Nationalism and private law in Europe
Comparato, G.

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Chapter II
Nationalisation and Denationalisation

The nationalist political principle requires national communities to organise themselves politically without the interference of foreign non-national subjects. In contemporary western societies, law performs this function of political organisation of society and, as such, it becomes inherently national according to nationalist ideology. It would indeed be contradictory to assume that nations should freely organise themselves and at the same time to admit that one of the most important instruments to achieve this goal may be decided by non-nationals or at a supranational level. In this sense, the nationalisation of law represents a necessary step in the nationalisation of society.

Corollaries to this assumption are that the history of legal nationalisation more or less organically follows the more general history of nationalism and that, since a conceptual-historical link between nationalism and law exists, processes of legal denationalisation – as notably in the case of European law – are likely to meet with resistance from nationalist perspectives. In this chapter, therefore legal historical developments will be seen through the lenses offered by nationalism studies.

II.1. Influence of nationalism on the development of private law

II.1.1. The affirmation of the nation in international law

As one of the most influential political principles in contemporary politics, nationalism has left a significant print on modern legal systems. Although still philosophically poor and theoretically disputable, nationalism’s basic assumption that nation and state should be congruent has become an almost universally accepted principle first in social consciousness and secondly in established international law.

The emergence of the principle of nationalities in the eighteenth and nineteenth century radically changed not only the geopolitical map of Europe but even the theoretical foundations of international law. Until that point, this area of law was
Nationalisation and Denationalisation

based upon the state-centred assumption that only states – instead of nations – were actors in the international arena;¹ it took the influence of French, Italian and German liberal nationalism for the concept of nation to assume relevance in law. That concept was initially introduced in private international law by influential scholars such as most notably the German Friedrich Carl von Savigny and the Italian Pasquale Stanislao Mancini, whose ideas can be considered as the cornerstones of modern private international law.² But those legal theories were not invented from scratch; rather they can be collocated in a specific cultural context³ characterised by the emergence of nationalism in Europe. In particular Pasquale Stanislao Mancini, famed lawyer and political protagonist of the Risorgimento, claimed that it was the nation and not the state that represented the basic unit for the international legal order⁴ and on the basis of this assumption, after having rejected the ‘classical’ views of Grotius and Puffendorf⁵ – he built his system of private international law as revolving around the fundamental principles of nationality, sovereignty and freedom.

In a few decades, this view took the upper hand in the international arena and was formalised in the public international law principle of self-determination, which indeed appears as the translation in legal terms of the nationalist idea that every nation should have the right of constituting an autonomous and independent state. Consequently and significantly, many of the theoretical objections and problematic aspects which are intertwined with the political principle of nationalism reverberate in the interpretation of that legal principle. According to this fundamental principle, ‘all peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development’.⁶ Once they are organised into independent nations, people have a right to determine their internal development freely: the principle does not prescribe any particular way in which this has to be achieved; internal self-determination does not require a certain type of constitutional parliamentary democracy,⁷ nor does it dictate the content of the statutes that internal parliament has to adopt. In fact, it is not even clear whether it requires a parliament to be present in the state organisation, and the question whether self-determination coincides with democracy remains a delicate one.⁸ Apparently, the only condition which has to be met in order to be entitled to

¹ N Berman, ‘‘But the Alternative is Despair’: European Nationalism and the Modernist Renewal of International Law’ (1993) 106 Harvard Law Review 1792-1903
³ On the cultural and political premises of Savigny’s system of private international law: J-H Halpérin, Entre nationalism juridique et communauté de droit (Paris: Presses Universitaires de France, 1999) at 48-66, where emphasis is put on its internationalist (and anti-Semitic) character. In this respect, it is still possible to detect a link between Savigny’s thought and the early Romantics, more focused on Europeanism than nationalism, in particular Novalis and his conception of a Christian Europe – expressed in a speech from 1799 later published with the title Die Christenheit oder Europa.
⁴ PS Mancini, Della nazionalità come fondamento del diritto delle genti [1851] (Torino: Giappichelli, 1994) at 48. The text is of 1851.
⁵ E Jayme, Pasquale Stanislao Mancini, at 20, with quotes.
⁶ This principle is included in several international law instruments like the UN General Assembly resolution 1514 (XV) of 14 December 1960 (‘Declaration on the granting of independence to colonial countries and peoples’), the International Covenant on Civil and Political Rights of 1966, the International Covenant on Economic, Social and Cultural Rights of 1966. It is also accepted as customary international law.
Self-determination is to be a nation, the definition of which remains an open problem in political science.

Whereas the basic formulation of the principle of self-determination, as famously expressed (although not called with this name) by President Wilson in his famous ‘Fourteen Points’ is basically unrestricted, the exercise of the right could of course be subjected to further requirements; so for example, another political leader who had a central role in contemporary history too, Joseph Stalin, affirmed that although a nation has the right to arrange its life on autonomous lines ‘this does not mean that it should do so under all circumstances, that autonomy, or separation, will everywhere and always be advantageous for a nation, i.e., for its majority, i.e., for the toiling strata’. In this case, thus, nationalism seems to be purely instrumental, for in some cases it will be more convenient to recognise the right to self-determination and in other cases not, a specification which easily paves the way to political oppression of other peoples. It is interesting to note that even more recent developments in international public law – that may have taken place in order to compensate for the practical difficulties of a pure nationalist approach on the politically controversial questions of self-determination – pose limitations to the exercise of the right to self-determination, mainly due to the need for protection of human rights. This tendency found within the confines of recently developed humanitarian international law therefore seems to move away from more nationalist theories and to get closer to the liberal approaches to the problem of self-determination: instead of making reference to distinctions between nationality (legitimising secession from the state) and ethnicity (legitimising reform of the state) – as clear in theory as impracticable in reality in particular if we were to adhere to an ethnic definition of the nation – like nationalists do, liberals more pragmatically affirm that it is the failure of the state to deal with the needs of the community claiming independence that legitimise a right to secede.

This viewpoint helps clarify how nationalism may be linked to very different political ideologies: once the congruence of nation and state has been brought about, the policies enacted by the nation-state could be liberal, libertarian, socialist, communist and so on. All this is covered by the principle of internal self-determination. An inquiry into the influence of nationalism on private law, therefore must note that nationalism is as such incapable of shaping the contents of private law in a distinctive way: the significant element in a nationalistic perspective is that any nation can organise itself and therefore also have a private law of its own, but as to the political choices contained in such a body of rules, there are no particular requirements.

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8 It can be said that in President Wilson’s idea, ‘self-determination’ was substantially a ‘right to democracy’ and thus only in its ‘internal’ sense, coinciding with people’s right to choose a particular form of government. Furthermore, it was in his opinion possible that, according to changes in social and political conditions, national boundaries could also be changed, it was in other words evident an understanding of ‘nation’ inclined toward subjectivist theories typical also of the American experience; J Castellino, International Law and Self-determination (The Hague: Kluwer Law International, 2000) at 13 ff.
9 JV Stalin, Marxism and the National Question [1913] (Moscow: Foreign Languages Publishing House, 1947) at 31
II.1.2. From a common to a national private law

The idea that private law is mainly a national phenomenon is a modern one. Looking at the legal experience of the Middle Ages and the early Modern Age, for example, one notes a very different state of affairs. The appearance of the ‘medieval legal order’ is well-known in the literature, here it suffices to note that private law was of a mixed universalistic and particularistic nature, being based both on local customs and on the ‘science’ of Roman law, but did not have a national dimension. The reason for this circumstance is remarkably obvious, but still telling: nation-states did not exist as of yet. In that context, rather, private law did not considerably differ from one end to the other end of Europe and, as soon as universities were created, a flow of students and professors started travelling that geographical area spreading the same knowledge. Regardless of this apparently cosmopolitan situation – today often idealised – however, one should not think that law was somehow ‘unified’ in the whole of Europe, at least in the modern terms in which we conceive legal unification today. The mixed universalistic-particularistic nature of the medieval *ius commune* is clearly explained by Zimmermann:

> ‘many individual legal problems were solved differently by different lawyers at different times and in different parts of Europe. But these differences, by and large, were variations of a common theme, because the development of the law occurred within an established framework of sources and methods, of concepts, rules and arguments. It was a tradition marked as much by a considerable diversity as by a fundamental intellectual unity’.

Such a fundamental intellectual unity, however, began to waiver as soon as the national idea emerged. In particular two important historical and cultural events stand out from the slow and continuous process that led to the nationalisation of private law, and lie at the roots of our present-day systems: the creation of the first modern states after the treaties of Westphalia and the emergence of nationalist thought.

In the first place, the political scenario in Europe drastically changed – starting its process of modernisation – when the Treaties of Westphalia were concluded in 1648. It is now commonly agreed that those documents mark the birth of the modern idea of sovereign state, though previous political organisations which had characters similar to the state already existed. The conceptual elaboration of private law was already influenced by the political events in this era. Already in the period between

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15 More precisely, this event concluded a fundamental phase in European history that saw its beginnings in the Protestant Reformation of 1517, a subject that cannot be dealt with in this book but whose significance for the nationalisation process of Europe should at least be mentioned.
16 HJ Berman, *Law and Revolution. The Formation of the Western Legal Tradition* (Cambridge: Harvard University Press, 1983) at 113, for example considers the Catholic Church as the first modern Western state.
the sixteenth and the eighteenth century an important transformation occurred and the idea that it was a positive law that had to govern the relationships between nations developed.\(^{17}\) The creation of modern nation-states did not automatically lead to the abandonment of the particularistic-universal nature of private law and its substitution with inherently national systems – though some legal scholars started to envisage this option since the Reformation\(^{18}\) – so that the traditional *ius commune* continued existing normally in its local variations still for decades. Newly formed states did not feel any need of becoming involved in private law yet, and several new independent states, such as the Netherlands, remained firmly bound to their system of laws.\(^{19}\) The non-national character of private law never represented an issue, just like ‘the differences in language and culture among the various regions had not been looked upon as problematic, at least not until the seventeenth century’.\(^{20}\) The creation of the state was just the start of a process that rapidly evolved.

It is indeed true that since then, the modern state started expanding its competences regulating more and more various aspects of the life of its population. In order to obtain this result, fields that today are often considered to be part of the area of ‘public law’ such as criminal, administrative and procedural law, became the first sectors in which the new state showed interest, as instruments of organisation of the society. In contrast, while states administered private law through a massive system of courts, they did not pretend to create it as of yet and legislators remained relatively indifferent to private law for quite a long time.\(^{21}\) It took nationalism to lead to a complete nationalisation of private law.

The principle of personality of law that so strongly characterised the medieval era was challenged in the eighteenth century, when the idea became predominant that the foreigners dwelling on the soil of a given country had to adapt and be subject to the law and authority of that country.\(^{22}\) National thought led to epochal political and social changes in continental Europe, starting from France, but did not lead to the same spectacular outcomes in England, a country that was already unified and in which absolutism *à la française* did not exist anymore. Under these circumstances, the concepts of state and nations are – just like in pre-revolutionary France – less distinct than in the languages of countries that experienced nationalist revolutions. Private law there continued to be administered by the Court system, but the contents of it remained mainly customary: the civil codification, the favourite instrument of civic nationalism originally contemplated in England and later accomplished in France, did not manage to cross the English Channel. Continental Europe embraced national claims and broke off from the natural legal development that continued in England. The meaning of this historical transformation can be understood from different angles and our appraisal of the role of nationalism in the development of

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European private law can vary accordingly. If one likes to underline the substantial ‘unity’ and cosmopolitan character of the *ius commune* as a common system of law understood by everyone in its Latin language in Europe, nationalism appears as the blameable phenomenon that destroyed that unity. On the other hand, if one considers that besides its frequent depiction as a kind of legal golden age *ius commune* was characterised by heterogeneity in all parts of Europe nationalism should be considered more favourably as the element that destroyed legal pluralism within given territories, though recreating it at a higher level.

In continental Europe, it was therefore the emergence of the national idea that led to a shift to a national conception of private law. The phenomenon manifested itself most notably in France and Germany, where it took two different forms, and then spread throughout Europe. Now, our attention has therefore to be drawn to the events that took place on the continent.

II.1.3. Nationalism and the nationalisation of law

In the first chapter it has been noted that nationalism studies have drawn a strong distinction between two nationalist forms, often described in geographical terms: western – most notably French – and eastern – most typically German – manifestations. According to this dichotomy, nationalism has developed in the western part of Europe as a civic phenomenon, while in eastern countries it assumed an ethno-cultural connotation that soon paved the way to the infamous xenophobic and racist movements of the twentieth century. This distinction – which should however not be exaggerated and certainly not considered as an alternative between ‘good’ and ‘bad’ nationalist expressions – also manifested itself in the processes of nationalisation of private law of those countries: France and Germany. It was in this period and in these contexts that some of the most basic legal concepts of modern jurisprudence evolved, most notably the idea of codification, that still carry the signs of the cultural context that gave rise to it. Indeed, the first codification in the modern understanding of the word can be considered to be the French *Code civil*, clearly a product – though an indirect one – of the Revolution and civic nationalism.

The task of nationalism in France was more restricted than in other countries. While in other experiences nationalism had to perform the function of creating a unitary state – previously instilling a national consciousness in the people dwelling on those territories according to modernist theories – in France nationalism had a less ambitious programme. A sole state had already been established, so that the function of nationalism mainly consisted in the overturning of the governing class through the substitution of a new historical subject: the nation. The historical importance of this operation explains why such a change had to be realised by means of a Revolution. The pre-existence of a politically unified state also explains why French nationalism took a civic form: there was no need to rely on ethnic elements to define the category of the French, it was rather necessary to lay down the new principles on which the new society had to be organised. A civil codification has indeed the function of organising society in a new way and functioned as the manifesto of the new bourgeois

23 See infra first chapter, ‘Are there ‘good’ and ‘bad’ nationalisms?’.
classes. The French codification is not the perfect translation in legal terms of the ideals of the Revolution, as it was drafted and eventually enacted under the determinant influence of Napoleon, however, it still shows the signs of the tension that characterised the era of the Enlightenment between rising legal nationalism and enlightened cosmopolitanism, increasingly less forceful as the tensions between France and the other European states increased.24

The events that took place in Germany were, if possible, even more multifaceted and the civic understanding of the nation was opposed to ethno-cultural pulsations that soon took the upper hand in a context of strong political tension with France. It is thus useful to look at the legal and historical events that took place in Germany, occasionally referring to experiences in other countries the development of which has been strongly influenced by the cultural and political events in Germany.

II.1.4. Between civic, cultural and ethnic nationalism: the German experience

Nationalism took a quite different aspect east of France. In Germany, where a united nation-state existed only in the minds of a few liberal patriots but not in reality, a form of ethno-cultural nationalism was developed, thanks in particular to the extremely popular work of Johann Gottfried Herder and developed against the intellectual background of German Romanticism. Ethnos and culture were the only common roots upon which a national consciousness could have been built and finally used to give rise to a national state. Furthermore they could have easily been employed to forge a national identity based on an opposition between the German and the French, as German nationalism arose in the first place as a reaction against ‘cultural humiliation’ by the French25 and of course as a political defence from the perilous neighbouring country.

