Mauro, Storia linguistica dell'Italia unita (Bari: Laterza,1963) – cited by EJ Hobsbawm, The Age of Capital. 1848-1875 (London: Weidenfeld and Nicolson, 1975) at 89 – reports that when Italian language teachers were sent from northern Italy to Sicily after the unification of the country to spread the national language, they were mistaken for Englishmen by the local population who spoke the linguistically closely-related Sicilian language.
state which was to unite Serbs, Croats, Slovenes, Bosnians, Macedonians and others who to this day demonstrate that their Yugoslav nationalism is, to put it mildly, in conflict with their sentiments as Croats, Slovenes, etc.' 48

Today’s reader cannot avoid noting that, while Hobsbawm wrote these considerations on the Yugoslav state in 1975, the later dramatic events in that area proved that even the most audacious nation-building projects are often inadequate to suppress the nationalist sentiments of smaller groups.

How do then linguistic factors relate to the formation of nation-building? In Europe, on the one hand, there are numerous cases of nations that were built without taking linguistic factors in consideration, while the fact that the same language or mutually intelligible languages were spoken in different communities did not lead to national unity and did not prevent nationalisms to arise based on other criteria. 49 On the other hand, national languages were more often promoted or even created, drawing on ancient languages or by extension of a particular dialect, only after the formation of the nation state: ‘Languages multiply with states; not the other way round’. 50 Linguistic politics of this kind, though not particularly widespread at the age of the creation of the first nation-states, became more common afterwards and in the twentieth century there have been no nationalistic governments in Europe that did not pursue a cultural policy of linguistic unification; often manifestly prohibiting the use of local languages. Since the beginning of nationalist experiences, the linguistic factor has been used to solve the contrast between different nationalisms – in a way, an almost paradoxical contrast between ‘nationalism’ and the movement for the creation of nation states: 51 as soon as the ‘spring of nations’ let the voice of several aspiring nations arise, the first nation states in the making disrespected the claims of several other groups aspiring to build a nation of their own, degrading that nationalism to a mere ‘regionalism’ and considering their languages just different ‘dialects’. 52 Surpassing such political use of the distinction between languages and dialects, modernist theorists – accordingly to modern linguistics – reject the contraposition between languages and dialects, highlighting that the distinction has a political rather than linguistic fundament. Quoting a Yiddish saying 53 well-known to linguists, ‘a language is a dialect with an army and navy’.

As it delves into the roots of the nation, modernism therefore chooses for a different period of time, which coincides with the beginning of the industrial age. It recognises that some kind of political associations on a national basis already existed in the Middle Ages, but it considers these associations to be mere forms of ‘proto-nationalism’, 54 founded on criteria and interests that are very different from those of modern nation-states.

48 EJ Hobsbawm, The Age of Capital, at 86.
49 See EJ Hobsbawm, The Age of Capital, at 86-88; EJ Hobsbawm, Nations and Nationalism since 1780, at 51 ff.
50 EJ Hobsbawm, Nations and Nationalism since 1780, at 63.
51 EJ Hobsbawm, The Age of Capital, at 88.
52 EJ Hobsbawm, The Age of Capital, at 86-87.
54 EJ Hobsbawm, Nations and Nationalism since 1780, at 46 ff.
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I.1.2.2.1. Techniques of nation-building

‘Nation building’ is an expression that has become particularly popular in academic circles, and refers to all the techniques which are used by the ‘state’ to build the ‘nation’. Assuming that nations are, borrowing the famous expression of Anderson, imagined communities, those techniques aim to let people think that a certain community which can be defined as a nation exists. According to Anderson, a nation will necessarily be an imagined community as it is practically impossible for all people in a country to know one another, so that one can only ‘imagine’ to be part of a community with given characteristics that distinguish it from others. In this sense, communities only differ in ‘the style in which they are imagined’. 55

According to the constructivist perspective, of course, people can be deliberately led to imagine nations in a particular way, often opposing it to others. While classic primordialist nationalism has insisted on the ethnic and cultural differentiation of nations, modern scholars of comparative literature highlight ‘a systematically diversified and particularised assignation of characters to specific ethnic groups […] appears in European written culture only during the early modern period, whereby character traits and psychological dispositions were distributed in a fixed division among various “nations”’. 56 Such a national characterisation was the first step to identify nations while, later, national characters acquired a normative content, evolving at first in a Geist and then in pure stereotypes to be used even to ridicule other national groups. 57

However, the building of a nation also requires a shared past as well as a cultural homogeneity. In order to suggest that a nation ‘shares a common past and future’, the process of ‘invention of tradition’ is particularly important. According to Hobsbawm, 58 traditions which are thought to be ancient are in reality more often very recent and deliberately invented to serve particular aims. To further this aim, arts and literature have often been used in order to create or consolidate the idea of a common national origin. 59 Even the diffusion of the newspapers became a fundamental element of nation building, since every citizen could now read – in an intelligible and fixed common language – about events taking place in every corner of the country: print-capitalism – i.e. ‘the convergence of capitalism and print technologies’ 60 – contributed to the development of national consciousness in diverse countries.

These techniques did not operate at a particular moment in history subsequently exhausting their function, but are continuous; so for instance,

55 B Anderson, Imagined Communities, at 6.
59 A recurring element is the accent upon the heroic actions of the forefathers of the nation: in the years between the eighteenth and nineteenth centuries, Europe discovered a huge number of contemporary national ‘Homers’ whose feats only by then came to light after the finding of some dusty old manuscript, A-M Thiesse, La création des identités nationales : Europe XVIIe-XIXe siècle (Paris: Éditions du Seuil, 1999) at 107. Such emphasis on the folk heritage has indeed always been the first stage of ‘national revival’, EJ Hobsbawm, The Age of Capital, at 85.
60 B Anderson, Imagined Communities, at 44.
61 B Anderson, Imagined Communities, p. 46.
newspapers still focus primarily on the events which occur in their nation, school programmes are still chiefly focused on national history and so on. After having invented the nation, nationalism must maintain it: ‘the ideology operates to make people forget that their world has been historically constructed’.\(^{62}\) Flags, hymns, statutes and so forth are just techniques to make people aware that the nation exists. This is a form of nationalism which is much less patent than the one dramatically manifesting itself in the occasion of military conflicts but which is often more effective, though merely ‘banal’, using the famous expression of Billig. Once the nationalist sentiment has been built, the nationalist doctrine can be seen as ‘the deliberate exploitation of national and/or ethnic sentiment for political ends’.\(^{63}\)

I.1.2.2.2. Reasons for nation-building

From a political perspective, nationalists never considered the multinational state as an appropriate model of political and social organisation. It is easier to ensure social peace and to maintain – in Weberian terms – the monopoly of the use of the force in a state of homogeneity rather than in a society where different social formations are present;\(^{64}\) that is also the reason why nationalist regimes contrasted or reluctantly accepted *corps intermédiaires* on their territory. It is then clear why modern states – that, as it is commonly agreed, appeared as states in the world scenario in 1648 – rapidly evolved as *nation-states*.

The main modernist argument is however of an economic nature. In the perspective of, among others, Gellner, it was industrialisation that led to the formation of nation-states. In a legal historical perspective, that moment coincided with the highest point of the slow historical shift from, using the expression of Sumner Maine,\(^{65}\) status to contract. Nationalism itself is a product of modernisation, so these two phenomena do not occur in the same period out of pure coincidence (chronological modernism) but because of their necessary interrelation (structural modernism).\(^{66}\) As Hobsbawm suspected, the nation-state, that had to be at least moderately large, was ‘in fact the ‘natural’ unit of the development of the modern, liberal, progressive and *de facto* bourgeois society’.\(^{67}\) Whereas in particular socialist thinkers like Kautsky\(^{68}\) have articulated the idea that the rise of nationalist movements coincided with ‘the victory of capitalism over feudalism’,\(^{69}\) non-Marxist authors later agreed on the fact that, at least initially, nationalism was an essentially bourgeois phenomenon.\(^{70}\) The nation-state represented the most advanced form of political organisation in order to pursue the aims of an industrial economy that called for a


\(^{67}\) El Hobsbawm, *The Age of Capital*, at 86.


certain type of division of labour. Even ‘[t]he risks associated with specialisation in modern dynamic economies can be greatly reduced if the individuals happen to share a general common culture’. A higher degree of mobility among workers, which would have been restricted within a state composed by different groups, became a necessity. It has been argued that the only real nationalists in German society were the merchants and bankers, whereas the aristocracy and proletariat did not feel any need of nationalism. But again from a different point of view, nationalism was on the contrary a valuable idea for the poorer echelons in society who made the move from rural agricultural to urban and industrial societies, since the new ideology provided a model of identification that replaced the old social ties and local identities, gone lost on the way toward the city. It was indeed necessary to create new bonds between citizens: whereas in a Gemeinschaft (community) everyone knows their fellow citizens, in a large modern Gesellschaft (society) it is impossible to know everyone, and the necessity arises of creating new social bonds. In this context, nationalism became, in Hroch’s words, the ‘substitute for factors of integration in a disintegrating society’. This author has nonetheless also challenged Gellner’s idea of nationalism as inherently linked to industrialisation, noting that most of national movements in Europe ‘emerged well before the arrival of modern industry’, and even more ‘before they had any contact with it — many of them, indeed, in overwhelmingly agrarian conditions’. Moreover, Gellner’s theory suggests ‘in the style of classic nineteenth-century unilinear evolutionism, that there is some predetermined path that all societies must follow’. With regard to this point, one should recognise that modernist authors more than primordialists pay the price of trying to develop a more general and comprehensive theory of nationalism, thus to some extent abstract and blameable for not taking into account all the differences among different historical manifestations.

I.1.2.3. Primordialism vs modernism?

Although some of the basic assumptions of primordialist and modernist theories give the impression of existing in a state of insufferable contraction, they are less radical and do not seem necessarily mutually exclusive in their original formulation. The differences between different conceptions of nationalism are in fact less considerable than normally suggested. So for example, Hobsbawm claims in a very moderate and almost conservative fashion that what he wants to discuss in his study is true for ‘most’ of historical experiences. Also Gellner, using the metaphor of the navel to symbolise the perennial nature of nations, explicitly affirms that ‘some nations

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72 U Pagano, ‘Can Economics Explain Nationalism?’, at 178.
74 BC Shafer, Faces of Nationalism, at 220.
75 M Hroch, Nationale Bewegungen früher und heute. Ein europäischer Vergleich, at 14, quoted by EJ Hobsbawm, Nations and Nationalism since 1780, at 173.
77 J Hearn, Rethinking Nationalism, at 106.
78 M Hroch, Das Europa der Nationen, at 7.
79 P Burke, What is Cultural History?, at 86.
possess genuine ancient navels, some have navels invented for them by their own nationalist propaganda, and some are altogether navel-less’, nonetheless insisting on the fact that the second category is ‘by far the largest’. Furthermore, these authors do not seem to suggest that nations can be simply created ex nihilo in any particular historical moment, but they choose to investigate the objective conditions – in particular of an economic nature – that led nationalism to develop, which for sure is not incompatible with a primordialist-like idea that national consciousness already existed simply waiting to be awaken when political contingencies would have allowed it. It would admittedly be very naïve to sustain that something like a nation could be created overnight by some political power, rather than being the result of social dynamics with more ancient roots. On the other hand, even primordialists do not deny that some distinctions between nationalities might be artificially constructed: Fichte complained that ‘the distinction between the Prussians and the other Germans is artificial, founded on institutions established arbitrarily or by chance. The distinction between the Germans and other European nationalities is founded on nature’, therefore with the purpose of sustaining the nationalist assumption that institutional lines should be drawn on ‘natural’ national lines. Moreover, modern authors adhering to ethno-symbolism do not deny the importance of cultural practices for the definition of nationality, but also put emphasis on the necessity of ethnic substrata.