Civic nationalism furthermore developed from the ideals of French rationalism, as such it could not hope to be successful in Germany in a period in which, in the cultural realm, the Romantic movement of Sturm und Drang embodied an authentic reaction against Enlightenment classicism,26 while Enlightenment came to be associated politically with Revolution, feared and firmly opposed in particular by the conservatives of all Europe. Those events indeed marked a strong break in the nationalistic developments of the two countries: while in the first phase the French Revolution was judged positively in Germany even by several Romantic thinkers, that was not the case after 1792-1793.27 The Revolution’s violent shift ended up discrediting even the theoretical works of the Enlightenment thinkers, most of who had passed away by that time and could not offer any intellectual guidance.28 In the cultural arena the political principles of the Revolution were famously criticised and rejected notably by the conservative Edmund Burke, while in France, François-René de Chateaubriand attacked even the theoretical foundations of Rationalism and the

26 RN Stromberg, European Intellectual History since 1789, at 13 and 41.
27 D Grimm, Deutsche Verfassungsgeschichte, 1776-1866: vom Beginn des modernen Verfassungsstaats bis zur Auflösung des Deutschen Bundes (Frankfurt am Main: Suhrkamp, 1988) at 52 ff.
28 RN Stromberg, European Intellectual History since 1789, at 18 and 13.
Enlightenment. Politically, the Congress of Vienna of 1814 and 1815 took over the task of erasing the Napoleonic era by bringing history back to before the French Revolution.\textsuperscript{29} At the same time, the Congress of Vienna precluded the possibility of a united German nation-state creating a weak German confederation (\textit{Deutscher Bund}) instead, a multi-coloured jumble of inhomogeneous states often in contrast to one another. In this context, German ambitions to form a sole nation-state had to choose between Rationalism – typically French and thus expression of a state extremely dangerous to German interests and hardly importable in the very different German social environment – and political Romanticism – developed in particular in Germany (though imported from England and France) and easily employable to foster the awakening of a national consciousness. It is understandable that, especially under the political climate of the Bourbon Restoration, liberal patriots inspired by the Enlightenment became a minority and Romantic nationalists gained the upper hand. Despite the schematic simplification that opposes western and eastern models of nationalism, enlightened patriots thus existed also in the German context, but their voice was soon overwhelmed by Romantic ideas and ethno-cultural nationalism.

Needless to say, these theories influenced the understanding of the law. While in newly parliamentarianly organised countries the elected bodies and the legislation that they issued were seen as the expression of national unity, consuetudinary law was seen as the expression of the spirit of the people in those nations that could not organise themselves in the form of a state yet, like Germany\textsuperscript{30} (while the Italian case seems more complex as it will be shown later).\textsuperscript{31} In Germany, the opposition between civic and ethno-cultural understandings of the nation is already perceivable in the probably best-known legal quarrel ever, a discussion which, under the veil of the technicality of private law theory, was animated by high political fervour and had extremely important practical implications for German and European history: the \textit{Kodifikationsstreit} between Anton Friedrich Justus Thibaut and Friedrich Carl von Savigny. Far from being a pure academic debate about two technical models of law, the discussion has to be collocated in its exact historical and political context, a context that should always be considered when the arguments of these authors are employed or referred to even at present.

German territories had experience with the concept of a civil code, the most widely exported legal product of the Napoleonic era and indirectly of the French Revolution and Enlightenment. The circulation of the ideas of the Enlightenment in Germany had been easy: cultural and political elites in the German territories were particularly interested in French traditions and civilisation. It was the period in which French was spoken and written by all educated people in those territories, while German was despised as the idiom for ‘soldiers and horses’.\textsuperscript{32} The works of the French thinkers were thus known and appreciated among these elites and this is how

\textsuperscript{29} In the field of private law, however, the Bourbon Restoration failed in its attempt: the impact of the French codification had been so considerable that numerous states chose to enact a codification of their own, usually based on (when not merely translated from) the Napoleonic code itself: with particular regard to the Italian pre-Unitarian states, see CA Cannata, \textit{Lineamenti di storia della giurisprudenza europea} (Torino: Giappichelli, 1976) at 139 ff.
\textsuperscript{30} AM Hespanha, \textit{Introduzione alla storia del diritto europeo} (Bologna: il Mulino, 2003) at 203-204.
\textsuperscript{31} See infra in this chapter ‘Diffusion and impact of the Volksgeist theory’.
\textsuperscript{32} According to the impression that Voltaire got travelling in the German territories; P von Polenz, \textit{Geschichte der deutschen Sprache} (Berlin: Walter de Gruyter, 2009) at 102.
the early ideas of first Rationalism and then Romanticism came to circulate in the German territories. However, such a fascination for French ideas was doomed to an early death.

The case of the Prussian codification is telling in this sense. Enlightenment had been quite successful also among the highly educated sovereigns of Prussia, who undertook an ambitious design of legal codification. This effort eventually led to the creation of the Allgemeines Landrecht für die Preußischen Staaten (ALR), entered into force in 1794. Though this instrument was heavily influenced by the law of reason, it cannot be understood as a civil code in modern terms, since it did not repeal *ius commune* and indeed put itself in a subordinate position thereto. It moreover lacked the necessary degree of abstraction and systematisation necessary to make a code versatile and not overly detailed, consisting of more than 19000 rules, but more importantly, its political success was relative. On the one hand the enlightened ideas which pervaded the codification soon lost their charm after the shift to terror that the Revolution experienced in the years when the ALR was still being drafted and finally promulgated. In this sense, its ideological premises were at odds with the new course of Prussian politics, as those ideas that initially seemed so attractive to the Prussian elites and were embodied in the codification had now become extremely dangerous to them, putting their very existence at risk. On the other hand, the ALR did not even gain the complete favour of the German liberal patriots, so that in the end it did not manage to become a model for German legal unity. When it was born, it was already too old.

Technically different and politically more successful than the ALR was the French code, which also circulated in several German regions. Unlike Prussia or Austria, where several attempts had been made to come up with a code that was in the end perceived as ‘l’aboutissement d’un long mouvement de séparation avec le ‘droit commun’”, the revolution determined a break with the past in France, creating a more ambitious code that did not aim at a mere integration of medieval common law: it was rather a ‘puissante vague d’unification balayant les anciens particularismes’. Following Napoleon’s territorial conquests, the *Code civil* had already entered into force *ratione imperii* and occasionally even *imperio rationis* in the Rheinish territories. In this region, the *Code civil* had been highly appreciated and the local populations intended to maintain it even after Napoleon’s fall, principally due to the economic interest in maintaining the same legislation as France and the Lower Countries as well as because it was considered more advanced and liberal than the Prussian code. In this sense, the *Code civil* became the guarantee of the political independence of the local institutions in those territories.

Thus, as evidenced by the case of the Duchies which deliberately adopted it, the Germans had already become acquainted with and appreciated the clarity of the

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33 However, it should be considered that the code comprehended the whole of the legal system: civil law, commercial law, criminal law, administrative law, procedural law.

34 F Wieacker, *Industriegesellschaft und Privatrechtsordnung* (Frankfurt am Main: Athenäum-Fischer-Taschenbuch-Verlag, 1974) at 82.


Nationalisation and Denationalisation

Liberal patriots considered it as a symbol of progress. The ideal of the liberal codification soon gained support more than the Code civil itself in the academic sphere. Indeed, while in our day the French codification is commonly regarded as an outstanding code by German scholars, it was still too close to a foreign dangerous power to be simply proposed as the codification of the German territories at that time. Most German patriots pleaded instead for a codification on the model of the French but authentically German. If it is true that the homogenisation required by nationalism necessarily requires the exclusion of some subjects and dangerously benefits from an externalisation of the evil, many German patriots had found their useful nemesis in the French. The German fatherland is there, ‘wo jeder Franzmann heißt Feind, wo jeder Deutscher heißt Freund, das soll es sein!’ in the words of the patriotic poet Ernst Moritz Arndt. As soon as German nationalism took a clearly anti-French connotation, it became clear that the Code Napoléon would not have a place in the German nation: on the 18th of October 1817, a group of patriots from several German cities – mostly students and professors – gathered in Eisenach to celebrate the three-hundredth anniversary of the Lutheran Reformation and in this occasion started burning twenty-eight books of non-nationalist and reactionary authors. Including the Code civil. In the academic debate, among the advocates of a codification for German law (not limited to private law issues) an authoritative voice was that of Thibaut, renowned professor at the freshly re-founded University of Heidelberg. In 1814 – the same year as the Congress of Vienna – he published his famed pamphlet Über die Nothwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland.

II.1.4.1. The civic

Several scholars believed that the legislator has the power to modify private law rules and that these can be employed as an instrument to shape society, but in particular Thibaut’s position stands out inasmuch as it assumes that legislation can also be used as a means to achieve political unity in the German territories. In modern terms, we could say: an instrument of nation-building. This view was an expression of a progressive movement linked to the ideas of the French revolution, therefore a ‘civic’ nationalist manifestation. To achieve the aim of a legal and political unity, the codification Thibaut pleaded for had to be general (allgemein): it should encompass the whole of law – similarly to the ALR – and be the same for all the territories, performing the role of an authentic liberal constitution for Germany. The codification would therefore represent the ideal occasion to carry out a through liberal reform of civil, criminal and procedural law for the entire nation. In this sense, Thibaut’s view evidences national concerns that make his conception diverge from those of other jurists, exemplified by Nikolaus Thaddäus von Gönner, who accepted the idea of

40 CA Cannata, Lineamenti di storia della giurisprudenza europea, at 167.
41 AJF Thibaut, Über die Nothwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland (Heidelberg: Mohr & Zimmer) at 12.
private law codification exclusively within the borders of the existing German states, rejecting the liberal principles which inflamed Thibaut.

According to the Heidelberg professor, there were two fundamentally intertwined reasons for such a necessity, one political and the other technical: on the one hand legal unification would be a first step towards political integration and thus the triumph over particularism and fragmentation of the German nation in a myriad of small political units. Even if political unity would not come, the Code would still contribute to nation building:

‘Schon die bloße Einheit wäre unschätzbar. Wenn auch eine politische Trennung Statt finden muß und soll, so sind doch die Deutschen hoch dabey interessirt, daß ein brüderlicher gleicher Sinn sie ewig verbinde, und daß nie wieder eine fremde Macht den einen Theil Deutschlands gegen den andern missbrauche. Gleiche Gesetze erzeugen aber gleiche Sitten und Gewohnheiten, und diese Gleichheit hat immer zauberischen Einfluß auf Völkerliebe und Völkertreue gehabt’. 42

The classic economic argument in favour of unification appears in Thibaut’s argument: transactions across borders become impossible or extremely more costly if economic actors have to deal with several obscure different legal systems. The preservation of a non-unified legal system only lends advantage to shrewd lawyers, to the detriment of the citizens – a point that had been already used by Jeremy Bentham to advocate the idea of a codification of law. 43 This argument had been successful just a few years earlier in France and was doomed to become a leitmotif during the following decades in Europe.


42 AFJ Thibaut, Über die Nothwendigkeit, at 32.
44 AFJ Thibaut, Über die Nothwendigkeit, at 32-34.
On the other hand it is only a civil code that could ensure a systematic private law where every question can be answered in a single and unequivocal way. Even German academia would benefit from the codification of law, which would substitute the countless series of confused laws and definitions that law students had to learn by heart at that time.\textsuperscript{45} Thibaut’s liberal nationalist attitude also merges with technical considerations on the qualities a good legal system should exhibit and clearly emerges from his appraisal of the laws in force in Germany. These no longer respond to the needs of the nation; instead, the only viable solution appears to be the elaboration of a German private law code, ‘\textit{ein einfaches National-Gesetzbuch, mit Deutscher Kraft im Deutschen Geist gearbeitet’},\textsuperscript{46} since such German spirit was reflected neither in Canon nor in Roman law. Now, it was time for the legislator to take charge to give systematic expression to it. Roman law in particular was considered inappropriate because elaborated by different and decadent civilisations according to their own requirements:

\begin{quote}
‘Die letzte und hauptsächlichste Rechtsquelle bleibt daher für uns das Römische Gesetzbuch, also das Werk einer uns sehr ungleichen fremden Nation aus der Periode des tiefsten Verfalls derselben, die Spuren dieses Verfalls auf jeder Seite an sich tragend!’\textsuperscript{47}
\end{quote}

Justinian’s work was thus mainly accused of being the codification of the latest Roman law, that of an already decadent civilisation, distant from the splendour of classic Rome. Using the terminology adopted by Thibaut, the object of criticism is the Roman \textit{code} rather than Roman \textit{law}. In this sense the author shows another link to the cultural context in which he developed his ideas: the Enlightenment’s rejection of the past indeed did not extend itself beyond the Middle Ages. Roman and Greek civilisation continued to be used as civic models and idealised, as it strikingly emerges looking at the neoclassic pictorial art of the age of the Revolution. But Thibaut’s argument is even more radical: regardless of the Roman legal geniality which had been so much appreciated by Leibnitz, between the minds of Roman and modern German jurists there seems to be an almost insurmountable cognitive wall. Roman law remains the product of a civilisation that is considered to be very different from the German, it is a \textit{foreign} law. As a result, even the celebrated Corpus Juris remains ‘zu dunkel, zu flüchtig gearbeitet und der wahre Schlüssel dazu wird uns ewig fehlen’.\textsuperscript{48} A similar criticism was also directed against classic Germanic law,\textsuperscript{49} so that in the end, issuing a brand-new codification – following the examples of the Prussian ALR, the Austrian ABGB and above all the French \textit{Code civil} – appeared to be the best solution.

It was inevitable that this pamphlet, which so firmly attacked both Roman and Germanic law, would cause the strong reaction of the jurists who would have given

\begin{itemize}
\item \textsuperscript{45} AFJ Thibaut, \textit{Über die Nothwendigkeit}, at 27.
\item \textsuperscript{46} AFJ Thibaut, \textit{Über die Nothwendigkeit}, at 25-26.
\item \textsuperscript{47} AFJ Thibaut, \textit{Über die Nothwendigkeit}, at 15.
\item \textsuperscript{48} AFJ Thibaut, \textit{Über die Nothwendigkeit}, at 15 ff.
\item \textsuperscript{49} AFJ Thibaut, \textit{Über die Nothwendigkeit}, at 13.
\end{itemize}
rise to the Historical School of Law, focusing exactly on Roman and Germanic law: a Schandschrift somehow ungelahrt und unwissenschaftlich, was Friedrich Carl von Savigny’s severe judgment on Thibaut’s book.

II.1.4.2. The cultural

The publication of Thibaut’s work in 1814 on the necessity of a German private law codification gave Savigny the occasion to bring out a polemic pamphlet in that same year, the famed Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft. In this pamphlet Savigny brought the normative anti-Thibaut argument to the fore that there was no necessity to adopt a common codification, basing his argument on the descriptive theory, inspired by Herder and based on Hegel, of law as a product of the nation’s spirit, the Volksgeist – to employ a term that soon became popular in the German cultural circles and was adopted only later by Savigny. While Thibaut’s civic nationalism brought him to advocate a code that would have nationalised law in Germany similarly to what had happened in France, Savigny defended the status quo, in this sense appearing as an opponent of nationalisation processes and possibly a champion of legal Europeanism. In order to defend his position, nonetheless, Savigny employed arguments often borrowed by cultural nationalists, elaborating a theoretical framework which was coherent with the intellectual period of his time and which was soon adopted by cultural nationalists. It is therefore necessary to devote our attention to this conception.

The opinions of the two famous German scholars strongly diverge on many aspects: Thibaut argued that the laws existing in Germany were not appropriate to the needs of the population and that only the legislator could enact a rational and systematic code. He believed in the force of Reason and enlightened governments and that it was time for the German nation to enact a liberal constitution. This optimistic view could have never been shared by Savigny, pessimist by nature also because of his particularly unhappy lot: while Thibaut could describe his childhood as one of the happiest periods of his entire life, Savigny was soon orphaned and while the former – not only jurist but also musician – could organise magnificent choirs at his home in Heidelberg, the latter had even difficulty in maintaining durable relationships of friendship. Unlike Thibaut, Savigny had no trust in enlightened sovereigns and maintained that the idea of a liberal code which breaks with the past is purely illusory: law is not the individual’s act of free will but rather the actual product of a long historical process. The present itself is nothing more than the ‘Fortsetzung und Entwicklung aller vergangenen Zeiten’. In this sense, Germans do not have to follow the path distinguished by Thibaut to have ‘ein eigenes, nationales Recht’. Germans therefore had to follow the way of their ancestors instead of ceding to the revolutionary temptation of creating new rules deliberately. After all – as the

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51 H Hattenauer, Thibaut und Savigny: ihre programmatischen Schriften (Munich: Vahlen, 1973) at 10 ff.
52 FC von Savigny, ‘Über den Zweck dieser Zeitschrift’ (1815) 1 Zeitschrift für geschichtliche Rechtswissenschaft 1-17, at 3
53 FC von Savigny, Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft, at 133.
Portuguese legal historian Hespanha put it – the nation is an entity in which the dead command the living. 54 The methodological consequence of this interpretation of the past was that also modern law had to be studied historically, a methodology that Savigny himself applied particularly in his works on Roman law from the Middle Age and in the present. The programmatic manifesto of the German Historical School of Law was set and the nationalist element was coessential to it. 55

Savigny’s view on law is therefore inherently conservative: legal and social change cannot be produced by the will of a few people in a brief period of time but only through a slow evolution. The political consequence is that there were no historical justifications for revolution but only for reforms. 56 His understanding of law perfectly matches his political conservatism, his distrust towards Enlightenment and abhorrence for revolution, a feeling which was after all particularly widespread in Germany after the turning-point represented by the Reign of Terror. In this respect, even regardless of its alleged technical qualities (that Savigny could not really see), the codification had to be refused chiefly as an instrument of domination used by Napoleon to fetter nations. 57 In Savigny’s rejection of liberal ideals lies another point of contrast not only with Thibaut but with several Germanists of the Historical School of Law, notably the illustrious Jacob Grimm.

II.1.4.2.1. Intellectual background: Hegel, the Romantics, Herder

The arguments used by Savigny echo Hegel’s philosophy on several points. 58 Although Hegel at first showed at least some sympathy for the social claims of the Jacobins, the idealist philosopher soon became highly critical of the idea that belonging to a nation could be a matter of choice and to Rousseau's social contract theory, based on a very different understanding of ‘common will’ as well as on a confusion between state and civil society. 59 Both of these theoretical foundations of civic nationalism were therefore refuted. Hegel did not see law as the imposition of a particular political power; according to him, law is rather the product of the natural evolution of a given community, otherwise state and Volksgiést would disunite, with the result that imposed law would encounter resistance from the Volk. Hegel would not elaborate on this conception until the point of becoming a theorist of nationalism. 60

54 AM Hespanha, Introduzione alla storia del diritto europeo, at 213.
55 CA Cannata, Lineamenti di storia della giurisprudenza europea, at 157.
56 E Wolf, Grosse Rechtsdenker der deutschen Geistesgeschichte (Tübingen: Mohr, 1963) at 480.
58 While an indirect influence of The Phenomenology of Spirit (published in 1807) cannot be excluded and rather seems plausible, it is still unclear to what extent the thought of Hegel directly influenced Savigny, see C Mährlein, Volksgiésit und Recht. Hegels Philosophie der Einheit und ihre Bedeutung in der Rechtswissenschaft (Würzburg: Königshausen und Neumann, 2000) at 126-127. Moreover, a limited intellectual dialogue among the authors occurred, as references in Hegel’s Philosophy of Right of 1820 show. In the end, the ideas of Hegel and Savigny show on several aspects interesting points of contact, so that it seems justified to make limited references to the thought of the idealist philosopher in the following pages.
59 On some similarities and differences between the theories of Rousseau and Hegel, see M Pawlik, ‘Hegels Kritik an der politischen Philosophie Jean-Jacques Rousseaus’ (1999) 38 Der Staat 21-40.
60 The interpretations as to the relation between Hegel and nationalism are many and divergent, wavering between those who deny that the national question played any role within Hegel’s system and others affirming the opposite; on this point see A von Bogdandy, ‘Hegel und der Nationalstaat’ (1991) 30 Der Staat 513-535, at 514-515.
– at least not one who demanded the ethnic homogeneity of nations – but still articulated arguments that could be easily employed by more explicit nationalist theorists, less interested in philosophy and more concerned with politics.

Savigny’s view was more radical: he negated the possibility to alter private law on the part of the state, rejecting therefore the idea of a code of law. In this respect there is a great divergence between Savigny’s and Hegel’s views, since Hegel praised the idea of a codification.61 Savigny was indeed more exposed to the influence of Romanticism, and in this respect, the divergence from Hegel – who moreover looked with great interest at the ‘enlightened’ Prussia62 where law had already been codified in 1794 – can be explained. Although he himself was too realistic to be a Romantic, Savigny found the cultural ground on which his assumptions could be based in German Romanticism. At least the ‘second phase’ of Romanticism (1805 to 1830s), a phase more nationally focused on the folkish Germanic roots, played a significant role in the development of the thought of Savigny. The author somehow imported the views of Romantic poets and philosophers into the legal discipline, with whom he also came in personal contact in particular after his marriage to the sister of the poet Clemens Brentano.

While followers of the Enlightenment rejected the past and most particularly the Middle Ages – ideologically looked upon as an obscure era of ignorance – Romantics valued it. By the same token, Savigny thought that a separation between past and present is purely deceptive. According to this views, the historical method allows to go to the roots of a legal system and ‘jeden gegebenen Stoff bis zu seiner Wurzel zu verfolgen, und so sein organisches Prinzip zu entdecken, wodurch sich von selbst das, was noch Leben hat, von demjenigen absondern muß, was schon abgestorben ist, und nur noch der Geschichte angehört’.63 In this way, the dimension of time becomes relative: there are no breaks in the validity of law and historical sources on which the jurist focuses. These sources can be utilised to answer today’s questions of law while Savigny seems to be able to discuss all kinds of legal issues with ancient scholars as if they were sitting at the other side of his desk.64 This position could give even formal legitimacy to Roman law in the new state, as the authority of Justinian work had been purely de facto: as a matter of fact, since it was issued, the Corpus Juris had never had any formal legal authority.65 Of course, the question as to the validity of Roman law would have sounded like a heresy at the time of the glossators,66 but it now became a sensitive problem that cropped up in the era of the modern state. What is more, it was the circle of the Romantic poets that

63 FC von Savigny, Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft, at 117-118.
64 On the dimension of time in the thought of Savigny see M Bretone, Diritto e tempo nella tradizione europea (Bari: Laterza, 2004) at 70 ff.
65 As van Caenegem explains: ‘Legally speaking the Corpus had as much binding force in twelfth-century Europe as the Assyrian clay tablets in their cuneiform scripts have today’, R van Caenegem, European Law in the Past and the Future. Unity and Diversity over Two Millennia (Cambridge: Cambridge University Press) at 17.
transmitted the idea of the *Volksgeist* to Savigny, initially based on the Hegelian concept of *objektiver Geist*. Savigny used the concept to affirm that also law, just like language and art, expresses a collective spirit shared by the whole nation.

Law became rooted in the German nation as a result of the *Volksgeist* theory; the idea that legal rules can respond to a universal rationality and be valid in all contexts is rejected: while theorists of natural law claimed that the legislator has to issue laws that could be valid for all times and peoples, Savigny explicitly discards any form of universalism or Natural law. In this, Savigny’s refusal of rationalism makes his ‘rough’ understanding of the *Volksgeist* more coherent than that of Hegel, whose relation to historicism remained ambivalent, held back by the challenging aim to uphold the authority of reason.

Cultural nationalism could not accept the idea of a law that is non-historical and universal, undifferentiated and exportable without consideration of the specific characteristics of a nation, so that if there is no universal reason supporting the law, then law can only be particular to every single community. This affects both private and public law: to speak of an ideal form for the state is nonsensical, since there is not a universal form that can be ideal worldwide without taking into consideration the community that establishes it. Such a community can only be a national one, since under the rising German nationalism as expressed in the thought of Herder, *Volk* and *Nation* become for the first time synonyms. It is in this period that ‘culture’ becomes ‘unquestioningly, national culture, held to be different a priori from other cultures and singled out by the nation’s underlying characteristic individuality’. In this respect, it is rather Herder the intellectual who more strongly influenced Savigny.

**II.1.4.2.2. The Volksgeist theory**

The idea that legislators cannot regulate private law was of course not new in the European context, and even less an invention of Savigny: the view was already implied by those adhering to natural law following a tradition that went back till the Ciceronian principle *non opinione sed natura ius constitutum esse*. But Natural law itself was rejected by the Historical School of Law. In the attempt to overcome the dualism between a practical and a purely speculative jurisprudence, Gustav Hugo had already rejected the idea that law could be reduced to statutory form and instead underlined the context-dependence of legal rules, expressing his views in the same

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69 F Beiser, *Hegel*, at 263.
70 AM Hespanha, *Introduzione alla storia del diritto europeo*, at 212
71 C Mährlein, *Volksgeist und Recht*, at 17.
73 E Wolf, *Grosse Rechtsdenker der deutschen Geistesgeschichte*, at 475, where a sentence from a letter that Savigny wrote in 1807 is also reported: ‘Ich habe in der letzten Zeit viel in Herters Schriften gelesen und mich sehr daran erfreut’.
75 In his *Lehrbuch eines civilistischen Cursus* of 1799, Hugo gives a famous example to explain his point, explaining that polygamy can be legally justified among those populations where women’s ‘beauty and fertility’
years in which, some miles to the west, the Bastille was collapsing. According to the same line of reasoning, Savigny – who had been indeed strongly influenced by Hugo himself\textsuperscript{76} – concluded some years later – when the revolution was already put to an end by Napoleon and after the Congress of Vienna strove to move history back in time – that it is impossible for the law to be modified by the mere discretion (\textit{Willkühr}) of some legislator.\textsuperscript{77} law – just like language – is something that spontaneously arises from the spirit of the people. How then could the will of a single person alter what centuries of tradition have created? In this respect the new German Historical School distanced itself from both the Law of Reason and legal positivism.

In reality, not even the architect of the French code, Portalis implied that the codification would have made possible to elaborate new laws \textit{ex nihilo} only justified by the arbitrary decisions of the political power: in particular when it came to more sensitive issues like family law, the legislator ‘\textit{doit consulter les moeurs, le caractère, la situation politique et religieuse de la nation qu'il représente}'.\textsuperscript{78} However, after such a ‘consultation’, the legislator would still have the power to intervene on private law creating rules. On the contrary, Savigny conceived the role of the legislator as a non-creative one, although still not completely superfluous. According to this view, the function of the legislator is limited to the reorganisation and systematisation of an already existing consuetudinary law: what Germany needed was not codifications emulating the French model but rather mere compilations of German law. The exhortation of Herder seems to have been taken on: ‘if you must imitate, please imitate the people of your own country and do not make yourself ridiculous or contemptible by imitating foreign nationalities’.\textsuperscript{79}

Given the complexity of the legal system, this work would have necessarily required the contribution of legal scholars. However, at that particular point, German legal scholars were not ‘ready’ yet to help the legislator issuing good statutes and this is the basic reason why, in Savigny’s view, codification or even compilation plans had to be abandoned. Codification could take place one bright day in the distant future, but until then, legal scholars would have the task of interpreting the \textit{Volksgeist} and make the legal system work properly and evolve. The real oracles of the \textit{Volksgeist}, the only ones legitimated to interpret it and speak in its name, are thus the educated lawyers: the origin of law is popular, but law in itself is a professorial and elitist issue. Insofar as it maintains that political power is not legitimated to alter private law, Savigny’s view does not significantly differ from the view that spread in the years previous to the creation of the first modern states. Until this point, Savigny merely defends a very ancient view of law as something intangible by the will of people, rejecting the developments under French Enlightenment just like Hugo did. Indeed, although it is commonly accepted that the Historical School of Law introduced the idea of \textit{Volksgeist} in the legal discourse, it is possible to identify analogous theories

\textsuperscript{76} JEG de Montmorency, ‘Savigny’, in J MacDonell and E Manson (ed), \textit{Great Jurists of the World} (London: John Murray, 1913) at 563.
\textsuperscript{77} FC von Savigny, \textit{Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft}, at 11.
much earlier: in particular, the idea that ‘unwritten laws’ are better than ‘written laws’ and that political organisations should be made according to the characteristics of particular populations is older. At first sight, the only relevant difference would seem that while the Historical School spoke of Volksgeist, previous thinkers preferred to employ Latin words like ‘indoles’ or ‘ingenium populi’. The expression ‘ingenium populi’ in particular became common in the seventeenth century, not by coincidence, in the period that will lead to the formation of the modern states, while during the medieval era analogous considerations were infrequent. Furthermore, particular characteristics were more usually assigned to wide groups of people: northern Europeans, southern Europeans, Asians etc., ‘populations’ rather than ‘nations’. Consider for instance Aristotle, who already spoke of ‘the character of the citizens’, distinguishing Northern and Asian populations from the Hellenic race. The characteristics of each of these groups had political repercussions, so that for example only the Hellenic race had the characteristics (high spirit and intelligence) that made it possible for them to develop their particular institutions. Interestingly, nonetheless, Aristotle recognised that people’s characteristics diverged even among Hellenic tribes themselves. The novelty of the Volksgeistdenken, which furthermore underwent a radicalisation in the first years of the nineteenth century contextually with the beginning of the era of Restoration, lies in its intertwining with the concept of nation.

The difference between Savigny and older legal theories could not be grasped – and Savigny would be reductively intended as a mere legal reactionary – without references to the nationalist theory. As particularly modernist studies on nationalism have pointed out, it is questionable whether people in the Middle Ages thought of themselves as parts of an organic living community coinciding with the modern concept of nation. As already said, private law was at that time far from being ‘national’, and its source was of course not the power of the state. The sources of such intangible legal rules were looked for in several elements such as God, Nature or even the will of people, but not in the nation, which is a comparatively modern construct. This new element appeared in the legal debate only after the creation of modern states contextually with the diffusion of nationalism: at the beginning of the nineteenth century the concept of Nationalgeist made its appearance in law. The national idea first appeared in the work of Montesquieu, then spread in the German context through thinkers like Moser and only later became the fulcrum of the theory of law of Savigny. The Savignian Volksgeist furthermore appears to be even more radical than

83 T Würtenberg, Zeitgeist und Recht (Tübingen: Mohr, 1987) at 55.
84 The remark of EJ Hobsbawm on our cognitive limits remains valid: ‘what Herder thought about the Volk cannot be used as evidence for the thoughts of the Westphalian peasantry’, Nations and Nationalism since 1780. Programme, Myth, Reality (Cambridge: Cambridge University Press) at 48.
86 Who wrote in 1766 ‘Von dem deutschen Nationalgeist’.
Nationalism and Private Law in Europe

its direct precursor (also on this aspect, a contrast between ‘Romantic’ cultural and ‘Enlightened’ civic nationalism could be perceived), since neither Montesquieu’s ‘esprit de la nation’ implied the futility of a positive legislation and was rather even determinable by legislation\footnote{Plusieurs choses gouvernent les hommes, le climat, la religion, les lois, les maximes du gouvernement, les exemples des choses passées, les mœurs, les manières ; d’où il se forme un esprit général qui en résulte. A mesure que dans chaque nation une de ces causes agit avec plus de force, les autres lui cèdent d’autant’, C-L de Montesquieu, \textit{De l’esprit des loix} Vol 2 [1748] (London, 1777) at 189.} (though the basic principle remains that it is the law that should follow the characteristics of the people and not the other way round, or the risk of despotism would arise), an idea shared also by Rousseau.\footnote{‘Il est certain que les peuples sont, à la longue, ce que le gouvernement les fait être’, J-J Rousseau, ‘Discours sur l’économie politique’ [1755] in \textit{Œuvres de J.J. Rousseau. Ouvrages de politique. Partie I} (Lyon, 1796), at 284.} In Savigny’s view, on the contrary, if it is not the Willkür that makes law, it is the ‘gesammte Vergangenheit der Nation’.\footnote{FC von Savigny, ‘Über den Zweck dieser Zeitschrift’, at 6.} Law is now seen as expression of a \textit{national} character formed through the centuries, according to a view which was inspired by Herder and, to a lesser extent, Schelling.\footnote{F Wieacker, \textit{A History of Private Law in Europe}, at 284 ff.} ‘Savigny follows Herder: Herder praising the creativity of the folk; Savigny seeking to protect the product of the folk, its common and customary law […] Codification, a Benthamite rage, was an instance of the lack of veneration for the past that seemed to Romanticists to mark all their opponents’ \footnote{JB Halsted, \textit{Romanticism} (New York: Harper & Row, 1969) at 28.}.