Although modernist theories have probably been presented as more extreme than they are, in particular by later theorists, it is a sign of their historiographical success the fact that today even liberal nationalists – those who explicitly advocate the nationalist political principle – have adopted some of the basic assumptions of modernists and embraced in particular Anderson’s theory of imagined communities. It should finally be underlined that none of these theories can provide a single ‘right’ answer to a universal question: the historical events which led to the formation of the modern nation states are complex and heterogeneous. Thus it cannot be inferred that what has happened in a particular social context and in a given historical period may be valid also in very different environments and moments. Both approaches can therefore be employed for the analysis of different nationalist experiences, keeping in mind that even if we accept to speak of ‘nationalism’ as a political principle that emerged since the eighteenth century, we cannot ignore the existence of a less developed earlier ‘proto-nationalism’.

I.2. The nationalist political principle

Many different definitions have been given of nationalism; to sum up all of them would be a tedious and misleading exercise since, surveying a number of several of them, one soon gets the impression that most definitions do not really diverge. The one given by Gellner – who is perfectly aware of the difference between nationalist

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movements and ideologies – is particularly useful, at the very beginning of his fundamental work of 1983, he affirms that *Nationalism is primarily a political principle, which holds that the political and the national unit should be congruent*. Such is the contemporary understanding of nationalism, free from the sedimentations of particular historical experiences and that was known until the second half of the nineteenth century simply as ‘principle of nationality’. In the following pages, the constitutive elements of this definition – political unit, national unit, their congruence – will be dealt with, although the analysis will primarily focus on the fundamental concept of ‘nation’, whose different conceptualisations historically led to the development of specific nationalist forms.

Although the scientific debate on nationalism has often put strong emphasis on the differences between those manifestations, a sharp distinction is not useful: although the definition of nation is central to the nationalist ideology, the criteria which can be used to define it are to some extent interchangeable and depending on historical circumstances. Particular attention will be paid to the criterion of culture, which is the most frequently employed by modern nationalists. It is also worth noting that the basic assumption of all nationalist forms is the necessity of the congruence of political and national unit (where the political is not only expression of the national but also acts in the interest of the latter), whereas further aims – whether of a racist, socialist, or liberal nature – are not *per se* nationalist aims: nationalism in its different historical manifestations has usually taken on aspects from other ideologies and theories (racism, socialism, liberalism) that have nonetheless little or nothing to do with nationalism as such, creating a remarkable cause of confusion.

### I.2.1. The political unit: the state

When we speak of political unit we mainly refer to the concept of state. ‘State’ is understood through Max Weber’s definition as ‘eine Gemeinschaft, welche innerhalb eines bestimmten Gebietes das Monopol legitimer physicher Gewaltsamkeit für sich (mit Erfolg) in Anspruch nimmt’ (a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory). Nevertheless, this is not the only form of political unit we can think of. Political unit is indeed a much wider expression that covers any unit where decisions concerning a

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87 EJ Hobsbawm, *The Age of Capital*, at 82.
88 An interesting example is provided by Danish history, where the choice between voluntaristic and non-voluntaristic criteria was strongly influenced by the hostility towards the Germans, increased by the agitated political career of the German born doctor Johann Friedrich Struensee, who took absolute control of the Danish government in 1711 before being arrested and executed. The choice for an objective criterion, moreover, ‘resonated with the material concerns of the small, but growing, Danish bourgeoisie who strove to secure a better place for itself within the state administration’, L Hansen, ‘Sustaining sovereignty. The Danish approach to Europe’ in L. Hansen and O. Wæver (ed), *European Integration and National Identity. The challenge of the Nordic states* (New York: Routledge, 2002) at 54.
particular group of persons are taken – in a democratic system, for example, by representatives of the group itself. In this sense, the political unit is where the decision making power is located. Nationalism can therefore also be considered as the principle that aims at the maintenance or the transfer of decision making power from a certain political unit to another where it is easier for the nation to exercise the decisional power and pursue its own particular ‘national interest’.

I.2.2. The national unit: what is a nation?

The definition of the concept of nation is central to any nationalist theory. It would be impossible to establish who has the right to create a state without a clear idea of what is covered by that concept. This is a problem which is shared both by nationalism and democracy: the very basic principle ‘let the people decide’, is ‘in fact ridiculous’, as long as nobody determines who the people are.\(^\text{91}\) Nationalism provides an answer to this question: the nation. In this sense, it is easily understandable how the nation can be intended as an instrument of democracy. However, this solution is not really satisfactory and only rephrases the initial problem, since once we have identified the people with the nation, it becomes immediately necessary to understand what a nation is.

The question as to what constitutes the nation cannot be eluded: if we imagine nationalism in Gellnerian terms, to define the nation is fundamental in order to determine who is entitled to exercise the decision making power as well as who will be affected by the decisions taken by the political unit. What is more, a clear idea of what constitutes a nation is necessary in order to distinguish different nationalist manifestations: there is no other criterion to distinguish for instance the nationalism of liberation or resistance from the nationalism of conquest than the ‘nationhood’.\(^\text{92}\) To find an answer to the question as to what a nation is, objective and subjective criteria of nationhood can be employed. The former refer to particular circumstances that cannot be changed by the individual, whereas the latter involve the willingness of a subject and can therefore be also defined as voluntaristic. Objective criteria tend to be static, whereas subjective criteria are dynamic and more easily allow inclusive citizenship policies: one can change one’s mind, but not one’s blood. None of these sole criteria are sufficient to define nationality. Opinions vary as to which criteria are more important and take precedence to define nationality. In this regard different theories may be distinguished.

I.2.2.1. Ethnic nationalism and the objective interpretation of the nation

The nationalist ideology that supports objective criteria of nationhood such as bloodline and tradition can be defined as ethnic nationalism. According to this


\(^\text{92}\) In this sense, from the perspective of the Kingdom of Naples, the movement of Risorgimento represented a form of aggressive nationalism, and while the newborn Italian state considered rebels in the southern regions as mere outlaws and notoriously repressed them accordingly, in the end a clear difference between these and the patriots in other nations like Poland was difficult to see already for foreign observers of that period, see *Cronaca degli avvenimenti di Sicilia da aprile 1860 a marzo 1861: estratta da documenti* (Italy, 1863) at 373.
conception, ‘the nation can trace its roots to an imputed common ancestry and [...] therefore its members are brothers and sisters, differentiated by family ties from outsiders’. Assuming such a common biological origin, it is also easier to posit that the same emotional bonds that exist between the members of a family also work in relation to co-nationals. Ethnic ties are able to surpass ideological distinctions and, in a constructivist perspective, are more effective as means of social control for it is more likely that the level of unrest in the societies will be minor if people can consider one another as relatives. In other words, ethnic nationalism provides the theoretical justification to the partiality of nationalism considering fellow countrymen as members of the same family. This particular form of nationalism is usually associated with Germany and Herder’s theories, probably the first intellectual to develop a philosophy of nationalism. According to another view, ethnic nationalism developed in that particular context because German society was ‘split between a feudal aristocracy and a rural proletariat’ and, given this condition, the nationalist phenomenon could not originate as a social movement, as it did in France, but only as a cultural movement, which preferred to look to the past instead of to the present.

Ethnic nationalism conceives nations ‘primordially’ as a natural organic reality. If this is true, belonging to the nation becomes almost a matter of biology: in the same way in which the zoologist and botanist Carl Linnaeus had systematised animal and vegetable species, nationalities could be scientifically distinguished mostly ‘on the basis of ethnotypes reconfigured into what comes to be called ‘national temperaments’ or ‘national characters’’. A certain mix of ethnic and cultural criteria has therefore characterised objective interpretations of the nation. Biological criteria have been used several times in the history of nationalism: many local groups advancing autonomy or independence claims have based these claims on biological criteria, putting emphasis on their alleged descent from some particular ethnic group. The objective criteria of bloodline and soil represent indeed the ‘natural elements’ from which the sense of community develops into nationalism.

It is undeniably true that the identification with ancestors represents an important strategy for nation building in the history of nationalism, nevertheless, biological criteria of nationhood are clearly contradicted by modern genetic science. From a scientific point of view, indeed, a criterion of nationhood based on the ethnos can hardly be defended: there are no populations or ethnic groups which are completely apart from others. Moreover, modern studies on individuality and society

93 A Smith, National identity, at 12.
94 RR Ergang, Herder and the foundations of German nationalism, at 50.
95 H Kohn, Nationalism: its Meaning and History, p. 30.
98 J Leerssen, National Thought in Europe, at 56.
100 This strategy has been employed not only by Nazi Germany and Fascist Italy, but also by the French and notably the Norwegian, whose independence claims were perfectly sustained by the patriotic theory that Norwegian stem from an ancient population coming to the South from the North, whereas Danes and Swedes were descendents of different Gothic populations which walked the opposite way. A-M Thiesse, La création des identités nationales, at 74.
show how the identification of the individual with the community is chiefly a psychological and cultural process, which usually leaves biological criteria out of consideration, so that ‘no serious scholar today believes that hereditary characteristics explain cultural variations’.102 As it has been summed up sagaciously, ‘[m]easurements of skulls and classifications of blood types tell us little about men except about their skulls and blood types’.103

In conclusion, ethnic nationalism encompasses several dangers. The problem consists in the fact that, whereas every criterion of distinction can easily degenerate into an argument of superiority, the criterion of bloodline has a logical tendency to degenerate into forms of racism, especially ever since it was started to be thought that a different genetic heritage determined not only different somatic characteristics but even moral and spiritual ones.104

1.2.2.2. Civic nationalism and the subjective interpretation of the nation

If classical objective criteria spread in particular in Germany, due to Romantic thought and later on National Socialism, the traditional location of subjective criteria has been France, where a different understanding of nationality arose inspired by the Enlightenment and the theory of social contract. Herder’s and Rousseau’s ideas were indeed authentically antithetic in several respects105 and consequently different ideologies grew out of their ideas. Unlike in Germany, in France a ‘civic’ form of nationalism spread, called so ‘because it envisages the nation as a community of equal, rights bearing citizens, united in patriotic attachment to a shared set of political practices and values’.106 The spontaneous acceptance of the rights and duties arising from the ‘social contract’ and of the values underlying a community is the condition for being a member of it.

The manifesto of civic nationalism was codified in a famous speech given some time later by Ernest Renan, by the title of ‘Qu’est-ce qu’une nation?’. Rather than focusing on a common ethnic heritage from ancient Roman or Gallic populations, Renan preferred to speak of the French nation as a plebiscite of every day (‘un plébiscite de tous les jours’).107 The speech draws freely on revolutionary theories of the social contract108 identifying the foundation of the state in the will of the citizen rather than in an old God-given right of the king; the association of free citizens and their ideal signature on the social contract give rise and legitimacy to the political unit and in a contract what matters is the will of the parties; of course, it is not their ethnos.

The word ‘nation’ itself was barely used in France before the revolutionary period,109 indeed ‘the Crown, the State and the Nation were but three words for the

102 T Eriksen, Ethnicity and Nationalism, at 5.
103 BC Shafer, Faces of Nationalism, at 326.
104 BC Shafer, Faces of Nationalism, at 323.
105 RR Ergang, Herder and the foundations of German nationalism, at 95.
same thing’. In this perspective, the deep meaning of Louis XIV’s famous expression, ‘l’État, c’est moi’ becomes completely understandable. The function of the revolutionary concept of nation was just that of contending the King’s power, so that revolutionaries could have replied to the egocentric affirmation of Louis XIV: the state is not the King anymore; it is the nation, that is, the Third Estate. The nation became people and the word ‘nation’ acquired a new meaning, now becoming the source of state’s sovereignty. This change is of pivotal relevance: this was not the first time that people rebelled against their sovereign but it was the first time they rejected the legitimacy of that power. However, Renan’s speech was delivered only in 1882, thus a very long time after the events that led to the French revolution. It therefore contains also elements which seem closer to those Romantic ideas which spread all over Europe inflaming the continent just a few years earlier.

1.2.2.3. From civic nationalism to constitutional patriotism

A recent development of the spontaneous acceptance criterion which fosters integration rather than exclusion is the theory of constitutional patriotism developed in Germany by Jürgen Habermas building upon an expression of Dolf Sternberger, and which notably influenced the contemporary political thought on nationalism. According to constitutional patriotism, a set of civic and political values of a liberal nature, which in contemporary societies are often laid down in national constitutions, should represent the object of identifications of people independently of ethnic or linguistic factors. This would make a form of ‘solidarity among strangers’ possible. At the core of the theory lies a dynamic understanding of the concept of identity: rather than something inherited, this is a political construction.

The expression ‘constitution’ should not be understood in a narrow sense, as the basic norm of a legal system – let alone a written one – but rather as the set of liberal values and democratic procedures that shape the basic structure of a liberal society. Loyalty thus manifests itself more toward the idea of constitution rather than to its contents. A complete commitment to the constitution as such would be indeed difficult to be required from all citizens, since in a modern and evolved society it is more than likely that contrasts with regard to the contents of the law will occur.

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111 B Shafer, Faces of Nationalism, at 56 ff.
112 J Leerssen, National Thought in Europe, at 86 ff.
115 J Habermas, ‘Staatsbürgerschaft und nationale Identität’, at 642-643.
116 R Sternberger, Verfassungspatriotismus (Hannover: Niedersächsische Landeszentrale für politische Bildung, 1982)
People’s consensus is referred to the ‘procedure for the legitimate enactment of laws and the legitimate exercise of power’. In the end, thus, constitutional patriotism is ‘the morally necessitated readiness of a country’s people to accept disagreement over the application of core constitutional principles of respect for everyone as free and equal, without loss of confidence in the univocal content of the principles’. Such a ‘revival’ of the voluntaristic criteria of identification, that however ‘must be embedded in the context of a historically specific political culture’ and therefore does not appear as totally abstracted from the social context, has to be set against a specific historical and cultural background. The theory of constitutional patriotism developed and gained momentum in divided Germany, where the memory of the Nazi period made it politically complicated to foster identification on the basis of the classical objective criteria of the German tradition. The idea of identification with constitutional values has been one of the key concepts in the extended debate on ‘German identity’ which began already in the 1960s as soon as a new generation began to raise disturbing questions about the Nazi period in reaction to the society’s forgetfulness of the past in the immediate post-war period. That self-analysis culminated in the 1980s in the Historikerstreit, the dispute between historians – including Habermas – on the responsibilities of the German people and their ‘national character’ for the crimes that were committed in the Nazi era. In this context, constitutional patriotism could provide both an identification model based on non-nationalist or even anti-nationalist values and the theoretical guideline for successful integration policies in a country exposed to a massive flow of extra-European immigration. For the same reasons, the theory had a very relevant function in the construction of a political consciousness in other post-fascist countries and it has subsequently revealed itself to be an important element for the theoretical elaboration of the European Union.

Despite its success – or probably as a consequence of that success – the theory has been criticised from different perspectives, in particular for two reasons: on the one hand it allegedly provides too ‘thin’ of a model of identification, which is unable to cope with fundamental issues like the determination of the boundaries of the state, whereas objective criteria may result more useful to promote integration. On the other hand, in order to be easily shared by the greatest number of people living in the community those constitutional values have to be so basic and ‘thin’ that it becomes quite difficult to base any ‘strong’ national identity exclusively on them. Moreover, if every community is based upon the same general values, what is the

121 J Habermas, ‘Struggle for Recognition in the Democratic Constitutional State’, at 135
122 F Michelmann, ‘Morality, Identity and ‘Constitutional Patriotism’’, at 269.
123 J Habermas, ‘Struggle for Recognition in the Democratic Constitutional State’, at 135
125 M Canovan, ‘Patriotism Is Not Enough’ (2000) 30 British journal of political science 413-432, at 417. ‘The German discourse of Verfassungspatriotismus […] should be seen as a way of managing tensions between traditional understandings of national loyalty and the post-war constitutional arrangements of the Federal Republic. As a rhetorical response to that situation it seems to have been quite successful, partly no doubt because its local resonances were decently clothed in the language of unpolitical generality’, at 432.
126 See infra fourth chapter on Euronationalism.
Nationalism and Private Law in Europe

criterion to distinguish one community from another? In this sense, the same objections that are usually directed to Rawl’s and Dworkin’s idea that common principles of liberal justice may be employed to constitute and distinguish ethical communities can be directed to Habermas: those principles are often shared not only within states but also across states.\textsuperscript{129} It can be even more problematic to employ the model of constitutional patriotism with regard to social values which require a high degree of social solidarity and consensus. One critique of this theory is indeed that it does not provide legitimacy to a model of an extensive welfare state.\textsuperscript{130}

\subsection*{I.2.2.4. Defining the nation as ‘culture’}

Renan already spoke of the ancestral legacy in order to define the nation, a legacy which, of course, is of a cultural nature instead of a biological one, since it would be a mistake to confuse ‘la race avec la nation’.\textsuperscript{131} But the importance of culture as an objective criterion of nationality emerged primarily under German Romanticism, when cultural and ethnic elements were often combined. For a long time, objective nationalism has been based on an indissoluble combination of ethnos and culture, so that different ethnic groups were considered to also have different cultures. Such a linkage between culture and ethnos has been broken only in recent times, after the criterion of bloodline was discredited following the defeat of ideologies based on racism. Since then, the idea of nations as ethnically homogeneous communities has faded away but in turn the view considering the nation as a community of people sharing a common culture has gained the upper hand. National belonging is now more often expressed in cultural rather than ethnic terms and ‘culture’ has clearly become the favourite criterion of national identification for modern nationalists. Neither bloodline nor spontaneous acceptance constitutes the criterion of nationhood anymore; culture has taken their place, intended objectively: culture is something everybody is born with and cannot change even if they wanted to. In these terms, the nation becomes ‘a union of similarly thinking and similarly speaking persons’,\textsuperscript{132} while the language is the most important feature of a national community; as already in Herder’s view, this is ‘the purest expression of the spiritual character of a national group’.\textsuperscript{133} Modern day nationalism, unlike Fichte’s conception according to which ‘whenever a separate language is found, there a separate nationality exists which has the right to take independent charge of its affairs and to govern itself’,\textsuperscript{134} downplays the importance of the linguistic factor and considers language just as one of the many manifestations of culture, which is instead the crucial feature.

Nationalist theories underline the substantial homogeneity of culture at the national level and its difference from those of other nations. Even those liberals who aim to take distance from classical nationalist positions are aware that nations ‘tend to attribute to themselves a greater degree of cultural homogeneity than their members

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\textsuperscript{129} W Kymlicka, \textit{Contemporary Political Philosophy. An Introduction}, at 255.
\textsuperscript{131} E Renan, \textit{Qu’est-ce qu’une nation?}, at 2.
\textsuperscript{132} R Springer, \textit{The National Problem} (Moscow: Obschestvennaya Polza Publishing House, 1909) at 43.
\textsuperscript{133} Quoted by RR Ergang, \textit{Herder and the foundations of German nationalism}, at 150.
\textsuperscript{134} JG Fichte, \textit{Werke}, Vol 5, edited by F Medicus (Leipzig: Meiner, 1910) at 564.
\end{flushleft}
actually display’, nonetheless advocate that a set of basic ‘beliefs, practices, sensibilities’ still give form to clearly distinct national cultures.\textsuperscript{135} The problem becomes then at which level of approximation the specificity of a national culture should be recognised, understanding that – at some level – a cultural difference between nations must be found in order to make a distinction possible and discover a common ‘identity’.

It is indeed usual that identity be constructed through a process of differentiation: ‘National identity is equated with difference, and there is a constant, even obsessive, concern to remain different from others lest one should lose one’s identity’.\textsuperscript{136} But the construction of identity through juxtaposition is quite an odd mechanism, it is like defining an object explaining what it is not rather than what it is: more logically, ‘difference is derivative, and not the central defining feature of identity’.\textsuperscript{137} The nationalist theory of identity seems thus to be based upon three cornerstones ‘(1) each nation [has] a unique character, and (2) members of each nation [are] born with or acquired national characteristics stemming from the national character, and (3) every citizen of a nation should have these characteristics.’\textsuperscript{138} The reason why national characteristics are transmitted to all members of the nation is of course because personal identity is primarily a social identity, determined by the social context in which the subject is embedded.\textsuperscript{139} The differences within nations are thus concealed. National stereotypes, often ideologically biased, are the clear result of this process of generalisation. But when moral evaluations are linked to these characteristics, potentially violent and aggressive forms of nationalism can arise: the externalisation of the evil appears as a decisive step in the shift from a non-aggressive to a violent form of nationalism.

Nevertheless, this idea has many drawbacks and is critically discussed in academia: the simple nationalist conception of identity would strongly collide with the complexity of human identities, which are constructed by many elements and are not a static reality.\textsuperscript{140} The nationalist theory makes individual and social national identity overlap, whereas an individual’s identity is more likely the product of the dialectic combination of different identities, for example, one personal, one (or, usually, several) social and one human.\textsuperscript{141} Thus, human beings have multiple identities, sometimes even contrasting with each other, from which plural affiliations to particular groups derive,\textsuperscript{142} while national identities are but one of these allegiances. Though nationalist ideologies aim at reducing this complexity to unity, ‘[t]he political conception of a person as a citizen of a nation – important as it is – cannot override all

\textsuperscript{135} D Miller, \textit{On Nationality}, at 85.
\textsuperscript{136} B Parekh, \textit{A New Politics of Identity}, at 61.
\textsuperscript{137} B Parekh, \textit{A New Politics of Identity}, at 61.
\textsuperscript{138} BC Shafer, \textit{Faces of Nationalism}, at 249.
\textsuperscript{139} A MacIntyre, \textit{After Virtue: a Study in Moral Philosophy} (Notre Dame: University of Notre Dame Press, 1981) at 220.
\textsuperscript{140} ‘While it is plausible to say that a person’s character and core commitments are partly shaped by their community, it is implausible to suggest that they are wholly determined by their community and that we cannot attain any critical distance’, S Caney, ‘Liberalism and Communitarianism: a Misconceived Debate’ (1992) 40 \textit{Political Studies} 273-289, at 276.
\textsuperscript{141} B Parekh, \textit{A New Politics of Identity}, at 8 ff.
other conceptions and the behavioral consequences of other forms of group association'.