Savigny’s understanding of the catchy word \textit{Volksgeist} is thus a personal one resulting from the eccentric combination of Hegel’s idealism and Herder’s nationalism. The term \textit{Volksgeist} alone could be therefore misleading: for instance the will of the \textit{Volk} could also be expressed as an act of parliamentary will, as also Hegel thought. However, under Herder’s influence,\footnote{A direct influence of Herder on Savigny has been acknowledged among others by P Koschaker, \textit{Europa und das römische Recht} (München: Biederstein Verlag, 1947), at 196; E-M Böckenförde, ‘Die Historische Rechtsschule und das Problem der Geschichtlichkeit des Rechts’, in E-M Böckenförde, \textit{Recht, Staat, Freiheit} (Frankfurt am Main: Suhrkamp, 1991) at 18 ff.; F Wieacker, \textit{A History of Private Law in Europe}, at 284 ff.} Savigny developed an organicist conception of the \textit{Volk} and claimed that people are a cultural and traditional subject, so that if the parliament moves away from those traditions, its acts would not represent the ‘will’ of the nation anymore. In this point Savigny’s thought departs from that of Hegel who now seems even closer to Thibaut’s considerations on Roman law. While Hegel’s conception of law – fundamentally not dissimilarly from Montesquieu’s – exalted the link between society and legal rules acknowledging the role of positive law, the nationalist \textit{Volksgeistdenken} goes further and deduces the impossibility of legal codification, only admitting compilations of rules under particularly limitative conditions. \textit{Volksgeist} represents now law’s origin and source of legitimacy: law is not deliberately created by the reason of man but originates instead from the spirit of a \textit{Volk}.\footnote{C Mährlein, \textit{Volksgeist und Recht}, at 19.}

 Nonetheless, when referred to actually existing peoples – like the Germans– instead of historical communities – like the Romans – this line of reasoning can lead to authentically reactionary results: what if the majority of the people democratically express a ‘will’ which moves away from tradition? The only way to solve this contradiction is to assume that the only real ‘oracle’ of the \textit{Volksgeist} is not the \textit{Volk} but rather the cultural elite of lawyers, or even more drastically, refuse democracy.
II.1.4.2.3. Volksgeist and language

The cultural nature of this nationalist form emerges also from the continuous references to language: employing arguments already used by Hugo, Savigny notes that ‘[d]as Recht bildet sich nunmehr in der Sprache aus’. This is not a mere stylistic or rhetoric analogy; the argument rather collocates itself in a precise theoretical context, inasmuch as it follows Fichte’s linguistic philosophy as well as Herder’s ideas on language and that language is necessarily tied to the characteristics of the people it is spoken by.

‘By whom and for whom was the French language constructed? By Frenchmen, and for Frenchmen. It expresses ideas and relations which are peculiar to their world, and to the course of their life; it expresses them in the manner which their local circumstances, the fleeting moment and the mood of their soul at that moment indicate. Outside of this area the words are only half understood or not at all; they are ill applied or, where the subjects are wanting, altogether inapplicable and thus uselessly learned.’

These considerations with reference to language are employed within the framework of the legal debate too. Through Savigny the nationalist ‘primordialist’ image often used by Fichte and Herder – the nation as an organic (though exclusively cultural) creature with some characteristics of its own, life and eventually death – penetrates into the German jurisprudence:

‘Aber dieser organische Zusammenhang des Rechts mit dem Wesen und Character des Volkes bewährt sich auch im Fortgang der Zeiten, und auch hierin ist es der Sprache zu vergleichen. So wie für diese, gibt es auch für das Recht keinen Augenblick eines absoluten Stillstandes, es ist derselben Bewegung und Entwicklung unterworfen, wie jede andere Richtung des Volkes, und auch diese Entwicklung steht unter demselben Gesetz innerer Nothwendigkeit, wie jene frühere Erscheinung. Das Recht wächst also mit dem Volke fort, bildet sich aus mit diesem, und stirbt endlich ab, so wie das Volk seine Eigenthümlichkeit verliert.’

With this understanding of law as the product of history and tradition, Savigny added to the Romantic Weltanschauung and stimulated the interest of other German patriots like the famed linguist and philologist Jacob Grimm, a student and friend of Savigny (at least until Grimm became one of the Göttinger Sieben), who later praised

94 FC von Savigny, Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft, at 12.
95 For the difference between an Hegelian and an Herderian conception of language, see A von Bogdandy, ‘Hegel und der Nationalstaat’, at 526.
96 Quote and translation from RR Ergang, Herder and the foundations of German nationalism, at 163.
97 FC von Savigny, Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft, at 11.
Savigny’s work (the legal scholar had sent a copy of his famous manuscript to the brothers Grimm in order to get feedback) further developing the theory:


The influence of Jacob Grimm on Savigny – of the brilliant pupil on the just six years older master – seems more than plausible. Wilhelm Grimm also expressed his particular interest for the theory on the popular origin of law, manifesting the intention to apply the same hypothesis to other fields of investigation, in particular literature and philology. 100 This contributed to the development of the modern Germanistik, the systematic study of the German language, literature and culture in historical perspective.

II.1.4.2.4. Diffusion and impact of the Volksgeist theory

The doctrine of Volksgeist, as well as the methodology employed by the Historical School of Law enjoyed immediate success. This was partially due to the fame of Savigny, who attracted a great number of young students from different parts of Europe willing to follow his lectures in Berlin. 101 More importantly, however, the doctrine was convenient in various countries, as it could perform several political functions: legal scholars were now reinstated as central figures within the legal system, a role that the boldness of the legislator had attempted to # obliviate. The Volksgeistdenken could be used with the aim not only of opposing to the codification but even legitimising legal systems in a traditional way. We can rapidly follow the journey of the Volksgeist in the discourses of legal scholars in a number of countries, on the old and the new continent, noteworthy experiences that exemplify the fortune of the concept, before we go focus on the development of the concept in its German homeland again until the events linked to National Socialism.

98 The Göttinger Seven were a group of German professors of the University of Göttingen who had been fired after protesting against the King of Hannover Ernest Augustus. The King had abrogated the liberal Constitution of 1833 that had been drafted among others by Friedrich Christoph Dahlmann, one of the Göttinger Seven and future drafter of the Constitution of the German Empire of 1849.
99 J Grimm, 29 October 1814, in I Schnack and W Schoof, Briefe der Brüder Grimm an Savigny aus dem Savignyschen Nachlaß (Berlin: Erich Schmidt, 1953) at 172.
101 Nonetheless it would be reductive to claim that legal scholars in other countries just repeated Savigny’s ideas and that the only renowned legal school in Europe at that period was the one established in Berlin, see P Caroni, ‘La cifra codificatoria nell’opera di Savigny’ (1980) 9 Quaderni fiorentini per la storia del pensiero giuridico moderno 69-111, at 92-95.
Nationalisation and Denationalisation

II.1.4.2.4.1. In other European countries

It has already been observed that the idea that law chiefly emerges as custom rather than legislation spread particularly in those nations that could not organise themselves in the form of a nation state. This should be a fortiori the case for those communities provided with a strong cultural and linguistic identity that claimed their nature of ‘nation’ against a centralist state, as in the case of Catalonia. It is therefore not surprising to discover that Savigny’s theories were favourably accepted in that part of Europe.

The Volksgeistdenken rapidly permeated the work of several Catalan scholars – in particular Manuel Durán y Bas – who got to know Savigny’s thought mainly through French translations and academic education. Following (and sometimes even misunderstanding) Savigny, these scholars affirmed that law is something that develops naturally from the people and is linked to particular contexts and historical periods (thus comply with Volksgeist and Zeitgeist). In conclusion, law can only be a national one, which implied the need to maintain a separate law for Catalonia. The reason for such diffusion is indeed a political, since the thesis of the German Historical School could be easily employed by Catalan scholars to defend their own autonomy and legal system against the plans of legal unification based on the laws in force in the region of Castile. In this sense, the political concerns of Catalan lawyers did not differ from those of Savigny. The main problem with codification seemed to be that ‘given the lack of Catalan political power, it was thought that legislation on Catalan civil law should not be left in the hands of non-Catalans’. Durán y Bas, who later became Minister of Justice in 1899, could obtain that the Spanish Civil Code of 1889 left traditional Catalan law ‘provisionally’ untouched. Still in the twentieth century, Catalonia managed to maintain its autonomy from Spanish law and gradually embarked upon autonomous projects of compilation and codification, always in light of the idea that

‘Civil law represented, together with the language, one of the most important cultural products of the Catalan people, one of the principal exponents of their identity as a people, and therefore one of

\[\text{102 M Figueras Pàmies, } \text{La Escuela Jurídica catalana frente a la Codificación española. Durán y Bas: su pensamiento jurídico-filosófico (Barcelona: Bosch, 1987) at 115.} \]

\[\text{103 M. Figueras Pàmies, } \text{La Escuela Jurídica catalana frente a la Codificación española, at 171-182, where in particular the thought of Durán y Bas is analysed.} \]

\[\text{104 ‘Nineteenth-century opposition to the codification process had its roots in the ideology of the historical school of law and its rejection of codification. This influence is clear in the setting up in Barcelona of a ‘Spanish Committee’ linked to the Savigny Foundation of Berlin, under the honorary presidency of Pere Nolasc Vives I Cebrià, although Duran y Bas was effectively its leader’, F Badosa Coll, ‘…Quae ad ius Cathalanicum pertinet’: the civil law of Catalonia, } ius commune \text{ and the legal tradition’, in HL MacQueen, A Vaquer and S Espiau Espiau (ed), } \text{Regional Private Laws and Codification in Europe (Cambridge: University Press, 2003) at 159.} \]

\[\text{105 M Figueras Pàmies, } \text{La Escuela Jurídica catalana frente a la Codificación española, p. 114: ‘Las circunstancias concretas de Cataluña se parecían, cada vez más, a las de Alemania, en 1841, cuando la codificación hacía peligrar las instituciones civiles alemanas. Es por ello que los juristas catalanes se acogieron a la escuela histórica para la defensa de su derecho civil.’} \]

\[\text{106 F Badosa Coll, ‘…Quae ad ius Cathalanicum pertinet’, at 160.} \]
the essential reference points in identifying Catalonia as a product of a specific historical process.\textsuperscript{107}

The Savignian theories represented an outstanding instrument of legitimation for those communities that had fought to gain independence from larger empires and affirm themselves as nation states. This was in particular the case of Hungary, which restored its old traditional laws in 1861 riding the wave of the ‘spring of nations’ of 1848.\textsuperscript{108} Hungarian legal scholarship soon absorbed the methodology of the Historical School and the Volksgeistdenken, so that expressions like ‘law of nation’ and ‘national character’ became common for almost a century, contributing – together with more dramatic historical events – to delay the codification of civil law by several years.\textsuperscript{109} Curiously enough, German legal theories spread so decisively in the Hungarian context that a first draft of civil codification in 1900 – just like the more successful commercial code of 1875 – met with strong criticisms for being too ‘German’,\textsuperscript{110} a style contested in particular by practitioners, who longed for less abstract rules.\textsuperscript{111}

The country in which the political situation was most easily comparable to the German is Italy. Given this similarity, one would expect an almost exact replication of Savignian arguments in the peninsula, but surprisingly enough the Volksgeistdenken did not spread to Italy immediately.\textsuperscript{112} Not even those scholars who knew and appreciated Savigny’s work and adhered to an analogous understanding of the relation between nation and law, like the famed private international lawyer and politician Pasquale Stanislao Mancini, embraced the anti-codification argument. On the contrary, those authors claimed that a code would be the perfect instrument for the nation to create a law of its own.\textsuperscript{113} They thus advocated a national idea of law to be realised by means of codification. This was a vision much closer to – though not necessarily derived from – Thibaut’s view and Hegel’s thought. This is quite surprising: if we consider that also Italy – just like Germany – was fragmented by a myriad of different states while cultural and political elites were operating to instil national consciousness and achieve political unit, one would expect a legal evolution comparable to the German one. This difference can however be easily explained: it has already been said that even in Germany at the beginning of the nineteenth century there were strands of ‘civic nationalism’, but the ‘cultural’ nationalism of which Savigny was an expression gained the upper hand mainly because of the general hostility towards France and the enlightened ideas that emanated from there. The political situation in Italy was quite different. Savigny’s pamphlet was circulated

\textsuperscript{107} This quote from the Commission for the review of the Compilation in the early 1980s can be found in N De Gispert I Català, ‘The codification of Catalan civil law’, in HL MacQueen, A Vaquer and S Espiau Espiau (ed), Regional Private Laws and Codification in Europe (Cambridge: University Press, 2003) at 164.
\textsuperscript{111} I Zajtay, Introduction à l’étude du droit hongrois, at 172.
\textsuperscript{112} On this point, see C Ghisalberti, La codificazione del diritto in Italia. 1865-1942 (Roma: Laterza, 1985) at 5 ff.
\textsuperscript{113} C Ghisalberti, La codificazione del diritto in Italia, at 7, with further references.
among Italian legal scholars very late, when a translation was published in 1857, more than forty years after the publication in Germany. In those years, Italy was about to achieve political unity, under the rule of a monarchy clearly inspired by the French ideals. A civil codification was therefore considered to be an excellent instrument to gain legal unity, while only conservatives critical to Enlightenment could have found Savigny’s ideas appealing. By then, furthermore, most Italian pre-Unitarian states already had their laws codified, as an effect of the penetration of the Code civil both ratione imperii and imperio rationis in the peninsula. Plainly, Savignian arguments against codification may have sounded very naïve and exaggerated to the ears of lawyers who were well acquainted with codifications.

Nonetheless, while the Volksgeist could not offer any appealing argument to object to codification of law, it still represented a solid theoretical justification for affirming the need of a nationalisation of law, so that the idea that private law and Volk are intrinsically connected became a ‘definitive acquisition of contemporary culture’ in a few years. This understanding is already evident in Mancini’s thought. This author adhered to what we would call today a classical primordialist understanding of the nation – typical of that historical period – according to which the nation is something really existing based on objective criteria like ‘la Regione, la Razza, la Lingua, le Costumanze, la Storia, le Leggi, le Religioni’, and with features of its own that necessarily reflect on the contents of the law. As a scholar of international law, Mancini was also concerned with the issue of transnational unification of law. His nationalist understanding of law however prevented him from advocating such a transnational unification. The imposition of a sole legal regime had been feasible in the Italian nation, but would be impossible within a broader geographical context: substantive laws necessarily differ among nations, and the idea of a universal legal system seemed neither feasible nor desirable. According to Mancini, consequently, not international unification but rather only private international law – though a particularly liberal one – could make up for the necessary fragmentation of the global legal order, in which any nation had the obligation – deriving from an overarching universal human law – to respect the other legal orders.