I.2.2.5. Is there a ‘good’ and a ‘bad’ nationalism?

Nationalism gives the impression of having undergone a transformation over the years, in particular ‘over the course of the nineteenth century, a slow, inexorable shift from the left of the political spectrum towards the right’. In pre-revolutionary France, nationalism was clearly inspired by the ideas of the Enlightenment and its main purpose was to create a liberal rational society, in which an underlying cosmopolitan inspiration was present. A similar connotation was initially present even in Germany but it later developed in that context into a different phenomenon. In the scientific debate, thus, a strong juxtaposition between civic and ethnic nationalism – often proposed even in geographical terms – has been made. This juxtaposition was already clear to some of the brightest intellectuals of the nineteenth century: for instance the German poet Heinrich Heine, who mixed elements of both Romanticism and Enlightenment in liberal patriotic fervor, noted that

‘der Patriotismus des Franzosen besteht darin daß sein Herz erwärmt wird, durch diese Wärme sich ausdehnt, sich erweitert, daß es nicht mehr bloß die nächsten Angehörigen, sondern ganz Frankreich, das ganze Land der Zivilisation, mit seiner Liebe umfasst; der Patriotismus des Deutschen hingegen besteht darin daß sein Herz enger wird, daß es sich zusammenzieht wie Leder in der Kälte, daß er das Fremdländische hasst, daß er nicht mehr Weltbürger, nicht mehr Europäer, sondern nur ein enger Deutscher sein will’.

One could therefore be tempted to conclude that the focus on objective elements of identification leads to ‘evil’ forms of nationalism, while the focus on subjective aspects does not imply such an outcome. This conclusion would be incorrect. In the first place, it must be made clear that the possibility of collocating civic nationalism in France and ethnic in Germany is doubtful while even a structural difference between civic and ethnic versions of nationalism is not convincing. A sharp distinction indeed appears ‘conceptually ambiguous, empirically misleading, and normatively problematic’. The advocates of the civic French nationalism have themselves used

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144 J Leerssen, National Thought in Europe, at 215. This shift is one of the characteristics which distinguished nationalism of 1880-1914 from the Mazzinian phase according to EJ Hobsbawm, Nations and Nationalism since 1780, at 102.
145 H Kohn, Nationalism: its Meaning and History, at 29.
146 In particular H Kohn, Nationalism: its Meaning and History, and J Plamenatz, ‘Two Types of Nationalism’, made use of the distinction. Surprisingly, whereas both authors agree that French nationalism can be intended as a Western phenomenon, the nature of the German one is less clear: Kohn believes it to represent a form of Eastern nationalism, while Plamenatz places it on the same level as the French in the category of Western nationalism, considering the Slave and even the South American experiences examples of Eastern nationalism; the one–in the thought of this Author–typical of ‘peoples recently drawn into civilisation hitherto alien to them’, J Plamenatz, ‘Two Types of Nationalism’, at 33.
147 H Heine, Sämmtliche Werke, Vol 5 (Hamburg: Hoffmann und Campe, 1861) at 51
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an ethno-nationalist vocabulary and imagery to some extent, and many elements of ethnic nationalism can be found in the civic version and vice versa. While in theory it is possible to observe – even with some conceptual ambiguity – a difference between civic and ethnic manifestations, such a clear-cut distinction is less evident in practice. Not even the accent on a voluntaristic criterion did prevent French nationalism from taking an illiberal form, as became evident already in the period of the Terror. Very soon, between the end of the eighteenth and the beginning of the nineteenth century, France, Germany and the United Kingdom competed in an impressive and fully nationalistic arms race that rapidly led Europe to war. Even taking the roots of modern nationalism in a period prior to the French Revolution into consideration, it can be noted that the nation-building process used the marginalisation of minority groups as a primary technique of homogenisation – a form of ‘cohesion by exclusion’ which has been brought about by making use in particular of religious criteria. In this sense, anti-Semitism has been an important factor: while the phenomenon became evident in France only during the Dreyfuss-affair at the end of the nineteenth century, the legal historian can detect that already at the beginning of that century ‘legal anti-Semitism’ was quite common in France.

A degeneration of nationalism from a liberal to an aggressive ideology appears less self-evident and ‘civic’ and ‘liberal’ do not appear to be synonyms. In this regard, civic and ethnic nationalism do not diverge considerably, as they both make use of a technique based on the exaltation of internal national homogeneity and of the differences between nations, which appears to manifest itself as a typical characteristic of nationalism. The same can hold true for constitutional patriotism, notwithstanding its commitment to liberal values. From the perspective of the legal scholar, Weiler detects the role that constitutional values can have in this sense; constitutions indeed

`are about restricting power, not enlarging it; they protect fundamental rights of the individual; and they define a collective identity which does not make us feel queasy the way some forms of ethnic identity might. Mobilizing in the name of sovereignty is passé; mobilizing to protect identity by insisting on constitutional specificity is à la mode'.

I.3. The arguments of nationalism

Having said that nationalism is the political principle which holds that national and political unit should coincide, we must investigate the theoretical justifications for that principle: why national and political units should coincide. Authors adhering to a view called ‘liberal nationalism’, whose main arguments will be introduced in the next paragraphs, have recently tried to give an answer to this intricate question. The recurring criticisms to those arguments will be highlighted as well, in order to underline which points are openly rejected by other schools of thought and thus represent exclusively nationalist arguments.

It can already be said that two fundamental types of criticism can be made with regard to liberal nationalist theories: on the one hand one can affirm that nationalist conclusions are based upon incorrect assumptions or, on the other hand that, although those premises can be agreed with, these do not necessarily have to lead to liberal nationalist conclusions. The former objection is the strongest and is normally based upon cosmopolitan ideas; the latter can more easily be advocated by communitarians who, nonetheless, reject the equalisation of community and nation made by liberal nationalist authors.

I.3.1. Preliminary remark: nationalism and liberalism

Most studies on nationalism have investigated and offered interpretations of the origins and main manifestations of that ideology, but there have been fewer attempts to explain its philosophical and normative foundations. Modernist authors have already explained the reasons for nationalist ideologies and their political and economic agendas, while a similar attempt by those who advocate nationalist positions has been less systematic. An interesting position in this debate is taken by liberal nationalists, who have attempted to find a remedy for the alleged philosophical ‘poverty’ of nationalism. These authors have attempted to demonstrate that nationalism is not necessarily an ‘evil’ phenomenon and that its true nature is visible in historical experiences like the Italian Risorgimento and German Romanticism instead of Fascism and Nazism, which, paradoxically, even contradict many nationalist principles. Liberal nationalists can actually support their allegation drawing evidence from history: the claim that the state should coincide with the nation may work as a limitation and therefore hinder the constitution of some kind of multi-national empire, an aspect which was problematic in particular for fascist regimes. In this sense, already those fascists who were more familiar with political and legal theory rejected the principle of nationalities, seen with suspicion as a limit that would have

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154 B Anderson, Imagined Communities, at 5.
155 AD Smith, Theories of Nationalism (London: Duckworth, 1983) at 262 ff.; Y Tamir, Liberal Nationalism, at 93.
156 Camillo Pellizzi sustained in 1927: ‘si tratta di stabilire se il principio nazionale debba costituire uno dei principii ispiratori e motori del Fascismo. Io dico di no […] La mia tesi è che il principio nazionale si fonda su un mito o pseudo-concetto empirico, di valore occasionale […] Dal Fascismo in poi non più ci si deve muovere per la nazione, bensì dalla nazione verso l’ideale fascista di stato e d’impero’ in R De Felice, Autobiografia del fascismo. Antologia di testi fascisti 1919-1945, (Torino: Einaudi, 2004) at 300. On the figure of Camillo Pellizzi, see A
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crystallised the international status quo.\textsuperscript{157} On the very other hand, ‘real’ nationalism has been perceived as functional to liberalism for a long time; some liberals already saw the nation-state as the model which best suits the interests of a liberal society,\textsuperscript{158} and this was actually the deep conviction of most patriots in the nation-building period: ‘A world of nations would, it was believed, be a liberal world, and a liberal world would consist of nations’.\textsuperscript{159}

Is nationalism therefore the unlucky victim of a historical misunderstanding? In reality, the possibility of reconciling liberalism and nationalism remains more controversial and, despite the optimism of the eighteenth and nineteenth century patriots, ‘[t]he future was to show that the relationship between the two was not as simple as this’.\textsuperscript{160} In fact, the two schools of thought often appear in radical contradiction to one another: one is inspired by universalistic ideals, whereas the other school takes its cue from particularistic ones.\textsuperscript{161} No wonder that, in the aftermath of the Second World War, after the idea of a nationalist world order peacefully organised in independent nation-states had revealed its fallacies, some of the most influential liberals of that period expressed clearly anti-nationalist views.\textsuperscript{162}

More recently, however, various contemporary political theorists sustained a type of liberal – i.e. non aggressive – nationalism which, of course, appears as ‘the most acceptable form of nationalism’.\textsuperscript{163} Having discarded any form of political authoritarianism, their interesting effort has been to prove the philosophical compatibility of nationalism and liberalism. Liberal nationalists like David Miller and Yael Tamir quite surprisingly seem to adhere to modernist views: they accept the idea that a nation is an ‘imagined community’ instead of something similar to a biological entity and that nations have been ‘built’ through the employment of techniques as those described by Anderson and Billig. Nonetheless, the beliefs which hold societies together ‘cannot be transmitted except through cultural artefacts which are available to everyone who belongs [to the nation]’.\textsuperscript{164} In the end, it remains true that ‘nations really exist, i.e. they are not purely fictitious entities’.\textsuperscript{165} Moderate modernist in the positive part of their theory, liberal nationalists defend the ideology in its normative assumptions. As already discussed, this position does not necessarily result in a contradiction, since even modernists are more concerned with a description of nationalism and its origins rather than with its philosophical justification. In the opinion of liberal nationalists, a moderate nationalism is still a useful political principle which can be employed to promote peaceful and noble ideals such as social justice – as for Miller – or peace between ethnic groups at war with each other – as for

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  \textsuperscript{157} C Costamagna, ‘Il diritto internazionale nell’ordine nuovo’ (1941) Lo Stato, at 402.  
  \textsuperscript{159} EJ Hobsbawm, The Age of Capital, at 97.  
  \textsuperscript{160} EJ Hobsbawm, The Age of Capital, at 97  
  \textsuperscript{163} A Vincent, ‘Liberal Nationalism: an irresponsible compound?’, at 294.  
  \textsuperscript{164} D Miller, On Nationality, at 32.  
  \textsuperscript{165} D Miller, On Nationality, at 10.
}
They therefore describe and analyse a ‘pure’ ideal form of nationalist, whose only assumption is that national and political unit should be congruent, excluding external elements such as racism.

1.3.2. The fundamental assumption: nation and culture coincide

Liberal nationalists are not exempted from the recurring problem of defining a nation. They admit that not every minority group can be entitled to self-determination. Liberal thinkers already singled out useful criteria to determine which communities are entitled to self-determination, which can be summed up in a prior inclusion in the actual state and in the failure of the state to deal with the needs of that community. On the contrary, to understand ‘when a national community presently incorporated in a multinational state is justified in demanding secession’, liberal nationalists resort to the distinction between nationality and ethnicity. Accordingly, only nationalities should be entitled to secession, whereas mere ethnicities could at most aim at the reform of the state. An ethnic group can be described as ‘a set of people with a distinct set of cultural values and a shared language, who recognise their cultural kinship with one another, and engage in practices that set them apart from outsiders’. Unfortunately, as Miller himself recognises, the distinction between these two terms is not very clear and indeed it already presupposes a theory of nationality based upon the employment of one of the criteria of nationhood examined before.

Adhering to some extent to modernist views and picturing the nation as an imagined community, liberal nationalists reject a traditional understanding of the concept of nation, based in particular upon objective criteria of nationhood exemplified by ethnicity, so that multiethnic nations can exist perfectly in their perspective. The characteristics of a nation are then given by its cultural homogeneity rather than the biological or linguistic similarity among its members. Authors like Miller are completely aware of the fact that an exaggeration of the cultural similarities amongst members of a nation and differences between different nations could lead to the creation of stereotypes which can prove to be dangerous. Nonetheless, having rejected this extreme position of classical nationalist rhetoric, they still argue that some kind of cultural homogeneity can be found in some nations and can be employed in order to distinguish that community from other nationals groups, just like in Herder’s ‘organic-genetic’ conception of culture, according to

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166 The Israeli scholar Y Tamir, Liberal Nationalism, at XXX, for example, sustains a moderate nationalist position assuming that the creation of two independent states – one day maybe parts of a confederation – could put an end to the bloody conflict between Israel and Palestine.  
167 Y Tamir, Liberal Nationalism, at 76.  
169 D Miller, On Nationality, at 108.  
170 D Miller, On Nationality, at 112.  
171 D Miller, On Nationality, at 127.  
172 D Miller, On Nationality, at 112.  
173 D Miller, On Nationality, at 21.  
174 D Miller, On Nationality, at 85.  
175 RR Ergang, Herder and the foundations of German nationalism, at 234.
which ‘every nationality is one people, having its own national culture as well as its language’. Whether one calls it ‘homogeneity’ or not, co-nationals share a set of basic information and conventions: different ‘ways of doing things’. These are ‘inherently arbitrary human artifices’ and as such they cannot ‘aspire to any objective truth status’.

Yet, liberal nationalists mistrust subjective criteria of identifications exemplified by the ones advocated by the theory of constitutional patriotism, seen as too thin. Even their conception of culture is predominantly objective. Furthermore, Miller claims that ‘national identities invariably contain some ethnic ingredients’ and that ‘[c]entral to the idea of nationality is not individual will, but individual identity’, blaming Renan for having confused these concepts. For all these reasons unless one rejects the objective criterion of culture, liberal nationalism cannot be intended as a mere synonym of civic nationalism.

1.3.3. A state should be national because…

Culture provides the state with legitimacy, but in return it demands protection. In Tamir’s view, nationalism’s end is cultural in itself. In order to protect culture – implying in a relativistic way that culture is worth of protection independently of the values it embodies – the nation-state stands out as the best form of political organisation. The liberal theory according to which liberties and local customs can only be preserved within a multi-national state is expressly rejected for wrongly assuming national identities as ‘exclusive in their nature’. Within a nation-state, it is indeed possible to promote policies of protection of the national culture that would be impossible in a multi-national state. This argument seems quite circular: a state has to be culturally homogeneous because this allows it to adopt policies of cultural homogenisation. But still, according to the liberal nationalist’s view, differences have to be safeguarded, because cultures are a relevant part of one’s identity, indeed, ‘the framework within which [people’s] plans and various projects are realized and exist’. Making use of communitarian arguments, liberal nationalists argue that the construction of one’s identity is a complex process dependent on the social context(s) where it takes place. Thus, cultural circumstances in the society influence the cultural

176 Quoted in RR Ergang, Herder and the foundations of German nationalism, at 88.
178 RE Goodin, ‘Conventions and Conversions, or, Why Is Nationalism Sometimes so Nasty?’, at 95.
179 D Miller, On Nationality, at 163.
180 Tamir’s position tends more to voluntaristic nationalism: see Y Tamir, Liberal Nationalism, at 57.
181 D Miller, On Nationality, at 122.
182 D Miller, On Nationality, at 37.
184 Y Tamir, Liberal Nationalism, p. XIII.
187 Y Tamir, Liberal Nationalism, at 73.
188 C Gans, The Limits of Nationalism, at 170
identity of the person which is a part of that community. If this is true, the respect toward national culture perfectly coincides with the respect for the person’s identity.

Culture is the basis of the liberal nation-state and even the term has become synonymous for nation, so that to speak of multi-national states means to speak of multi-cultural states. The model of the multi-national state is distrusted by both classical and liberal nationalists: in their view, an efficient democracy can only work within the context of a homogeneous cultural state, so that the existence of a common culture becomes the major premise of a wide range of nationalist arguments.\textsuperscript{189} There are different reasons for this assumption.

### I.3.3.1. …Co-nationals know better the needs of each other

In the liberal nationalist state, fellow citizens must be preferred over outsiders not because outsiders are of a culture, language, or race which is inferior – which is what racist nationalism would suggests – or even because they are only ‘foreigners’ to which no sense of commitment is ethically due. From this perspective the contrast between particularism and universalism could never be bridged. On the contrary, the partiality of liberal nationalism is morally and politically justified by the fact that the needs and exigencies of one group are better known and therefore dealt with most efficiently by people of that same group;\textsuperscript{190} in this sense, the justification of the partiality is merely ‘instrumental’\textsuperscript{191}

Starting from a universalistic standpoint, liberal nationalists claim that particularism is not a value in itself but can be seen as an efficient way to achieve universalistic principles. The tension between impartiality and partiality can be solved by developing a morality of partiality, intended as a means to achieve ends of justice which are of a universal nature: ‘in order to realise the values that lie at the base of our ethical theory most effectively, it makes sense for each agent to pursue those values in relation to particular other agents rather than the whole universe of agents’.\textsuperscript{192} If everyone’s needs were to be taken care of by all individuals within the society, exigencies would not be dealt with properly. Thus, a model of assigned responsibility seems to be more efficient\textsuperscript{193} – as opposed to one of shared responsibility – whereby a small number of people are instructed to take care of the needs of a few subjects, for ‘hospital patients are better cared for by being assigned to particular doctors rather than having all the hospital’s doctors devote one \(n\th\) of their time to each of the hospital’s \(n\) patients’.\textsuperscript{194} By the same token, the administration of a nation should only take care of the needs of its members and not of outsiders.

Starting from this assumption, one could then think that only a matter of efficiency in terms of regulation makes it necessary to adhere to particularism instead of universalism. The national group, thus, could take political decisions for a broader group, but there would be the risk that these decisions would not fit that group’s


\textsuperscript{190} D Miller, \textit{On Nationality}, at 52.


\textsuperscript{192} D Miller, \textit{On Nationality}, at 51.


\textsuperscript{194} RE Goodin, ‘What is So Special about our Fellow Countrymen?’, at 681.
needs. Nonetheless, Miller claims, arguing that assigning responsibility for the rights and welfare of the Swedes to other Swedes is convenient because of reasons of physical proximity and administrative ease would be a mistake.\textsuperscript{195} Instead, according to his theory, there is a cultural similarity between conationalists: as a consequence, they are ‘better informed’ than outsiders.\textsuperscript{196} Nationalist theories, thus, assume that co-nationals will be presumably more competent than others since they have a ‘cultural similarity’: according to the criterion of culture, actually, people sharing a culture also share a nationality. But here a tension between liberals and nationalists could arise, for the former can argue that decisions are to be made by those – usually the ones who are ‘closer’ to the citizens – who are more informed on particular circumstances;\textsuperscript{197} whereas nationalists will claim that competences have necessarily to be exercised at the nation state level, because outsiders are ‘culturally’ unable to properly cope with the exigencies of other people.

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1.3.3.1.1. Criticism: not only co-nationals know the needs of each other

Liberal nationalists defend the idea that co-nationals have to take care only of the interests of their fellow countrymen by positing that a common national culture justifies a kind of presumption of competence in dealing with co-nationals’ needs. This line of reasoning can be criticised from several standpoints. In the first place, it is easy to see that it is not sure that co-nationals are more aware of one another’s needs. This would probably be true in a simple society where information spreads freely and members of the community are well acquainted with one another. In modern and complex societies, however, it would be quite formalistic to assume that all compatriots have the same knowledge or even culture: members of the society are never (and can never be) totally informed. Certain kinds of information are particularly spread among certain groups, but those groups only occasionally correspond to national constituencies. If legislation had to regulate a particular technical issue, would the cultural homogeneity of the nation be relevant in order to affirm that this group is the more advisable for taking an informed decision? This is part of a more general argument against liberal nationalism, which criticises how nationalists put emphasis on national identity and culture, forgetting several other identities and cultures which are trans-national and on occasion more relevant. Furthermore, the mere fact that a problem crops up in or directly affects a particular community does not mean that the people belonging to that community will be aware of it or more able to deal with the problem itself.

These criticisms to the liberal nationalist argument can be taken to the extreme, making the question arise whether it is reasonable, in an era characterised by a globalisation of economic, social and environmental problems, to consign the regulation of those problems to local institutions, not making an ‘internationalisation of political decision-making’ follow an ‘internationalisation of the problems’ and ‘of

\begin{thebibliography}{99}
\bibitem{195} D Miller, \textit{On Nationality}, at 63.

\bibitem{196} D Miller, \textit{On Nationality}, at 63.

\bibitem{197} FA von Hayek, ‘The Use of Knowledge in Society’ (1945) 35 \textit{American Economic Review} 519-530, at 524 ff.
\end{thebibliography}
This counter-argument, nonetheless, appears to be indifferent to important questions of democratic legitimacy.

I.3.3.2. …Only within the nation state there can be democracy

A particular justification for the national organisation of a state is identified by liberal nationalists as democracy. Already in Mill’s opinion, even democratic institutions are impossible in a state that is not also a nation. Homogeneity is seen as the precondition for a liberal state, while where the population is too diverse it becomes problematic for the institutions to deal with the needs and interests of all people, so that eventually imperfect or unsatisfying political choices could be made. Indeed, different groups within the state will presumably have different interests, possibly opposite to those of other groups, which will soon or later lead to a high degree of social tension that, in turn, could induce the government to take oppressive measures. On the other hand, if these differences were too significant it would be impossible for minority groups to actively participate in normal democratic life and would therefore be slowly sent to marginalisation; an example is provided by linguistic minorities who cannot understand the political debate going on through the mass-media. Furthermore, a culturally heterogeneous population will give no guarantee that the state laws will find homogeneous application in society. Since, as already seen, it is likely that cultural minorities will not participate in the law-making process, legislation will be the expression of the interests of only one cultural group. In this sense, legislation (but also more generally state administration) will necessarily be an imposition highly doomed to failure, since

‘Much state activity involves the furthering of goals which cannot be achieved without the voluntary co-operation of citizens. For this activity to be successful, the citizens must trust the state, and they must trust one another to comply with what the state demands of them’.201

I.3.3.2.1. Criticism: not only within the nation state there can be democracy

Mill’s concern that democratic institutions may only exist within nation-states is probably excessive although it highlights important aspects of the organisation of a liberal society. From a theoretical perspective, indeed, the fact that there are groups that have different needs within the state is the usual situation which occurs in any democratic state, in which political decisions are the outcome of a dialectic juxtaposition of social and parliamentary groups. In this sense, a society is always heterogeneous, if not from a national perspective, at least from an ideological one.