II.1.4.2.4.2. In the USA

The impact of the Volksgeist doctrine was not limited to Europe: curiously, while we could gain the impression that Savigny’s Volksgeist did not manage to prevent codification in the long run at home and did not even ‘convince’ the neighbouring

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114 C Ghisalberti, La codificazione del diritto in Italia, at 7.
115 C Ghisalberti, La codificazione del diritto in Italia, at 9: ‘In questo clima di rinnovato fervore per la codificazione, le rievocazioni spesso retoriche del non più vigente diritto comune fatte da qualche giurista sorpassato o da qualche romantico nostalgico di un antico primato della cultura giuridica italiana erano destinate ad apparire come prive di senso per l’assoluta mancanza di concretezza’.
116 B Leoni, Il problema della scienza giuridica (Torino: Giappichelli, 1940) at 16.
117 J-H Halpérin, Entre nationalisme juridique et communauté de droit, at 69.
118 PS Mancini, Diritto internazionale. Prelezione con un saggio sul Machiavello (Napoli: Marghieri, 1873) at 27.
120 J-L Halpérin, Entre nationalisme juridique et communauté de droit, at 71.
Italians as to the undesirability of codification, it accomplished its plan much farther away, in the United States of America. In the second half of the nineteenth century, indeed, the Kodifikationsstreit reappeared in the state of New York, where professor David Dudley Field, moved by concerns analogous to those of Thibaut – though without the intention of unifying private law in the whole federation – embarked upon the project of drafting a code. A Code of Civil Procedure had previously been drafted by Field and already enjoyed a discrete success in the Western states, where the bar was ‘young and open-minded’, while Eastern states chose for autonomous reforms of procedural law. However, that code of procedure – per se the ‘great[st] affront to the common-law tradition can be imagined’ – was ‘only one part of a larger, bolder plan to codify the whole common law’. Such an ambitious plan could not avoid provoking a strong resistance. In the re-enactment of the German Kodifikationsstreit, the role of Savigny was seemingly played by Professor James Coolidge Carter who – representing the Association of the Bar of the City of New York – fiercely opposed the civil codification proposed by Field, giving rise to a debate which resulted in the victory of Carter’s view.

It is ascertained that Savigny’s theories played an important role in Carter’s argumentation, and the latter clearly resembles the former. Also Carter thought that legal rules originated in popular standards of justice which vary in different states and nations, while codes are the expression of ‘the arbitrary power of the sovereign’, which is furthermore typical of despotic systems. To be sure, the very idea of a code which professes to know beforehand how future and unknown cases have to be solved is arrogant, which is the ‘habit common to all pretenders in every science to fail to observe the necessary limitations of the human faculties; they assert an ability to know the unknowable, and to do the impossible’. There are of course some differences between the positions of the American and the German scholar and – as often happens – the view of the follower is more radical than that of the forerunner. One of these differences is however crucial and needs to be addressed specifically.

While in Germany a civil code would have had a unifying function, in the American context the codification could have been a threat to legal unity: each state could have enacted its own civil code, harming a national legal unity that would have been better served by a common law. Even the attractive possibility of unifying the laws of all English speaking states one day would have been compromised by codification.

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125 JC Carter, *The Proposed Codification of Our Common Law* (New York: Evening Post Job Printing Office, 1884) at 5: ‘Whoever glances over the varying systems of law exhibited by civilized States, will perceive that in some, as in England and with us, the great body of the rules which determine the rights of men in respect to their persons and property, have never been directly enacted in statutory form. They have their origin in the popular standard, or ideal, of justice, as applied to human action, and the usages and practices sanctioned by it’.
‘That a private law transaction between men in New Jersey and Ohio should be governed by a different law from that which would rule the same transaction in New York, must be a great evil. […] What more desirable condition, what more impressive spectacle can there be, than that of fifty States of a great continent, and Empires beyond the seas, all appealing to the same law, and aiming to drown all dissent in one concurring voice? And what more mischievous condition than that all these States and nations should have Codes, each differing from every other, without any conceivable agency for bringing them into unison; but gravitating, by a law of their being, into infinite diversity? ’  

This argumentation is definitely closer to Thibaut’s legal sensibility than to Savigny’s. As already touched upon, Field had no intention to unify the laws of the whole federation while Carter was concerned with the issue of legal unity. Subsequently, importing Savigny’s theories to the different context of the United States of America lends inconsistency to Carter’s argument: if it is true that law originates in popular standards which differ in different nations, how could so many different states appeal to the same law and what would be wrong with several codes representing each nation’s standard of justice? Indeed, Carter had to claim that while standards of justice can differ, ‘right, reason and justice are, however, everywhere the same’; even more, a ‘native sense of justice’ exists ‘in the breasts of all men’. Keeping in mind these fundamental diversities, the ‘roles’ of these scholars in the American Kodifikationsstreit should be inverted, and the Field-Thibaut and Carter-Savigny analogy reconsidered.

It is difficult to say whether the state of New York would now have its law codified without the influence of Savigny; however the significance of the Volksgeist theory cannot be underestimated, as it is shown by the positive reactions to Carter’s argumentation. Already with regard to the previous Procedural Field Code, many a legal scholar considered the imposition of a single code on different states impracticable, taking the different social and business conditions between states into consideration. As Lawrence Friedman pointed out, ‘lawyers could attack code pleading more easily when it was possible to identify it with an alien, and in this case, a hated culture’. Also Carter seems to have exploited such feelings. This argument seems biased by nationalism, in particular,

‘Carter succeeded in presenting Field’s attempt as a drastic and dramatic legal measure, as if enacting a civil code would sweep the common law away wholesale, and replace it with a foreign legal system. Carter succeeded in presenting himself as a defender of the

132 LM Friedman, A History of American Law, at 395, referring in particular to HH Ingersoll, ‘Some Anomalies of Practice’ (1892) 1 The Yale Law Journal 89-94
133 LM Friedman, A History of American Law, at 396.
American legal heritage, while portraying Field as a presumptuous lawyer who threatened to abolish one of the most remarkable accomplishments of American culture. Even though it is clear that Field did not attempt to do this.\textsuperscript{135}

Indeed, Field’s original idea of codification was different from the idea Carter (and, through him, even modern legal historians) ascribed to the former.\textsuperscript{136} While it is well-known that legal academia in the US greatly profited from the migration of several German lawyers in the twentieth century, the immediate reception of a German theory at such a stage of the American legal history surprises. There are several reasons why the \textit{Volksgeist} theory – though distorted – so rapidly spread in that very dissimilar context. It is not revealing to note that the \textit{Volksgeist} theory fitted better in a common law system like the American than a civil law system like the German: at that time both systems were not codified and based on a ‘common law’ (the American common law and the German \textit{gemeines Recht} based on the \textit{Rezeption} of Roman law). Rather, the conservative philosophy underlying Savigny’s position met the favour of the American middle class: Savigny’s distrust toward the democratic legislative matched with the American distrust toward state authority; the control of the legislator over private law was furthermore seen as a sort of economic dirigisme opposed to American \textit{laissez-faire} ideology, occurring at the time when state interventions in private law notably increased.\textsuperscript{137}

\textbf{II.1.4.2.4.3. In Germany}

Unlike in America, the \textit{Volksgeist} theory managed to prevent codification in Germany only for almost a century. Ultimately, at the beginning of the twentieth century, the German civil code entered into force. Right after its publication, Savigny’s pamphlet provoked a debate in which numerous criticisms were raised. Nikolaus Thaddäus von Gönner condemned Savigny’s theories already in 1815, but the most famous criticism – due in part to its ironic style – was made one year later by Paul Johann Anselm von Feuerbach – the enlightened legal philosopher who unsuccessfully attempted a codification of Bavarian private law after drafting the progressive Bavarian penal code of 1813.

‘Ob die Römer, ehe sie ihre Wünsche geltend machten, zuvor noch ihre gründliche Selbstprüfung über ihre Fähigkeit zu einer Gesetzgebung angestellt haben? Ob die Unbehilflichkeit ihrer Sprache und die Aussicht auf eine erst künftige Veredelung derselben, als ein Zweifelsgrund gegen das Unternehmen auch bei ihnen angeführt worden ist? Ob die verstockten Patrizier das dringende Begehren des Volkes unter anderem auch damit abzulehnen versuchten, daß sie ihm vorgestellt: – all ihr Klagen und Verlangen beruhe auf einem Mißverständnis, daß sie von Gesetzen forderten, was die

\textsuperscript{135} A Masferrer, ‘Defense of the Common Law against Postbellum American Codification’ at 420.
\textsuperscript{136} See A Masferrer, ‘Defense of the Common Law against Postbellum American Codification’ at 423 ff.
\textsuperscript{137} M Reimann, ‘The Historical School against Codification’ at 107 ff.
Politically, Savigny’s success seems therefore relative. Regardless of the academic fortune of his theories and the vivacious debate they started, it can be seriously questioned whether the theory of the *Volksgeist* has left a considerable mark on German private law by shaping its contents in a distinctive way. We could even wonder whether – from this point of view – the importance of this idea is not overestimated. However, the *Volksgeist* theory mainly served as philosophical justification for the historical legal methodology Savigny developed. As a distinguished legal scholar, Savigny contributed in a decisive manner to the legitimation and rediscovery of Roman law thereby paving the way to Windscheid’s Pandectism, which in turn played a central role in the elaboration of the BGB. The code was eventually adopted, but it followed the path inaugurated by Savigny: it was highly systematic and ‘professorial’, almost a textbook on the private law of the pandects, thus very different from the idea of codification Savigny feared, such as a prolix text similar to the ALR. Ultimately, it would be difficult to predict what the reaction of Savigny would have been if he had eventually been faced with the BGB, the product of a legal school that was highly indebted to Savigny himself.

Regardless of this, Savigny’s influence has been – and still is – fundamental to the German and the European legal culture in another sense. His greatest success is the preservation of law within a cultural dimension, safeguarded by the elite of the legal writers and protected from the mere will of the legislator, in a period in which legal positivism threatened to reduce the whole of law to the form of a statute. In the era of German nationalism, this was only possible by making also law part of that *Volksgeist* that inflamed German patriots who demanded the unity of the nation: putting emphasis on the national character of law, its roots in popular traditions and customs, its link to the natural evolution of language and history.

138 Quoted by F Wieacker, *Industriegesellschaft und Privatrechtsordnung*, at 87.
139 H Coing, ‘Savignys rechtspolitische und methodische Anschauungen in ihrer Bedeutung für die gegenwärtige deutsche Rechtswissenschaft’, in H Coing, *Gesammelte Aufsätze zu Rechtsgeschichte, Rechtsphilosophie und Zivilrecht*, Vol 1 (Frankfurt am Main: Vittorio Klostermann, 1982) at 181. Moreover, the *Volksgeistlehre* has also been considered not fundamental in the whole system of Savigny and not the most important reason for his rejection of the idea of codification, see P Caroni, ‘Savigny und die Kodifikation. Versuch einer Neudeutung des “Berufes” ’ (1969) 86 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Germanistische Abteilung* 97-176, and, of the same author, ‘La cifra codificatoria nell’opera di Savigny’ at 81-85.
140 P Koschaker, *Europa und das römische Recht*, at 258.
141 E Wolf, *Grosse Rechtsdenker der deutschen Geistesgeschichte*, at 532.
142 E Wolf, *Grosse Rechtsdenker der deutschen Geistesgeschichte*, at 532.
and considered a degree of homogeneity within them as necessary – proposed cultural criteria of identification rather than purely ethnic criteria.\(^{143}\) In the same way, Savigny was not a theorist of the race as it also emerges from other parts of his rich work.\(^{144}\) On the (quite uncertain and indeterminate) ground of culture, it could have been possible to build unexpected relations; Hegel could write that ‘bei den Griechen fühlen wir uns sogleich heimatlich, denn wir sind auf dem Boden des Geistes’,\(^{145}\) while Savigny employed the identical reference to the Geist to establish a relation between the Romans and German law.

Without a cultural rather than ethnic understanding of the nation (and in this sense, he was partially immune from the primordialist rhetoric of the nation particularly widespread in that period, that often confused culture and race) Savigny’s conception of Roman law as the new historical law of the German spirit could not be fully understood and the jurist’s view would become self-contradictory,\(^{146}\) incapable of explaining how the law of the Romans – deliberately received just a few centuries earlier – could have become the ‘traditional’ law of a Germanic nation. The refusal to accept ethnic interpretation of the nation and thus the characterisation of the Volksgeist in exclusively cultural terms appears to be a consequence of the political ideology of Savigny. Even if it is true that the various ‘national consciousesses’ in Europe arose mainly through the juxtaposition of certain territorial groups, prior to its ethnic and violent swift, nationalism did not advocate yet the superiority of a given nation and mainly aimed at building nation-states which aggregated people rather than divided them. In this sense, nationalism could be a universalistic ideal with the aim that all nations would give rise to independent states. This made it possible for several nationalists – the most famous (though particularly unfortunate) case is represented by the poet and Romantic hero George Gordon Byron – to take up arms for the independence of other nations. Such a – in reality quite troublesome – appeasement of nationalism and internationalism can be detected in the legal thought of Savigny, whose system of private international law, similarly to that of Mancini, was particularly open to the application of foreign rules.\(^{147}\)

This approach however could not last long, given the difficulty of keeping ‘aggressive’ and ‘non-aggressive’ forms of nationalism separated. While German nationalism initially remained of a cultural and linguistic nature – as the German speaking people were ethnically heterogeneous and dispersed over a vast geographical area – it turned to ethnic elements and to the rhetoric of the ancestral Arian origin already in the 1830s.\(^{148}\) In jurisprudence, the argument of Savigny with regard to Roman law very soon provoked reactions, already criticised by Rudolf von Jhering


\(^{144}\) J-L Halpérin, *Entre nationalisme juridique et communauté de droit*, at 58.


\(^{146}\) F Wieacker, *A History of Private Law in Europe*, at 305-306 and 312.

\(^{147}\) J-L Halpérin, *Entre nationalisme juridique et communauté de droit*, at 48 ff.

who highlighted the inherent contradiction of that argument. Indeed, even if one adheres to a cultural conception of the nation, it is a fact that Roman law was deliberately adopted in Germany in the sixteenth century for an ‘arbitrary’ political decision. A fracture thus occurred between Savigny and the Germanist wing of the Historical School, more interested in discovering the authentic Germanic roots in ancient law and which affirmed eventually that the reception of Roman law had been a real national disaster for Germany, a decision to be regretted by any Patriot. The contrast later took on a more political form.

In line with the involution of the German political context, the concept of Volksgeist started undergoing a process of redefinition that emphasised racist instead of purely cultural elements. This aspect is already perceivable in the thought of Savigny’s ‘successor’ Georg Friedrich Puchta, who thought of the Volk in ethnic rather than cultural terms, though admitting that immigrants could be nationalised over time, adhering to ‘primordialist’ nationalist views pursuant to which a nation could only have a natural instead of an artificial basis.

II.1.4.4. The racist: German and Italian fascist experiences

Point 19 of the NSDAP programme stating that ‘das der materialistischen Weltordnung dienende römische Recht’ had to be replaced by ‘ein deutsches Gemeinrecht’ almost represents a gloomy logical consequence of the shift from a cultural to an explicitly racist criterion of nationality. The programme of the NSDAP was in this respect of a purely negative nature: it did not propose anything for the future besides of the abandoning of the already existing and only showed a strong nationalist attitude, rejecting the legacy of Roman law. Indeed, in the German racial nation there was no room whatsoever for the law of a Mediterranean civilisation and now that the nation was defined in racist terms, Savigny’s focus on the culture could no longer represent an argument strong enough to ‘save’ Roman law. Questionable re-interpretations of history were the only way in which legal scholars could have saved Roman law. In this attempt, one could have argued that the first Romans were

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149 R von Jhering, Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung [1852] (Leipzig: Breitkopf & Härtel, 1907) at 3 ff. ‘Denn was hat das römische Recht mir der „gesammten Vergangenheit der modernen Nationen, innersten Wesen und ihrer Geschichte“ zu thun?’ at 4; ‘Möge sie auch noch so viel äußere Gründe und Ursachen namenthaft machen, die uns jene Thatsache pragmatisch erklären sollen; so lange sie den Gedanken der Nationalität des Rechts als ausschließlich berechtigten und maßgebenden aufstellt, bleibt der Widerspruch, in dem ihre Lehre sich zur Reception des römischen Rechts befindet, ewig ein ungelöster – durch das Thor der Nationalität kommt das römische Recht nie in unsere Wissenschaft hinein.’ at 5.