From an empirical perspective, it is self-evident that numerous states which are multi-national are also democratic. Of course, nationalists who sustain Mill’s

199 JS Mill, Considerations on representative government, at 310.
200 See also FA von Hayek, ‘The Road to Serfdom’ (London: Routledge, 2007) at 228
201 D Miller, On Nationality, at 90-91.
opinion will argue that to consider those countries multi-national denotes too strong a reliance on the objective criterion of the (native) language and on the contrary even those countries could be intended as nation-state, since a national identity independently from linguistic diversity already exists or because in the end one culture tends to overwhelm the others. The debate on nationalism, in other words, still suffers from a lack of certainty and consent as to the answer to the fundamental question ‘Qu’est-ce qu’une nation’. The risk is to overlook the distinction between nation and state, in a positivistic way arguing that multi-cultural states are in any case nations because they are also states. Otherwise, acknowledging that there is no single univocal criterion of nationhood, the consideration that the modern world boasts no single state which can be considered fully national, will collide with the fact that numerous states are nevertheless democratic.

Without a doubt, it can be problematic especially for linguistic minorities to actively participate in the public life of their country: it would be easier for them to follow political events in countries that are more linguistically homogeneous than in their own. This situation can incite oft legitimate independence claims. In several democratic countries, nonetheless, institutions take into account these circumstances, granting minorities particular benefits and mechanisms of representation. The democratic character of a country is evident also in the way in which it deals with linguistic minorities allowing them to participate in the political debate, so that in this sense, multi-nationality becomes not only the best guarantee but also some kind of test of democracy.

1.3.3.3. …Only within the nation state there can be solidarity

Nationalist and liberal nationalist authors sustain that a nation is characterised by the existence of social bonds between its members. They thus agree to the definition of the nation as a ‘community of people, whose members are bound together by a sense of solidarity, a common culture, a national consciousness’. The root of such solidarity ties is represented by the fact that individuals tend to relate to other people with whom they share similar characteristics.

According to this perspective, since solidarity automatically follows identification, in a community where people are too different – like in a multi-national society – no identification and therefore no solidarity would be possible. This assumption has important consequences for state policies. Indeed, as long as we consider humans as individual subjects detached from the community, if the government takes a portion of the individuals’ income to share it with the have nots in society, this would be perceived as unjust – which is indeed the sense of the libertarians’ criticism to Rawl’s liberalism – but if a strong sense of community exists, a redistributive taxation would be accepted as just: those economic resources will

202 D Miller, On Nationality, at 94 and 95.
203 JEED Acton, Nationality, at 160.

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however remain within the community. On the contrary, redistribution across
community borders would be perceived of as unjust.

Miller makes clear that this assumption – sustained in particular by
communitarians – is based upon studies of social psychologists that prove that
perceptions of similarity affect the boundaries of the moral community.\textsuperscript{205} If this is
ture, a multi-national state will not be able to enact welfare policies, and a concept of
distributive justice which exceeds the state’s borders will not be possible, since co-
nationals have to take care of their fellows’ interests only: \textsuperscript{206} ‘The duties we owe to
our fellow–nationals are different from, and more extensive than, the duties we owe to
human beings as such’.\textsuperscript{207} Solidarity among people will arise only if and when some
kind of social ties are present. The clearest examples of this kind of social obligations
are those which can be found within a family: a father should naturally feel a stronger
commitment to his own child; by the same token we are ‘far more disturbed by
someone who neglects his own children than by someone who fails to support
someone else’s children’.\textsuperscript{208} The reason is that between father and son there is a
particular moral and biological obligation not comparable to the one generally binding
someone to someone else’s children. The case of the father neglecting his child is
therefore more immoral, since it contains the violation of a further and stronger moral
and natural obligation. No-one would deny that this particular kind of relations
deserves a specific and particular attention,\textsuperscript{209} and also legal orders usually consider
these ties in order to establish differentiated legal treatment. For the identical reason,
we are more negatively struck ‘by a person who deserts a friend in need than by one
who does not help a stranger’, and, continuing quoting from Tamir, ‘by individuals
who are indifferent to starving members of their own community than by those who
do not care for starving people in faraway countries’.\textsuperscript{210}

1.3.3.3.1. Criticism: not only within the nation state there can be solidarity

Whereas Tamir’s first two examples are obvious and express principles which are
indeed already recognised in different forms by most contemporary legal orders,\textsuperscript{211} the
third example is more debatable. Why should a person who does not care about
starving children in his or her own countries be more immoral than a person who does
not care about children in the same conditions in remote territories? Unless one
seriously believes that the adage ‘out of sight, out of mind’ can be employed as a
philosophical justification, the underlying idea seems that the nation is a kind of
’enlarged family’. In this perspective, not caring about a starving child in one’s

\begin{footnotes}
\item[205] D Miller, \textit{Citizenship and National Identity}, at 157-158.
\item[206] T Hurka, \textit{The Justification of National Partiality}, in R McKim and J McMahan (ed), \textit{The Morality of
Nationalism} (Oxford: Oxford University Press, 1997) at 143.
\item[207] D Miller, \textit{Citizenship and National Identity}, at 27.
\item[208] Y Tamir, \textit{Liberal Nationalism}, at 99.
\item[210] Y Tamir, \textit{Liberal Nationalism}, at 99.
\item[211] So for example, family law imposes on people particularly strong duties only towards their own children,
criminal law considers as autonomous more serious crimes or aggravating circumstances the offences directed
against family, procedural law generally relieves people from the duty to testify against their family and so on.
\end{footnotes}
vicinity is as despicable as ignoring a dying brother. As already seen, this sets out the reason of traditional and primordialist interpretations of the nation, which put a particular emphasis on the objective element of the bloodline: in this perspective, if everyone shares the same ancestors, all co-nationals can be part of a common family, therefore sharing the same social, moral and biological obligations which exist within a family. This view implies the ‘natural’ character of the nation, the cornerstone of primordialist theories of nationalism, critically considered by the same modernist theories that have been nonetheless accepted also by advocates of liberal nationalism.

Yet, starting from even moderately modernist positions one should come to the conclusion that there is no natural relation between an individual and starving children either at home or in faraway locations. The relation, of course, is purely imagined. From the same perspective, the creation of such an imagined link by nationalist movements is essential to provide the nation with a degree of social homogeneity which is necessary to further the economic system from an agrarian to an industrial economy, or – from a legal historical perspective – to boost the shift from the status to the contract. National ties have the function to make up for the loss of traditional identities, occurring when rural populations moved to the industrialised city. But in this sense, if the relation between members of the nation – unlike a family or even a restricted community – is purely imagined and imaginable, there is no ethical reason why co-nationals have to be preferred to outsiders. Indeed, given that relations of affinity are not a fixed thing but are continuously changing, one could think that there is no reason why the same nation building techniques which have been successfully employed by the nation-state in order to create homogeneity on the inside cannot be also used for example at a European level to extend the borders of social solidarity, hitherto limited to the nation state.

More fundamentally, even admitting that solidarity can only arise as a consequence of identification, it remains questionable why only national identification should matter in this regard: why should someone feel a major commitment to someone with whom he or she shares nationality and not with someone else with whom he or she shares political opinions, religious beliefs and so on? What is more, why should human beings prefer and identify only with ‘their own kind’? Of course one of the contents of nationalist ideology is putting emphasis on the national identity

212 Studies in neuroscience have scientifically proved that human beings tend to be more empathetic with individuals of their own ethnic background (as long as it is recognizable) and presumably more willing to help them than individuals of other ethnic groups, see Xiaojing Xu, Xiangyu Zuo, Xiaoying Wang and Shihui Han, ‘Do You Feel My Pain? Racial Group Membership Modulates Empathic Neural Responses’ (2009) 29 The Journal of Neuroscience 8525-8529. Nonetheless, these kind of studies can hardly be employed to justify nationalist arguments, since the empathy with co-ethnical can easily be seen as an ethnic bias, thus a consequence of nationalist politics rather than their justification, on ethnic biases see JE Kilbride and M Yarczower, ‘Ethnic bias in the recognition of facial expressions: A cross-cultural comparison between Zambia and the United States’ (1983) 8 Journal of Nonverbal Behavior 27-41 In this sense, it would be necessary to repeat the experiments which subjects who have not been exposed to social conditioning yet (a similar study involving children has been made with regard to the capacity to recognize vocal emotions: R Markham and L Wang, ‘Recognition of emotion by Chinese and Australian children’ (1996) 27 Journal of Cross-Cultural Psychology 616-643). However, even if such experiments were to prove the existence of an ethnic bias, that still would not imply that social policies have to be inspired by those natural feelings, turning the descriptive findings of the studies into normative recommendations.  
213 BC Shafer, Faces of Nationalism, at 220. 
216 B Parekh, A New Politics of Identity, at 83.
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...playing down all other elements: ‘Nationality is de facto the main source of such solidarity’. 217

Furthermore, in the liberal nationalist’s theory the ‘imagined’ social obligation plays more than a merely subsidiary role, some kind of presumption of similarity between people who do not know each other, but has its own autonomy. People could also distrust or even detest their own co-nationals, but that would not affect the social obligations they still would have toward each other as members of the same national community: solidarity ties stem not from sympathy but from connectedness. 218 But since a nation has been defined as a ‘community of people, whose members are bound together by a sense of solidarity, a common culture, a national consciousness’, 219 we end up in a vicious circle: the sense of solidarity is a constitutive element of the nation, but its roots are the national community itself. Co-nationals have social ties because they live in the same nation, which is such because its members have common social ties. In another perspective, the duties that keep a community united diverge in terms of structure and cannot be compared with the duties toward one’s family, since they are political obligations which imply reciprocity. 220 What is more, these duties are not even due toward fellow nationals but rather to the nation itself, with consequent benefits for all its citizens. 221

I.3.3.4. ...justice is a national concept

As communitarians sustain, the concept of justice is not a universal one. It is rather socially embedded. There is no single and univocal understanding of solidarity and justice: what is just for one person can be not for another one and so on. According to communitarians, a certain conception of justice arises only from the shared way of life in the community: in particular, a distribution can be just or not only in relation to the social meaning of the good, which, of course, can vary depending on the society. 222

Liberal nationalist authors specify (restrictively or extensively) the community as a nation. If a nation is a community mainly characterised by a common culture – a Kulturnation – and social obligations between its members, it is possible to imagine that different nations present different kinds of social ties. But if a trans-national standard of social justice does not exist, it is also impossible to impose solidarity obligations among non co-nationals, since justice logically demands a community. Where such a community – i.e. nation – does not exist, there can be no justice. In liberal nationalists’ argumentation, this point becomes particularly strong inasmuch as it is interwoven with post-modernist concerns of protection of minorities’ cultural rights since the definition of an ideal of justice is a cultural process expression of the identity of a community. In this respect, a difference between ‘aggressive’ and liberal nationalism emerges: whereas the former acknowledges as legitimate only its own

217 D Miller, On Nationality, at 32.
218 Y Tamir, Liberal Nationalism, at 98.
219 H Seton-Watson, Nations and States, at 1.
222 M Walzer, Spheres of Justice (Oxford: Martin Robertson, 1983) at 8.
culture, the latter recognises the value of every culture but accepts to protect only one of them.