150 This was in particular the idea of Georg Beseler. Nonetheless, Beseler appreciated that the Reception of Roman Law managed to establish a common law for the entire nation, while its criticism was mainly inspired by the political concern of a democratic nature that the abandoning of traditional German law aggravated the split between the law of the jurists and the law of the people. See F Wieacker, Industriegesellschaft und Privatrechtsordnung, at 88-89.

151 See C Mährlein, Volksgeset und Recht, at 130 ff.

152 GF Puchta, Cursus der Institutionen [1841] (Leipzig: Breitkopf und Härtel, 1875) at 17.

153 GF Puchta, Cursus der Institutionen, at 17.

154 GF Puchta, Das Gewohnheitsrecht, Vol 1 (Erlangen: Palm, 1828) at 134.

155 C Mährlein, Volksgeset und Recht, at 174-175.
all in all a ‘Nordic’ civilisation,\textsuperscript{156} as someone\textsuperscript{157} in fact did. But these arguments only represented the exacerbation of an existing trend in the comparative studies of the second half of the nineteenth century: strongly conditioned by an ethnic national conception and making use of the categories of comparative linguistics, scholars traced the ethnic roots of the modern Germans back to the ancestral Indo-European populations (in the German language known as \textit{indogermanisch}), a group from which both Germanic and Roman populations originated, so that even Roman law could be looked upon as not alien.\textsuperscript{158} Again, to ‘save the reputation of Roman law’, it could have been argued that the Latin system presented all the qualities ascribed to Germanic law, but this intermediate position was overwhelmed by those who sustained traditional German law’s superiority.\textsuperscript{159} While it praised figures like Eike von Reppgow, the father of the \textit{Sachsenspiegel},\textsuperscript{160} Nazi propaganda already condemned Roman law, inevitably considered as a ‘foreign’ system.\textsuperscript{161} As a more serious and realistic strategy, one could emphasise the fact that the influence of Roman law on German legal doctrine had been merely methodological but did not touch its deeper Germanic spirit;\textsuperscript{162} as Roman law has just contributed to the ‘\textit{Verwissenschaftlichung}’\textsuperscript{163} of German law. This point had never been raised during the age of the \textit{Rezeption}: at that time, critics could have had good reasons to sustain that the law of a foreign civilisation should not be imported to the very different German context, but as a matter of fact this argument was never used.\textsuperscript{164} It was only

\textsuperscript{156} The idea of the Romans as Nordic civilisation is even more absurd if one only considers that – leaving aside the debated question as to what the influence of other ancient legal systems has been on Roman law – most of the celebrated Roman lawyers were ethnically of African or Middle-Eastern descent, see PG Monateri, ‘Black Gaius. A Quest for the Multicultural Origins of the “Western Legal Tradition”’ (2000) 51 \textit{Hastings Law Journal} 479-564, at 501.


\textsuperscript{158} PG Monateri, ‘Black Gaius’, at 490-496.

\textsuperscript{159} RC van Caenegem, \textit{European Law in the Past and the Future}, at 110-111.

\textsuperscript{160} K-P Schroeder, \textit{Vom Sachsenspiegel zum Grundgesetz. Eine deutsche Rechtsgeschichte in Lebensbildern} (München: Beck) at 18.

\textsuperscript{161} P Koschaker, \textit{Europa und das römische Recht}, at 311 ff.


\textsuperscript{164} P Koschaker, \textit{Europa und das römische Recht}, at 147 ss ; F Wieacker, \textit{A History of Private Law in Europe}, at 93, highlights that the view that a foreign set of rules had been adopted ‘was fostered by the romantic, nationalistic view of German legal history, which led people to suppose that in adopting ‘Roman’ law the Germans had taken over something foreign and given up something of their own’. CA Cannata, \textit{Lineamenti di storia della giurisprudenza europea}, at 78-79: ‘La recezione del diritto romano non fu sentita in Germania come adozione di un diritto straniero; un giudizio di questo genere è stato enunciato assai spesso, e divenne una proposizione programmatica del Nazionalsozialismo, ma esso è recente, ideologicamente viziato, e storicamente falso; la recezione ebbe bensì i suoi avversari, ma l’argomento tratto dalla natura “straniera” del diritto romano non fu mai usato’.
nationalism – already Thibaut accused Roman law of being alien, as seen above – and in particular ethnic nationalism that could introduce the element of the nation in the legal discourse that brought the ‘foreign’ nature of the Roman system to the fore. Such an alien nature was of course far less perceptible to those living in the Middle Ages, in a period in which nations had not yet been fully ‘awakened’, and became increasingly more evident only later, when the efforts to establish fully independent nation-states augmented: Roman law started being criticised as extraneous to the needs of that country already in sixteenth century France.  

Of course, these problems could easily be avoided in the Italian context under Fascism. Given the prevailing racist understanding of the nation under Fascism, Roman law could be rhetorically exalted as a perfect legal system, typically Italian. According to this view, Roman law had been later plundered and improperly changed by different ethnic groups that, with their alterations, contributed to the distortion of that originally perfect legal system. The pure law of the Romans – a true Roman rather than Latin law – could hence be used to give traditional legitimacy to the present state of the legal order and the new Italian civil codification, occasionally underlining also the contribution of the Catholic doctrine for contingent reasons of political opportunism. Looking at two different ‘nations’ as sources of legitimacy, both the Italian and the German fascist experiences shared the same racist approach on which a disastrous cooperation could be based. However, while it was relatively easy for Italians to claim a continuity with the Roman experience, the same was more complicated for the Germans, whose traditions in studies of Germanic law was much less consolidated. Instead of the repudiated Roman law, Nazi scholars employed now Germanic law – putting emphasis in particular on the duties of the individual toward the community – to provide the new regime with a legal-theoretical underpinning. Nevertheless, the legal philosophy of the Third Reich remained basically unclear and undeveloped. The task of providing National Socialism with a proper legal theory that could finally contribute to ‘give the German people a German law’ was later undertaken by a group of legal scholars known as the School of Kiel. Among them were two of the future leading figures in German jurisprudence, the aforementioned Franz Wieacker and the very young Karl Larenz – at that time more interested in questions of general jurisprudence than private law. Some of Larenz’s writing from that period leave no doubt that the School was trying to harmonise the German legal system with the principles of National Socialism.

The aim of the regime was to awake and exalt the German nation, and to this end Germany needed an autochthonous jurisprudence – freed from the harmful

165 P Grossi, L’Europa del diritto, at 95-96.
166 D Grandi, Tradizione e Rivoluzione nei Codici Mussoliniani (Roma: Tipografia delle Mantellate, 1940) at 10.
167 See, with several references, A Somma, ‘Da Roma a Washington’ at 204 ff.
169 A Somma, I giuristi e l’Asse culturale Roma-Berlino (Frankfurt am Main: Klostermann, 2005) at 280.
170 C von Schwerin, Grundzüge der deutschen Rechtsgeschichte (Munich: Duncker & Humboldt, 1934) at VIII
171 The three important writings of Larenz from the National Socialist period are Deutsche Rechtsrneuerung und Rechtsphilosophie from 1934, Volksgeist und Recht and Rechtsperson und subjektives Recht from 1935.
contaminations of foreign ideologies – in which the *Volk* had to play a central role.\(^{172}\) The cornerstone of the new national socialist society had been identified in the refusal of individualism and the promotion of an ethnic understanding of the nation. That in order to have citizenship one had to be a Christian was already an old and implicitly anti-Semitic claim of German nationalists,\(^{173}\) but now this principle assumed a clearer racist connotation. Point 4 of the NSDAP programme\(^{174}\) translated into private law in the proposed reformulation of section 1 of the civil code, the new section of which had hence to read: ‘Rechtsgenosse ist nur, wer Volksgenosse ist; Volksgenosse ist, wer deutschen Blutes ist’.\(^{175}\) The category of the subjective right was rejected and the predominance of the general over the individual interest (‘Gemeinnutz vor Eigennutz’), point 24 of the NSDAP programme) was affirmed instead.

In other words, the mentioned shift from the liberal patriotism of the Mazzinian phase to the nationalism of 1880-1914,\(^{176}\) also reached its peak in legal theory. The contrast to Savigny’s legal theory is indeed clear, as this was based on Kantian individualism\(^{177}\) as well as a cultural understanding of the nation. This circumstance made it also difficult to employ Savignyian categories for the ends of the Regime. Such was in particular the case of the concept of *Volksgeist*, a Hegelian idea Larenz had to adulterate in order to bridge Hegelianism and Nazi ideology,\(^{178}\) moreover adding a new racial component to the concept of spirit. Particularly hard was the conciliation of *Volksgeistdenken* and *Führerprinzip*, an operation that earned Larenz criticism and even suspicion from the Nazis resulting in a growing tension and open protests against the legal scholar.\(^{179}\) The problem was that if all law organically stems from the people, then the role of the *Führer* – just as Savigny had argued with regard to the democratic legislator – becomes unclear and fades away. Indeed, Larenz uses words that do sound very familiar to affirm that the legislator ‘ist gehalten, seine Entscheidung im Einklang mit den Sitten und dem sittlichen und rechtlichen Gemeinbewußtsein der Nation zu treffen’.\(^{180}\) This conclusion is nonetheless irreconcilable with the *Führerprinzip*, according to which the word of the leader matters, above law and the interpretation given by lawyers and judges. The contradiction can only be solved by resorting to the almost metaphysical argument that *Führer* and *Volk* coincide:

> Er gehorcht nicht einer an ihn gerichteten Norm, sondern dem Lebensgesetz der Gemeinschaft, das in ihm Fleisch und Blut gewonnen hat. Sein Wille ist mit der Gemeinschaft eins, weil in ihm der Privatmann völlig ausgelöscht ist, und er nichts anderes als das


\(^{174}\) ‘Staatsbürger kann nur sein, wer Volksgenosse ist. Volksgenosse kann nur sein, wer deutschen Blutes ist, ohne Rücksichtnahme auf Konfession. Kein Jude kann daher Volksgenosse sein.’


\(^{178}\) C Mährlein, *Volksgeist und Recht*, at 210.

\(^{179}\) HH Jakobs, ‘Karl Larenz und der Nationalsozialismus’, at 807.

\(^{180}\) K Larenz, *Deutsche Rechtserneuerung und Rechtsphilosophie* (Tübingen: Mohr, 1934) at 33.
Gemeininteresse will. Ihm ist alle Verantwortung anvertraut, denn für ihn und durch ihn ist die Gemeinschaft die lebendigste Wirklichkeit'.

As a result, people, nation and ‘King’ are once again indistinguishable from each other, just like during the period in history when civic nationalism rose up against the king’s totalitarian conviction that ‘l’État c’est moi’. The only difference is that this time the nation coincided with a much more despicable ‘King’ than the monarch dethroned by nationalism in France.

The classical tension between legislator (be it a parliament or a dictator) and lawyers, ingrained in any modern legal system, reappeared; however this happened in a particularly acute way in the German context, where the lawyer’s position had traditionally played a central role in the legal system, due to the extreme nature of the new political development. Strikingly, both cultural and ethnic nationalism continuously represented the Volk as the source of legitimacy of power, but never as power holder itself: provided that it is the ‘spirit’ of the people that gave legitimacy to political power, the interpretation and determination of what this spirit demands remained up to others to decide: the elite of the lawyers – as in Savigny – or the Führer – as under Nazism. This highlights the anti-democratic nature of these particular forms of nationalism. In this respect too, the lesson of French civic nationalism is rejected: the people are not holder of the power and the Volk is used as a mere justification. Only post-war constitutions – notably the German Grundgesetz – would overturn this development, clearly stating that all powers stem from and belong to the people.

On a closer look, thus, the concept of Volksgeist was not the best instrument employable to give legitimacy to the National Socialist idea. However, this did not prevent the racist propaganda of the regime to misuse the concept of Volk. Just like Nazi propaganda insisted on Germanic symbols, the pivotal element in the new understanding of law became the Volk, obsessively recurring in the words of Nazi scholars, while the Volksgeist theory had already successfully spread among the jurists who manifested at least some sympathy for the developing national socialist ideology.

In the end, the importance of that term was sacred even in the choice of name for the civil code the regime was planning to put into force: the Volksgesetzbuch. The BGB was indeed considered too liberal and ‘foreign’, as it was based primarily on Roman law. It was thus part of that ‘der materialistischen Weltordnung dienende’ law which had to be replaced by a Germanic legislation. The project of Volksgesetzbuch, however, had no particular luck: the first draft was published already too late, in 1942.

This, furthermore, only encompassed basic general rules with the first book dedicated to the law of the persons, whereas the definitive code had to be composed of eight books. In the project, the Nazi ideals already expressed in the NSDAP programme convert to a series of rules characterised by more propagandistic and rhetorical than truly normative content. The principles

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181 K Larenz, Deutsche Rechtserneuerung und Rechtsphilosophie, at 44.
182 See H Fehr, Schweizerischer und deutscher Volksgeist in der Rechtsentwicklung (Frauenfeld: Von Huber, 1926). On Hans Fehr, see RC van Caenegem, European Law in the Past and the Future, at 104-105.
focus obsessively on the primacy of the general over the personal interest, the idea that individual behaviors should serve the community and furthermore try to promote solidarity and even honour exclusively among the German Volksgenossen.

II.1.4.5. Back to culture

As already shown, the contrast between Volksgeistdenken and Führerprinzip can only be solved through baroque interpretations that ultimately hallow the priority of the latter over the former. This solution could not be maintained anymore in a world that experienced the cruel meaning of the Führerprinzip. The relation between natural, cultural and positive law urgently needed to be redefined. Already during the late ruinous years of the Nazi experience, Carl Schmitt – who had initially contributed to the development of the Führerprinzip – travelled around Europe now advocating in a series of conferences the primary role of legal science as source of law above the legislator. A pure and simple return to Savigny was impossible indeed, but the old opponent of German codification – whose thought had been overshadowed in the years of the triumph of legal positivism – could now have again something important to say for Europe as a whole, for ‘[d]ie europäische Rechtswissenschaft braucht nicht mit den Mythen vom Gesetz und Gesetzgeber eines gemeinsamen Todes zu sterben’.

However, the legal doctrine which is most indicative of this new course in changed post-war Europe is the famous ‘Radbruch formula’: when positive laws conflict in an intolerable measure with justice, then laws lose their validity so that ‘people owe them no obedience, and jurists, too, must find the courage to deny them legal character’. This was elaborated in 1945 by the legal philosopher Gustav Radbruch, a former legal positivist who radically broke with positivism and drew closer to natural law as a reaction to Nazism. That idea soon spread into the consciousness of the jurists who witnessed analogous political events. The formula

184 1. Oberstes Gesetz ist das Wohl des deutschen Volkes.
185 11. Volksgenossen können sich zur Förderung gemeinsamer Ziele zusammenschließen, die dem völkischen Kultur-, Arbeits- und Wirtschaftsleben dienen’.
186 15. Kein Volksgenosse darf einen Vertrag zur Ausbeutung eines anderen Volksgenossen ausnutzen’.
187 13. Wer eine Verpflichtung übernommen hat, muß seine Ehre darin sehen, sie auch in schwieriger Lage zu erfüllen; die Vertragsstreue ist die Grundlage des Rechtsverkehrs’.
189 C Schmitt, Die Lage der europäischen Rechtswissenschaft, at 25.
190 C Schmitt, Die Lage der europäischen Rechtswissenschaft, at 32.
192 “An order is an order”, the soldier is told. ‘A law is a law’, says the jurist. The soldier, however, is required neither by duty nor by law to obey an order whose object he knows to be a felony or a misdemeanor, while the jurist—since the last of the natural lawyers died out a hundred years ago—recognizes no such exceptions to the validity of a law or to the requirement of obedience by those subject to it. A law is valid because it is a law, and it is a law if, in the general run of cases, it has the power to prevail. This view of a law and of its validity (we call it the positivistic theory) has rendered jurists and the people alike defenseless against arbitrary, cruel, or criminal laws, however extreme they might be. In the end, the positivistic theory equates law with power; there is law only where there is power.”, G Radbruch, ‘Five minutes of legal philosophy’, at 13.
193 For Italy, see D Barbero, ‘Negazione della legge ingiusta come valore giuridico e resistenza’ (1949) Iustitia 25 ff.
Nationalisation and Denationalisation

thus marks the overcoming of a strong legal positivism which would have required judges and citizens to obey the formal validity of Nazi laws\(^{194}\) and the return to the ancient idea that the legislator – might he be a democratic parliament or a dictator – simply has not got the power to change law as he prefers according to his personal discretion producing thereby statutes which are willkürlich (as in the German original).\(^{195}\) The Savignyan idea of cultural Volksgeist as a limitation to the power of the legislator seems to reappear and the identification of law and will of the legislator is rejected, since also Radbruch claims that ‘das Recht ist eine Kulturerscheinung’\(^{196}\) while the ultimate end of law is justice, the conception of which may vary among eras and nations, mainly seen as cultural subjects who possess collective consciousness.\(^{197}\) The nation becomes once again cultural and the racist elements which appeared in the German legal discourse shortly after Savigny and came to their heyday under Nazism have been removed.