Starting from the exposed communitarian point, two normative consequences – one nationalist and one libertarian – can be drawn. If one admits that social justice policies are important, it will be opportune for societies to be organised as independent nation-states where solidarity between people will open the possibility to enact welfare policies. The same concept of global justice will entail on the one hand a minimum liberal duty not to harm and the nationalist right to self-determination in order to pursue distributive justice on the other hand. Given this interpretation, no tension between global justice and nationality arises. Otherwise, from a communitarian and anti-nationalist perspective – which nonetheless acknowledges that solidarity can only arise where people are similar – the state will necessarily have to be minimal. In this case thus, a communitarian theory can support libertarian economic choices dismissing the relevance of social justice, furthermore seen as a mere ‘mirage’. From this perspective, a contrast between nationalist and cosmopolitan theories will necessarily arise, since from a universalistic standpoint it is impossible to justify why people should identify only with co-nationals or indirectly discriminate against outsiders. The contrast between liberalism and nationalism, thus, is of a mainly ethical nature, while liberal nationalists strove for a difficult conciliation of these different and contrasting approaches.

I.3.3.4.1. Criticism: justice is not a national concept...

Building upon communitarian assumptions, liberal nationalists suggest that welfare policies are only possible within a nation state as addressing a standard of distributive justice on a supra-national or even global dimension makes no sense: every community – or nation – understands justice in a different way. This view is adopted in particular by Miller who, assuming that legislation choices are conditioned by the social understanding of what is good, asks the question

‘If the citizens of one state decide to opt for an entirely public system of education, while their neighbours prefer a mixture of public and private provision, why should a transnational court adjudicate on citizens’ rights (discovering, say, a right to private education and applying it to both states)?’

In this view, of course, it would be ‘a serious form of oppression’ to force that community to comply ‘with the dictates of some foreign power’, and this, it would seem, independently of the will of the nation-state to be bounded by the decision of the ‘foreign power’, which is what normally occurs in the case of supra-national institutions such as the Court of Justice of the European Union. This argument, that

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223 D Miller, Citizenship and National Identity, at 177.
224 D Miller, Citizenship and National Identity, at 178.
226 D Miller, Citizenship and National Identity, at 93.
227 D Miller, Citizenship and National Identity, at 162.
can undermine the ‘fairness’ even of European law, can nonetheless be criticised from different angles.

Cosmopolitans, for instance, affirm that all human beings share, besides of an undeniable human nature, a common set of values and beliefs from which a common notion of justice can be derived: there are a series of basic goods which are relevant to every human being with no distinctions of cultures or nationalities. In this regard, it makes no sense to object that there exist different interpretations in different contexts: a ‘sufficient consensus and shared understanding’ already exists. This sort of justice appears as some kind of greatest common divisor. Unfortunately, in order to be common, those values must also be particularly basic and generic: if it is easy to reach a consensus on the fact that human life is a good which is valuable in every community, other goods can be much more problematic.

Liberal nationalists argue indeed that this criticism is pertinent only ‘by thinking only of the most basic of goods – food, shelter and clothing’, but not as far as goods such as ‘money, work, honours, status and political power’ are concerned. The goods belonging to the first category are so basic that if the national community did not acknowledge them in favor of outsiders, even a breach of a positive duty not to harm might be materialised. Other goods, on the contrary, are highly dependent on the evaluation of the society and their configurability as rights is less obvious.

The cosmopolitan argument is therefore partially insufficient to confute the view of liberal nationalists. A different criticism can be obtained starting from a communitarian perspective, which assumes that the idea of the good is socially – but not necessarily nationally – conditioned: since every community is different from the others, it is likely that even within the same nation-state different conceptions exist. How could then a unified legislation properly deal with the social needs of all co-nationals? In this case too two consequences may derive: no unified social justice policies are possible, or the country should be divided in different smaller nation-states each with its own idea of justice. But once again, empirical evidence contradicts the first point: there are in fact several modern societies that are multi-national and nonetheless enact solidarity policies. With regard to the second point, it is impossible to acknowledge a right to secession to every local community, because this would give rise to a potentially never-ending process of disintegration of the country which can be defined as ‘Balkanisation’. The most important criticism, however, remains that different ideas and concepts of social justice are expressions of political and ideological differences rather than of national ones. This consideration leads to the necessity of looking at the problem from a different perspective.

None of the approaches examined can give an adequate answer to the question of Miller that has been cited before. In Miller’s example, the ‘intangibility’ of the political decisions taken by one nation state seems to derive from the ‘cultural nature’ of the decision itself, so that giving the power to decide on this matter to another

230 M Walzer, Spheres of Justice, at 8.
231 D Miller, Citizenship and National Identity, at 168.
232 D Miller, Citizenship and National Identity, at 38.
authority (an international court for example) would imply disrespecting the cultural and national identity of a country. In this respect, the nationalist character of the theory is revealed by the assumption that a national homogeneous conception of the good exists. In this sense, the legislative choice for, for instance, a public system of education is presented not as the outcome of a democratic parliamentary process where presumably an opinion prevailed over the others (that would already mean that in that society there is no unambiguous understanding of the good), but rather as the obvious consequence of the national character. This happens because it is ‘also the character of national identity that matters from the point of view of social justice’. In this sense, the relevance of politics is minimised, while political decisions appear to be the logical outcome of the character of a community according to a strong cultural determinism. It is then evident that any political indication coming from any foreign or supra-national institution – in the example of Miller an international court – would disregard such national character. In practice, no form of transfer of competences and sovereignty would be possible. As we will see later on, this argument is often used in the debate on the harmonisation of European private law systems, where a general tendency considers numerous matters of legislation as a cultural one, denying the competence of the European institutions to decide on them. Nevertheless, if we consider the dynamics of the democratic and legislative processes, it emerges that the ‘culture’ underlying most of the political choices is not national; otherwise it would make no sense to speak of majorities and minorities within the same national parliament. Those processes rather reflect ideological differences which, although possibly locally conditioned, are normally trans-national or interests which depend on economic conditions rather than cultural traits.

1.3.4. The fundamental criticism: do nation and culture really coincide?

Liberal nationalists, as well as classical nationalists, assume that nationality and culture coincide and represent the most important criterion to distinguish peoples. ‘The religion of nationalism […] makes a fetish of culture’. So in this sense, as discussed previously, welfare policies would only be possible in nation-states because we identify with people with whom we share nationality (but not political opinions?); legislation should be enacted at a national levels because only co-nationals know our needs because of cultural similarity (but not also informed – and democratically legitimised – outsiders?); that legislation itself can only work at the level of the nation-state because it would not fit the interests of outsiders (but the ones of all insiders?) and so on. This basic assumption is nonetheless disputable and it can be challenged both from a cosmopolitan and a communitarian perspective. Cosmopolitans, as already seen, would argue that a basic identity is common to all human beings, so that the nationality does not matter at all; communitarians would argue that identities depend on the particular community where the individual is embedded, which do not necessarily coincide with the nation-state, in particular if the state has a considerable geographical size.

233 D Miller, On Nationality, at 94.
Despite these objections, one could still accept that co-nationals share a distinctive set of common beliefs and values which form national culture, but to base a shared identity on this element would then require that those beliefs differ from the beliefs held in other countries. ‘The problem here is how we recognize the national identity and culture of Britain, Canada, Australia, Germany, America or Israel? Is there a central public culture or distinctive set of values acknowledged by all the citizens?’ More importantly, it is not sure whether those values will be shared by all members of the community. Although the nation continues to be represented as a basically homogeneous unity, people can in fact have different conceptions of the goods and values depending on their political, religious, cultural, or economic status. A French liberal would probably agree (and maybe develop solidarity) more easily with a Polish liberal – if they find a common language to communicate in – than with a French conservative. This happens for the reason that individuals have multiple and often conflicting group allegiances. The national identity is definitely one of these and, in the perspective of many, still the prominent one, but it still co-exist with a number of different loyalties that can occasionally conflict with it or sometimes even reinforce it. Anyway, to disregard such sub-national distinctions and emphasise national homogeneity would mean, to some extent, to hide the existence of political, social, economic and more in general cultural conflicts within the society, those conflicts which in mature countries are resolved through democratic processes rather than through homogenisation.

There can be of course cases in which those sets of values and beliefs are hopelessly irreconcilable. Those are the situations in which even advocates of constitutional patriotism justify exclusion – as there is a lack of acceptance of the constitutional-patriotic principles – and that modern legal systems tend to avoid even derogating from a pure democratic principle: not even a formally democratic process could validate a statute which infringes fundamental rights, even if this were the expression of some hypothetical national, social or economic culture.

Although there is no sufficient consensus as to a definition for national ‘culture’, nationalists assume that national culture will bind people together much better than any other more concrete type of culture and identity. That the national identity should count more than any other allegiance is of course the normative point of classical nationalist theories, aiming at the production of standardised citizens with no extra-societal allegiances that could challenge the loyalty to the nation, but it is still unclear whether national ties are really the most important to individuals. Some questions unavoidably crop up: ‘why liberals or anyone else should see any virtue or importance in nations above other types of group loyalty? Why should there be a

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236 A Vincent, ‘Liberal Nationalism: an irresponsible compound?’, at 285. In the same sense, already in 1907, K. Kautsky, ‘Internationality and Internationality’, at 374 challenged the idea of the nation as a ‘commonality of destiny and culture’ for it ‘does not form anything that strictly distinguishes one nation from another. Despite their different nationalities, the German and the French Swiss are connected by a much closer community of fate and culture than the German Swiss and those from Vienna or Holstein’. In Kautsky’s thought, it is indeed possible that a group of people living for a long time under the same conditions develop a common identity; nonetheless it is hard to affirm that the same can apply to larger states like Germany (at 376) and the most important factor to determine nationality is assumed to be the language (at 379).
virtue in giving political expression to nations above other groups? In the end, ‘The fatherland above everything’ remains more a prescription rather than a statement of fact.

I.3.5. National vs. social identities: some notes on the case of socialism

Regardless of the theoretical objections to the primacy of national allegiance, some empirical evidence validates this particular point of liberal nationalists, and an interesting case is offered by the history of socialism. Socialism initially set itself up as a non-nationalist ideology that appealed to the international community of workers. Nevertheless, despite such transnational vocation, precisely those workers eventually accepted to fight against their fellows who dressed the uniform of a different country whenever military conflicts between nations occurred. Still today, international crises tend to strengthen national allegiances and undermine cosmopolitanism. Nationalism proved to be stronger than class solidarity and internationalism. Thus, a modernist with Marxist background, sharing an old suspicion of Proudhon, would argue that nationalism had the political function of tearing apart large social classes in order to avoid the formation of a dangerous trans-national coalition: this already happened after the collapse of the great multi-national states, as the creation of nation-states based on ethnic criteria may have had the role of contrasting socialism in Europe, since ‘what looked like mobilizing the masses in 1917-1918 was social revolution rather than national self-determination’. According to this interpretation, thus, the ‘anti-hierarchical’ element contained in modern nationalism, according to which differences between social classes are reduced or even eliminated by new egalitarian categories (patriot, citizen, conational etc.), was an instrument of control rather than of equalisation. The ‘bourgeois principle of nationality’ was therefore meant to replace the ‘socialist principle of class struggle’.

But if it is true that nationalism was essentially bourgeois, the ease with which workers grabbed weapons to protect the nation-state is even more surprising. Is then national identity, independently of nationalism’s ideological connotations, really stronger than every other relationship? In reality, imaging the nation-state as the guardian of the exclusive interests of the middle-class would probably be a misleading conception due to an excess of historical materialism. On the contrary, nationalism has been capable of winning the loyalty of numerous citizens, including the workers’

243 EJ Hobsbawm, Nations and Nationalism since 1780, at 131.
245 JV Stalin, Marxism and the National Question [1913] (Moscow: Foreign Languages Publishing House, 1947) at 50.
246 JV Stalin, Marxism and the National Question, at 27 sustained that ‘the national struggle under the conditions of rising capitalism is a struggle of the bourgeois classes among themselves. Sometimes the bourgeoisie succeeds in drawing the proletariat into the national movement, and then the national struggle externally assumes a “nation-wide” character. But this is so only externally. In its essence it is always a bourgeois struggle, one that is to the advantage and profit mainly of the bourgeoisie’.
social class: ‘In fear and hope, individuals, rich and poor, and of the upper, middle, and lower classes, became nationalists’.\textsuperscript{247} Not a God nor a cosmopolitan ideology but instead nation-states, also through still thin constitutions and unified legislations, ‘became the chief instrument for achieving security for life and property, for establishing and safeguarding whatever liberties were won, for protection against foreigners, and increasingly for the fulfillment of the hopes of the citizens’.\textsuperscript{248} Within a few years, even socialist countries had to adapt the internationalism upon which their ideology was based to the benefit of the nation-state. ‘The fact is that workers did become nationally minded as they received concrete benefits in the present, not in some remote future’:\textsuperscript{249} in Stalin’s rhetorical words ‘as long as people believed in a “bright future”, they fought side by side irrespective of nationality […] But when doubt crept into people’s hearts, they began to depart, each to his own national tent’.\textsuperscript{250} Moreover, if it is true that the nation-state was functional to industrialisation and industrialisation is a pre-condition of the communist order, nationalism could serve the aims of socialism,\textsuperscript{251} provided that nationalism is a transitory phenomenon since class solidarity must eventually prevail on national categories.\textsuperscript{252}

In more recent years, quite paradoxically, in particular in re-unified Germany, ‘the traditional nineteenth-century concept of ‘the nation’ survived most strongly in the working class’,\textsuperscript{253} whereas the interest of the nation has been taken over as a means of resistance against extra-European immigration\textsuperscript{254} and the European Union even by socialist and communist parties. In France, driven by the fear that the new European construction could be symptomatic of a new German militarism on the rise,\textsuperscript{255} those parties argued that ‘‘internationaliste’ signifie précisément ‘entre nations’ et non la destruction des nations’,\textsuperscript{256} denying the existence of some kind of peculiar European identity and conforming to the views of several other French political parties of the 1950s with the exceptions of the Liberals.

The persisting importance of nationalism was revealed on a global scale at the end of a cold war that previously opposed ideologies rather than nations, when the former Soviet Union, a gigantic aggregation of very different national and ethnic groups (even the Russian word for ‘nationality’ has a strong ethnic connotation) disintegrated in a series of states organised on a national basis. In other words, whereas the relationship between nationalism and socialism remains problematic in theory, in practice these ideologies have often been complementary.

\textsuperscript{247} BC Shafer, \textit{Faces of Nationalism}, at 158.
\textsuperscript{248} BC Shafer, \textit{Faces of Nationalism}, at 158.
\textsuperscript{249} BC Shafer, \textit{Faces of Nationalism}, at 193.
\textsuperscript{250} JV Stalin, \textit{Marxism and the National Question}, at 7.
\textsuperscript{252} J Schwarzmantel, \textit{Socialism and the Idea of the Nation}, at 64.
\textsuperscript{253} EJ Hobsbawm, \textit{Nations and Nationalism since 1780}, at 190.
\textsuperscript{254} See the statements of the leader of the left party ‘Die Linke’ O Lafontaine concerning foreign workers taking the jobs of German family men and women and the reactions it provoked, in R Roßman, ‘PDS über ihr Zugpferd Lafontaine verärgert’, \textit{Süddeutsche Zeitung}, 17 June 2005
\textsuperscript{256} F. Billous in 1953, quoted by M Jachtenfuchs, \textit{Die Konstruktion Europas}, at 96.
I.4. Conclusion

I.4.1. The convenience of nationalism

Many explanations can be given for the success of nationalism; most of them are of a sociological or even psychological nature. It could be pointed out that patriotism became the civic religion of the new secular society, providing individuals with a sense of belonging to a larger and possibly immortal community, a feeling which is able to fire the crowds and produce huge social movements. Even empirical research seems to confirm that a feeling of attachment to the national community can contribute to life satisfaction in particular for those subjects and in those countries whose societal conditions are considered poorer. Tamir has gracefully pointed out that

‘the respect for continuity inherent in national membership enables individuals to place themselves in a continuum of human life and creativity, connecting them to their ancestors as well as to future generations and lessening the solitude and alienation characteristic of modern life’.

By becoming part of a perpetual higher entity, people gain the illusion of overcoming their own particular mortality, in the tragic attempt to escape the oblivion that, sooner or later, befalls every individual. Nationalism can reassure people as one of their most fundamental fears, occasionally employing this feeling for bellicose purposes. However, since nationalism is foremost a political principle, there must be political and theoretical reasons behind its continuous success. On the one hand, it can be said that one of the reasons of the success of nationalism has been exactly its alleged philosophical poverty. Nationalism, as a political principle holding that political and national unit should be congruent, has still a quite unclear ideology, its rhetoric and strategies are particularly flexible and can be employed with different aims gaining wide support.

Its very historical evolution proves that nationalism initially presented itself as a revolutionary force, aiming at the reform or the creation of new political institutions, while it has now assumed a more conservative aspect, aiming at the maintenance of the social status quo, which of course includes the defense of the existing nation-state against excessive interference on the part of often poorly legitimised international institutions. On the other hand, putting emphasis on the cultural homogeneity of the community and the exclusive national interest, nationalism also acts as a limit against tendencies to the disaggregation of the society: if, from an utilitarian perspective, life in society is necessary only because the

257 BC Shafer, *Faces of Nationalism*, at 257.
259 Y Tamir, *Liberal Nationalism*, at 86.
260 The incision on a militaristic monument built by national socialists – to be seen in Hamburg still at the present day – states ‘Deutschland muss leben und wenn wir sterben müssen’. This line originally comes from the poem ‘Soldatenabschied’ (1914) by Heinrich Lersch.
261 EJ Hobsbawm, *Nations and Nationalism since 1780*, at 176, notes that ‘Its very vagueness and lack of programmatic content gives it a potentially universal support within its own community’. 
advantages it brings to individuals are more important than the disadvantage of the loss of a part of individual liberty, it could be possible to change the social contract anytime it would be perceived as more convenient for a small privileged group to declare its autonomy from others. This circumstance would clearly destabilise the society, while the concept of national interest puts a limit to this process of Balkanisation.

The concept of ‘national interest’ works both inwards and outwards, so that any project of political or social institutions at a supra-national level will bear the burden of the proof to demonstrate that the national interest will be pursued better at that level than at the national one. Federations are created when the benefits outweigh the costs of the association and, once they are formed, they risk breakdown when this relation is overturned. But even if the benefits (also considering hypothetical symbolic utilities) outweigh the costs, there can still be good reasons why a nation-state should not give up its competences and enter into a federation. This, of course, is because where more subjects are involved in the democratic decision-making power process the weight of each single vote diminishes proportionally according to the number of voters: from a pure mathematical perspective, states are more democratic than international organisations, local communities than nations and so forth.

The relation between nationalism and democracy is indeed an intricate one. The democratic process necessarily presupposes a unit, which nationalism identified with the nation, indeed formalising the democratic concept of people. From a descriptive perspective, the main reason of the success of this ideology in modern political thought lies in the fact that it provides an answer to the difficult question ‘who is the people?’, although it consequently opened up an even more controversial one: ‘what is a nation?’, which can be answered in different ways and notably by resorting to the concept of national culture.

I.4.2. Summing up

In light of what has been discussed, nationalism should be viewed as an ideology or political principle which holds that national and political units should overlap. This basic idea can be detected in all nationalist manifestations. As such, this appears as an extremely thin political principle and it becomes easy to see why, in its historical evolution, it often took on elements of different ideologies and ideas. Furthermore, because of its ‘poverty’ and malleability, nationalism can be employed for very different ends; to promote imperialism, racism, socialism, liberalism, democracy. This also represents one reason for nationalism’s enduring success and explains the striking contrast between its philosophical poverty and its historical strength.

Although it is unclear whether a pure liberal form of nationalism that does not degenerate into illiberal practices can exist for a considerable length of time, in its basic form nationalism does not necessarily represent a negative principle. While nationalism’s philosophical poverty may lead us to think that a direct influence of this ideology on the process of Europeanisation of private law is improbable, the

arguments which have been used by ‘liberal nationalist’ authors to explain and justify nationalism are particularly concrete and can still play an important role in the process of European legal integration.

The liberal nationalist line of reasoning can be summarised as follows: since a model of assigned responsibility is preferable over a model of shared responsibility, a subdivision of the world in several political organisms each entitled to only take care of the needs of a small portion of the world population is ethically justifiable and even instrumental to the establishment of universal principles. This first argument is not nationalist per se and can be shared with liberal or even cosmopolitan perspectives. It nonetheless opens up the question as to what criteria would be used to select the population that would live under the law of a given political organism. Nationalist ideologies resort to the element of nationality (the way in which the nation is defined – or more precisely envisaged – distinguishes various nationalist ideologies): state and nation have to be congruent (the way in which the coincidence of these elements is intended to be brought about founds the distinction between nationalist movements). Nationalist authors, in particular liberal nationalists, have given several reasons in support of this principle. These arguments are based upon the assumption that a fully democratic political process will be possible only within a homogeneous community, while homogeneity is construed in cultural terms. Culture is therefore mainly national and people sharing a nationality also share a culture whose importance overshadows all other personal and social identities: identity is mainly nationally constituted.

In social studies this tendency is reflected in methodological nationalism, whereby the nation-state is seen as the starting point of every social discourse and the national dimension of personal and social identities are overestimated. Ever since the ‘invention’ of the nation-state, this approach has become widespread enough to become common even among politically non-nationalist scientists,265 and still persists in the era of globalisation.

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264 P Gilbert, The Philosophy of Nationalism, at 88.

265 U Beck, Der kosmopolitische Blick, at 43.