However, Radbruch only touches upon the issue of the cultural origin of law and does not deepen his appraisal of the relation between nation and culture: culture remains non-historical in a neo-Kantian perspective.\(^{198}\) Indeed, in twentieth century democratic Germany, an easy return to Savigny’s view was not thinkable: a unitary state not merely a night watchman had now been built. The proper functioning of this state presupposes citizens’ democratic participation and a certain degree of legal formalism represents a guarantee against arbitrary excesses of the political power. More generally, the end of the Second World War marks a moment of crisis for nationalist theory, now associated with chauvinism and seemingly fated to be overcome by a new humanitarian internationalism that once again draws from the Enlightenment. In order to single out what the limitations to the power of the legislators are, Radbruch therefore resorts to the open catalogue of rights offered by natural law and the law of reason, only indicatively listed in the declarations of rights of enlightened inspiration.\(^{199}\)

II.1.5. Impact on today’s legal systems

While the model of the trias politica is accepted in all countries belonging to the so-called Western legal tradition, a superficial comparative analysis reveals the extent to which some differences exist with regard to the relation between the diverse state powers and legal sources even within the group of civil law systems. These

\(^{194}\) It can be discussed whether legal positivism can legitimise even Nazi laws or whether, on the contrary, the Nazi state represented the denial of legal positivism. Indeed, according to this legal philosophy, there is a strong distinction between law and morals, while on the contrary Nazism abolished that difference: as Hitler himself made clear already in 1933 speaking at the Juristentag of Leipzig, ‘der totale Staat wird keinen Unterschied dulden zwischen Recht und Moral’, in a context in which legalistic guarantees disappeared and the Nazi principle was established that ‘Recht ist, was dem Volke nützt’, in M. Domarus, Hitler. Reden und Proklamationen 1932 - 1945, Vol 1 (Wiesbaden: Löwit, 1973) at 305.


\(^{196}\) G Radbruch, Rechtsphilosophie, at 164.

\(^{197}\) G Radbruch, Rechtsphilosophie, at 150.


\(^{199}\) G Radbruch, ‘Five minutes of legal philosophy’ at 14-15.
differences can also be explained on the basis of a long historical development, as the effect of the events we have considered thus far.

The civic conception of the nation that originated in France basically limited itself to transfer the same type of political power from the head of the sovereign to the hands of the citizens, so that law now represented the will of the nation instead of the mere will of the sovereign. In particular, the instrument through which the will manifested itself is the formal statute, though now issued through democratic procedures unrolled in a parliament. Thereby, the centrality of the democratic statute – authoritative but not authoritarian anymore – becomes a feature of the new legal system as derived from the Revolution, which necessarily required a moment of rupture with the past. Expressing the will of the nation, the statute tends to be ‘sacred’ – similar to the word of a sovereign drawing his power from a divine investiture. This is a consequence that does not lead to surprise in a nationalistic system, given that nationalism has gained the function of ‘civic religion’ of the society. Having executed the King, nationalism becomes a religion that celebrates the Nation as God, whose word is revealed through the statute. There are no priests in this religion: the nation is both God and the elected people, thus no mediums are required. In this context, any ‘oracles of the law’, to use John Dawson’s expression, would only risk misunderstanding and falsifying the will embodied in the statute. Their function is thus better limited; the judge becomes the mere mouth of the law, while the legal scholar simply explains what the statute says, primarily for educative reasons and in order to inform new judges.

One of the most characteristic features of the French civic national legal system has remained quite evident and concerns the delicate relation between legislative and judiciary power. Since the nation was embodied with absolutist powers – not different from those in the hands of the king before his beheading – which was expressed in a ‘sacred’ statute, it was impossible to allow other bodies to alter or otherwise limit the statute. A system of control on the constitutionality of statutes analogous to those developing in Austria or even in the United States – where too, the principle of judicial review introduced by the Supreme Court in 1803 in the famous case *Marbury v. Madison* initially met strong criticisms from influential founding fathers like Thomas Jefferson – was not easily conceivable. The French system rather maintained the less incisive control exercised by the *Conseil d’Etat*, an ancient institution that has in the first place advisory and administrative functions and is not totally independent from the other powers. Only in 1958 the new French Constitution introduced the *Conseil constitutionnel*, an institution analogous to the constitutional courts of Germany and Italy but less intrusive in Parliament’s sovereignty due to its particular control of constitutionality on statutes which have not entered into force yet – more precisely: after the act has been issued by the Parliament but before it is promulgated by the President of the Republic. What is even more telling, only a limited number of political powers could refer to the *Conseil constitutionnel*: the President of the Republic, the Prime Minister, the Presidents of the national Assembly and the Senate and a group of at least sixty deputies or sixty senators; noticeably not

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the judiciary power nor the citizens directly. Only more recently, a reform of 2008 entered into force in 2010,\textsuperscript{202} has introduced fundamental changes to this system, establishing that the \textit{Cour de Cassation} and the \textit{Conseil d'Etat} can refer to the Constitutional council even after a Parliamentary act has already been promulgated.

These developments have reduced the differences between the French and the German legal systems, as this latter has had a quite different evolution. As already shown, Savigny defended the very much older view that (private) law is not a product of will; what in France was called general will, was considered by Savigny in Germany – the peak of a long series of authors with similar views on the relation between law and statute – as mere ‘\textit{Willkühr’}. The role of the legislative is played down and the legislator can only draw from the existing body of private law. This conception brings the German experience closer to the English: ‘strangely enough, Savigny’s arguments fit the common law tradition better than his own, civilian, culture’\textsuperscript{203} Of course, when one of the legal sources is weak, the other competing sources will become stronger automatically.\textsuperscript{204} The only ‘oracle of the law’ in this context is the jurist, in particular the legal scholar who has now the task of building the ‘system’. The judge, on the contrary, is required to comply with the authority of academic writings for the sake of legal certainty.\textsuperscript{205} In this respect, the German experience strongly differs from common law systems, where the terms of the relation between judge and academic lawyer are completely overturned and even the expression ‘legal doctrine’ – intended as referring to the whole of the opinions of the jurists – seems odd.\textsuperscript{206} Although it is true that judges continue to gain importance and authority even among non-lawyers, this is also due to their strongly theoretical and conceptual academic education, which makes a ‘learned jurist’ out of almost every practicing lawyer.\textsuperscript{207} This aspect is also manifest if one looks at the ‘judges’ who form the German Federal Constitutional Court, generally leading academics. This court represents indeed another important feature distinguishing the German from the French model that can be explained historically. The history of German constitutionalism is much more ancient: even in a context characterised by the absence of a Constitutional charter, some constitutional functions were already recognised to the \textit{Reichskammergericht}, the institutional role of which made up for the lack of a centralised German state. Nonetheless, it was the reaction to the Nazi experience that played the most important role in the shaping of the German constitutional system and in the theoretical elaboration of modern constitutionalism more generally – it suffices to mention the Radbruch formula once again.

\textsuperscript{202} \textit{Loi constitutionnelle} 23 July 2008.

\textsuperscript{203} M Reimann, ‘The Historical School against Codification’ at 108

\textsuperscript{204} On these dynamics, see RC van Caenegem, \textit{Judges, Legislators & Professors. Chapters in European Legal History} (New York: Cambridge University Press, 1987) and, with particular reference to legal scholarship in Germany, S Vogenauer, ‘An Empire of Light? Learning and Lawmaking in the History of German Law’ 64 \textit{Cambridge Law Journal} 481-500.

\textsuperscript{205} S Vogenauer, ‘An Empire of Light? Learning and Lawmaking in the History of German Law’, at 498.


\textsuperscript{207} S Vogenauer, ‘An Empire of Light? II Learning and Lawmaking in Germany Today’, at 654.
II.2. Private law as a nation-building tool

Although nationalism as an ideology does not seem to have the normative power to shape the contents of private law in a distinctive way, private law as such cannot be considered irrelevant in a nationalist perspective. The evidence which we have drawn from history rather shows a strong correlation between nationalism and the nationalisation of private law. Even from a more analytical perspective, it is clear that private law is connected to the concept of nation. A primordialist perspective – as exemplified in the Savignyian organicist theories inspired by Herder – would insist on the derivation of private law from the (spirit of) the nation, arguing that law – just like language and traditions – is a characteristic feature of the national organism. A modernist perspective would highlight how rhetorical this construction is and would rather invert the terms of the debate: it is not the law which stems from the nation but the other way round. Law contributes to the creation of the nation as a means of social change. The key concept to understand the relation between nationalism and law is no longer organicism but rather instrumentalism.

It was already the French Revolution that introduced the idea that private law could be used not only as an instrument to regulate social and economic relations among citizens but more generally as a tool to govern society as a whole. The civil codification eventually issued under Napoleon brought about a new political project, enabling a new economic and social bourgeois order in which all individuals were considered to be equals and joined in the new egalitarian category of ‘citizen’, which replaced previous feudal class-based distinctions. The code, which standardised the legal treatment applicable to all citizens, was in this sense the most powerful legal instrument of that civic nationalism that had just transferred the political power from the king to the nation. In Germany, a civil codification would have had a slightly different function. Since a centralised state did not exist, the code would have created at least a common sense of belonging to a German nation among all German citizens and facilitated the edification of a new German nation-state, as in the hope of Thibaut.

The civil codification, beyond its importance as a legal instrument, played a role that is commonly described in the nationalism studies as ‘nation-building’. While in a classic primordialist perspective the already existing nation strives to unity and eventually produces an act which announces the ‘awakening’ of the nation, in a modernist perspective the civil code can be used to create a new consciousness among people as to their condition as nationals. From a modernist perspective, it could be said that the unification of private law represents a nation-building technique comparable to the invention of a common culture by means of language and literature, the ‘invention of tradition’ and forms of ‘banal nationalism’.

The question is now how private law can serve as a nation-building technique, in other words, how can it promote homogeneity within the nation, in line with the tendency inaugurated by newly formed nation-states that utilise law as a tool to achieve social

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objectives.\textsuperscript{211} This requires a sociological approach to law: while classical legal philosophers have seen communities as the creators of law, legal sociologists have shown that, among all the functions it has as an instrument of social change, law can also be employed as a tool to create those communities.\textsuperscript{212}

II.2.1. Homogenisation by inclusion

In case of homogenisation by legal \textit{inclusion}, both insiders and outsiders will be brought together under the application of the same legislation. The sentiment of belonging to a national community can thus be fostered – or, according to modernists, even created – through the politics of integration through law.

In the view of Gellner,\textsuperscript{213} nationalism was a phenomenon that fostered the transition from a static agrarian to a dynamic industrial society, a shift which is coherent with the tendency to move ‘from status to contract’ described in legal history. In this sense, the creation of a common set of legal rules mainly incorporated in a civil codification had the function to permit a higher mobility of the workers required by the new model of division of work and create more opportunities to contract across borders. It is well known that in particular the French civil and commercial codifications represented the economic charter of the new bourgeois society that arose from the industrial revolution. In a common legal framework it is indeed easier for merchants to enter economic transactions, for they will be able to rely on uniform legal rules. This would also serve the interest of the nation, since the economic relationships between communities would increase the wealth of nations.

In another sense, it is sometimes alleged that an economic community will necessarily bring about a political community, since the economic transactions among different peoples will increase the possibility of knowing each other’s culture, develop a common solidarity\textsuperscript{214} and possibly even merge into a single community. This is indeed the sense of the above-mentioned words of Thibaut, who was concerned with the edification of a common German consciousness that foreshadowed political unity. However, this view is typical of the liberal nationalism of the nineteenth century, which still considered nationality a category of inclusion rather than exclusion and could not even suspect the turn that nationalism was about to experience within a few years time. Nowadays, such an ‘optimistic’ view is more often objected to while some highlight that a common economic space does not automatically lead to a common cultural and political space, since ‘\textit{[u]n espace économique n’engendre pas ipso facto un sentiment d’identité commune parmi les individus qui y participent’.}\textsuperscript{215} Moreover and paradoxically, the contact with different cultures may more easily increase differences,\textsuperscript{216} giving people awareness of their cultural specificities and occasionally

\textsuperscript{211} BZ Tamanaha, ‘Understanding Legal Pluralism: Past to Present, Local to Global’ (2008) 30 Sydney Law Review 375-411, at 381.
\textsuperscript{213} Supra, first chapter on ‘Nationalism’, ‘Reasons for nation-building’
\textsuperscript{214} A Sen, \textit{Identity and Violence}, at 147, referring to D Hume, \textit{An Enquiry Concerning the Principles of Morals} [1751] (La Salle: Open Court, 1966) at 25.
\textsuperscript{216} From an economic perspective it has also pointed out that the process of economic integration in Europe, instead of leading to a convergence of values, may lead to the opposite result ‘as a result of increased
feeding nationalist sentiments.\textsuperscript{217} at the foundations of this pessimistic reflection already lies the perception that nationality has become a matter of \textit{cultural} belonging, very different from the \textit{civic} conception of nationality envisaged by the French revolutionaries and Thibaut.

Regardless of the sociological consequences produced by the interplay of different populations put into contact with one another by facilitated market relations, it is historically ascertained that unification of law, in particular by means of civil codifications, has also had a strong symbolic reason, as one of the ‘\textit{sommi fattori dell’unità}’,\textsuperscript{218} as the rhetoric of nationalist governments declared. Indeed, modern legal historians can state that, though ‘an exclusive codification does not necessarily bring about legal unity’,\textsuperscript{219} nonetheless ‘the fact that in the course of the nineteenth century European states were able to become nations was at least partly due to the introduction of uniform codifications’,\textsuperscript{220} in other words, the sociological importance of civil codification is that it has been ‘a means for the state to assert its domination by shaping and controlling the law’.\textsuperscript{221} This already emerges from several European continental experiences: in Germany, where the new civil code could give an answer to the demands summarised in the slogan ‘\textit{ein Volk, ein Reich, ein Recht}’, and in France where the code civil was considered by Napoleon as his most important and lasting work, the symbolic authority of which remains even today. Generally, unification of law and civil codifications have been employed as means to affirm the character of a state which has been recently created or re-built and its authority on the population living on its soil, as an instrument of ‘internal colonisation’.\textsuperscript{222} This is evident in the aforementioned cases, as well as in many other nations: in Italy, where fascism undertook an ambitious programme of reform of all codifications; in the socialist Germany, where the DDR decided to deviate from the excessively bourgeois BGB by issuing a new \textit{Zivilgesetzbuch} and, more recently, also in the Central and Eastern European countries where new civil codifications and new constitutions characterised the birth of new democratic post-communist states which had the goal of a rapid adhesion to the European Union. This was the case of states exemplified by Rumania, where the new era was opened by the execution of the old despot – almost a gruesome constant in history – or Estonia, where the new private law codifications were also ‘based on the experience of developed democracies which would also allow for close international cooperation’.\textsuperscript{223} The situation of the Catalan nation/nationality in Spain has already been touched upon, here it is significant to note that even recently, a former Catalan Minister of Justice explicitly advocated law’s nation-building function, stating that ‘[a]t the beginning of the twenty-first century, I am

\begin{thebibliography}{99}
  \bibitem{218} G Vacca (1866) \textit{Relazione ministeriale al Re sul codice civile del Regno d’Italia} (Torino: Stamperia Reale) at XIII
  \bibitem{219} PAJ van den Berg, \textit{The politics of European codification}, at 6.
  \bibitem{220} PAJ van den Berg, \textit{The politics of European codification}, at 25.
  \bibitem{221} C Varga, \textit{Codification as a Socio-Historical Phenomenon} (Budapest: Akadémiai Kiadó, 1991) at 334.
\end{thebibliography}
II.2.2. Homogenisation by exclusion

In case of homogenisation by legal exclusion, legal rules will tend to give outsiders a less favourable treatment than insiders, as insiders are those who have the characteristic feature which is assumed to be the main criterion of nationality (for example, those who speak the French language or profess the Christian religion) and outsiders are those who do not.

In order to operate policies of homogenisation based on exclusion it is first necessary to make a distinction. It is necessary thus to distinguish insiders and outsiders, in order for the legal rule to prescribe a different treatment. While the civic nationalism of the first phase was chiefly an integrative movement – which aimed in the first place at the integration of the several feudal classes into the general category of the citizen – violent nationalism of the second phase became mainly exclusive. Given a racist interpretation of the nation, for example, a man of Jewish origin would not be allowed to marry an ‘Arian’ woman, as took place in Nazi Germany and fascist Italy: the Italian code of 1942, indeed delegated ‘special legislation’ – the infamous race laws of 1938 – to list the circumstances of race and nationality that could constitute impediments to the marriage. Still within the Italian legal experience, the contrast becomes striking if we consider the change since the Civil code of 1865 – following a French model and of liberal inspiration – that already read that ‘lo straniero è ammesso a godere de’ diritti civili attribuiti ai cittadini’.

Rules on citizenship usually ‘translate’ nationalist criteria of nationhood into legal language: so for example ‘ethnic nationalism’ favours objective criteria like the bloodline, leading to internal rules acknowledging the principle of ius sanguinis (a famous example is the proposal to include in the German BGB the provision ‘Volksgenosse ist, wer deutschen Blutes ist’ under National Socialism), whereas ‘civic nationalism’ opts for subjective criteria, usually translated in the principle of ius soli. However, in modern private international law – inspired by trans-nationalism more than nationalism – both these criteria are usually coexisting in the legislations of the same country.

Such an approximation takes place since ‘[w]hile traditional ius sanguinis countries (Belgium, Germany, Greece) have introduced or extended ius soli provisions for second and third-generation immigrants, classic ius soli countries (the UK, Ireland) have limited these provisions’, besides of this, however, the concrete regulations of citizenship in Europe are so different that it is still difficult to speak of a ‘unspecified process of convergence’.

225 A brief historical account of the legal treatment of religious minorities (in particular the Jews) in Italy written before the race laws of 1938 were issued is offered by M Roberti, Svolgimento storico del diritto privato in Italia. Vol. 1 (Padova: Antonio Milani, 1935) at 184-202.
226 In this regard, also the Austrian Code of 1811 should be mentioned: J-L Halpérin, Entre nationalisme juridique et communauté de droit, at 26 explains that ‘le Code autrichien de 1811 pose, d’abord, le principe de l’égale admission des étrangers et des nationaux aux droits civils, ainsi que de leur égale soumission aux obligations imposées par l’État. La condition de réciprocité est, certes, essentielle, mais elle n’intervient que pour trancher les cas douteux devant les tribunaux: l’étranger doit alors prouver que son État traite également les sujets autrichiens. Tout ce qui touche la capacité personnelle des étrangers doit être jugé selon les lois de leur domicile, ou à défaut de leur naissance’. Moreover, also in the Kingdom of the Netherlands a statute of 1838 acknowledged foreigners civil rights without any condition of reciprocity, J-L Halpérin, Entre nationalisme juridique et communauté de droit, at 30.
227 Such an approximation takes place since ‘[w]hile traditional ius sanguinis countries (Belgium, Germany, Greece) have introduced or extended ius soli provisions for second and third-generation immigrants, classic ius soli countries (the UK, Ireland) have limited these provisions’, besides of this, however, the concrete regulations of citizenship in Europe are so different that it is still difficult to speak of a ‘unspecified process of convergence’, MP
modern politics in naturalisation law link citizenship with the concept of culture, as a clear symptom of the inclination to overcome the use of classical criteria of nationhood in favour of the (quite undetermined) category of culture. Rules distinguishing people on the basis of their nationality are indeed not frequent in modern private law systems, since private law rules tend to be general and abstract. This kind of rules, nonetheless, are usually more articulated and involve different levels of ‘abstraction’: the legal subject is normally split up in a long series of categories such as ‘landlord’, ‘tenant’, ‘seller’, ‘buyer’, or, more recently ‘consumer’ (or even ‘vulnerable consumer’) and ‘business’. It could then also be technically conceivable of a further specification with regard to the nationality of the subject. But although a legal rule which distinguishes on the basis of nationality is imaginable, there are not many examples in private law systems; the ‘exclusion’ of non-nationals is indeed carried out upstream at the constitutional level. The constitutions of several new member states provided an example, inasmuch as they prohibited sale of land to foreigners.

II.2.2.1. Constitutional aspects

It is significant to note that, whereas a rule in which discrimination operates on the grounds of ethnicity would be considered unconstitutional nowadays, the principle is not self-evident with regard to the discrimination on the basis of nationality: even post-Second World War constitutions often consider nationality differently. Indeed, whereas an ethnicity-grounded discrimination denies a subject rights he or she is legally entitled to enjoy, nationality or more correctly citizenship is the prerequisite for acknowledging those rights and duties (whose violation can represent a discrimination): citizenship – at least in its ‘active’ version – is, as in the famous words of the US Supreme Court, ‘the right to have rights’. International law, within certain limits, does not interfere with national discretion in this respect. The political question nonetheless remains: on the basis of what criteria are some rights acknowledged to some persons and denied to others? The question is still debated: what rights should be acknowledged to every human being? Already between the two World Wars, it could be noticed that ‘die Menschheit ist auch heute weit davon entfernt, friedlich und reinlich zu trennen, welche Rechte und Befugnisse dem


229 In this sense, referring to contract law, G Mäsh, ‘Le droit communautaire des contrats et son influence sur le droit national des Etats membres’, in G Mäsh, D Mazeaud, R Schulze (ed), Nouveaux défis du droit des contrats en France et en Europe (Munich: Sellier, 2009) at 18. The question whether private law rules make distinctions between nationals and non nationals has become of practical relevance since the EC treaty prohibits this sort of discrimination in the EU.

230 A Albi, EU Enlargement and the Constitutions of Central and Eastern Europe (Cambridge: Cambridge University Press, 2005) at 64, 73, 110.


Inländer als Bürger des Staates vorbehalten und welche allen Mitmenschen eröffnet sein sollen’,

Whereas a differentiated legal treatment between citizens and foreigners can be politically and legally justified as a result of pragmatic reasons of economy when it comes to social rights, the rights which involve expenses for the state and can therefore not always be provided to everyone but often only to (some) co-nationals, it is more striking that discrimination can arise with regard to liberal ‘negative’ rights that are traditionally looked upon as ‘non-expensive’, inasmuch they do not require a positive action from the state. Older and even more recent constitutions tend to distinguish fundamental rights of every human being and fundamental rights of the citizens, so for example, whereas ‘Jeder hat das Recht auf Leben und körperliche Unversehrtheit’ (Art. 2.2. GG) and ‘alle Menschen sind vor dem Gesetz gleich’ (Art. 3.1. GG), only ‘alle Deutschen haben das Recht, sich ohne Anmeldung oder Erlaubnis friedlich und ohne Waffen zu versammeln’ (Art. 8.1. GG) and, once again, only ‘alle Deutschen haben das Recht, Vereine und Gesellschaften zu bilden’ (Art. 9.1. GG). This kind of differentiated legal treatment is laid down of course not only in the German constitution but also in the basic laws of just about all European states. Indeed, the presence of corps intermédiaires – representing a possible competitor for the monopoly of violence and undermining nations’ assumed homogeneity – on the soil of the state have always represented a worry for nationalists, and even modern democratic societies have not completely overcome this worry, so that in their constitutions they reproduce the provisions already laid down in much older basic laws. So for example, the aforementioned articles of the German Grundgesetz directly

233 H Sperl, Nationalismus, Internationalismus und Rechtsordnung (Wien: Hölder, 1924) at 5.
234 H Sperl, Nationalismus, Internationalismus und Rechtsordnung, at 5.
235 So for example Article 20.3 of the Dutch Basic Law. The differentiation in the treatment between nationals and foreigners remains however a particularly intricate legal issue, so in EU law, it can be questioned whether directive 2004/38/CE – in the part in which it allows member states to refute social benefits to non-citizens looking for a job – is really compatible with articles 12 and 39 of the Treaty, see L. Raimondi, ‘Cittadini dell’Unione europea in cerca di lavoro e principio di non discriminazione: osservazioni in margine alla sentenza Vatsouras’ (2010) 2 II Diritto dell’Unione Europea 443-462.
236 In reality, under this viewpoint, the distinction between liberal and social rights is not completely justified, since also liberal rights of freedom require in modern democracies expensive actions by the state; see S Holmes and CR Sunstein, The Cost of Rights. Why Liberty Depends on Taxes (New York: Norton, 1999)
237 National constitutions are normally even more restrictive (although their provisions have to be combined with international rules). So for example, from a brief overview of national constitutions in Europe we find provisions like ‘Belgians are equal before the law’ (Art. 10.2 Belgian Constitution), ‘all Greeks are equal before the law’ (Art. 5, Greek Constitution), ‘Spaniards are equal before the law’ (Art. 14, Spanish Constitution), ‘Luxembourgers are equal before the law’ (Art. 11, Chapter II: ‘Luxembourgers and their rights’, Luxembourger Constitution), or ‘All citizens have equal social status and are equal before the law’ (Art.3, Italian Constitution), ‘all citizens shall be equal before the law’ (Art. 6.2, Bulgarian Constitution), ‘all citizens enjoy the rights and are subject to the duties laid down in the Constitution’ (Art. 12 of the Portuguese Constitution. In Art. 13 several grounds of discrimination are prohibited, but no reference to nationality is done), ‘All federal nationals are equal before the law’ (Art. 7.1, Austrian Constitution).
derive from the liberal ‘Grundrechte des Deutschen Volkes’ elaborated in the Paulskirche in Frankfurt am Main shortly after the revolutions of the ‘Spring of Nations’ in 1848 and fully in the spirit of German patriotism. However, as was already discussed in a previous chapter, nationalism in Europe witnessed ‘over the course of the nineteenth century, a slow, inexorable shift from the left of the political spectrum towards the right’, so that categories like ‘citoyen’ and ‘Deutsch’, born as means of inclusion and extension of rights, soon evolved in categories of exclusion.

Considering the German legal experience, a constitutional right is thus acknowledged to those who belong to the nation but denied to outsiders. This concern politically justifies the category of rights acknowledged exclusively to nationals – as they are called, Deutschenrechte – within that of fundamental rights and consequently those constitutional provisions which guarantee the legitimacy of a hypothetical secondary rule which denies (or acknowledges under stricter conditions) foreigners a right which is constitutionally guaranteed to insiders (as far as they do not find protection under different and more general constitutional provisions). Indeed, whereas ordinary legislation grants foreigners the freedom of association, the formation of Ausländervereine is still subjected to a differentiated legal treatment justified by reasons of protection of the internal and external security. Furthermore, although some legal authors have pleaded for an extension of the constitutional provisions limited to German citizens also by means of an extensive interpretation of the Basic Law, the German Constitutional Court has rejected this solution thus far.

II.2.2.2. A brief digression: Non-discrimination law in Europe

Already in the past, anti-discrimination legislation has been adopted as an instrument ‘to promote peaceful revolution in social relations’, and thus as a tool of integration ‘by inclusion’. In the light of the process of constitutionalisation of private law, prohibitions of discrimination have started slowly moving from the public to the field of private law. The drafts for a European codification are quite indicative of this tendency. Representing a real though very controversial innovation compared to traditional private law codifications and even a progress from the point of view of

\[\text{\tiny 239 O Kimminich, Deutsche Verfassungsgeschichte (BadenBaden: Nomos, 1987) at 342 ff.}\]
\[\text{\tiny 240 J Leerssen, National Thought in Europe. A Cultural History (Amsterdam: Amsterdam University Press, 2006) at 215.}\]
\[\text{\tiny 241 § 11 Versammlungsgesetz}\]
\[\text{\tiny 242 § 14 Vereinsgesetz}\]
\[\text{\tiny 244 A Bleckmann, Allgemeine Grundrechtslehren (Köln-Berlin: Heymann, 1979) at 110 ff.}\]
\[\text{\tiny 245 With regard to the Deutschenrecht laid down in article 12 of the Basic Law, the Constitutional Court (BVerfGE 78, 179) affirmed: ‘Jedoch kann auch die Selbstverständlichkeit, daß Ausländer Träger von Menschenrechten sind, nicht zu einer - wenn auch eingeschränkten - Anwendung des Art. 12 Abs. 1 GG auf diesen Personenkreis führen, soll die ausdrückliche Entscheidung des Grundgesetzes, die Berufsfreiheit nur deutschen Staatsbürgern zu gewähren, nicht unterlaufen werden’.}\]
social justice,’247 in the DCFR (Art. II.-2:101) non-discrimination has become an authentic right, namely the ‘right not to be discriminated against’.

Nevertheless, echoing the wording of articles 10 and 19 of the Treaty on the Functioning of the European Union, this provision also limits itself to prohibiting discriminations on the grounds of sex, racial or ethnic origin. Once again, the element of nationality or citizenship, unlike the elements that can be used to found the political concept of nationality like ethnos, is not explicitly taken into account. Even non-discrimination can thus manifest itself as an instrument of integration ‘by legal exclusion’, when considered from the perspective of those belonging to the non-protected categories. An express prohibition of discriminations based on nationality is contained in article 18 of the Treaty, which nonetheless limits the principle ‘within the scope of application’ of the Treaty itself; that means that ‘nationality’, as clarified by the Court of Justice,248 only refers to the ‘European nationality’, so that discrimination against third-country nationals is not covered – although a broader interpretation of the article would still be possible and, in the opinion of some, desirable.249 Article 18 limits itself to broadening the notion of nationality: functionally considering the European Union a sort of federation, its principle of non-discrimination does not differ from internal constitutional provisions proclaiming the equality before the law of all ‘citizens’. In a ‘Euronationalist’ perspective the nation-building strength of this principle is clear:

‘no other aspect of Community law touches the individual more directly or does more to foster that sense of common identity and shared destiny without which the ‘ever closer union of the peoples of Europe’, proclaimed by the preamble of the Treaty, would be an empty slogan’.

It is against this legal framework, that directives against discrimination have been issued. Hence, at first sight, the choice of the DCFR does not surprise, even less if we consider that both Directive 2000/43 on ‘equal treatment between persons irrespective of racial or ethnic origin’ and Directive 2000/78 on ‘equal treatment in employment and occupation’, while prohibiting discrimination on grounds of race or ethnic origins and (in the case of Directive 2000/78) also religion, belief, disability, age, or sexual orientation, explicitly allows it on grounds of nationality.251


248 Case C-230/97 Criminal proceedings against Ibiyinka Awoyemi [1998] ECR I-6781, para 29: ‘A national of a non-member country […] may not effectively rely on the rules governing the free movement of persons which, in accordance with settled case-law, apply only to a national of a Member State of the Community […]’.


251 2000/43/EC art. 3(2); 2000/78/EC art. 3(2).
Nevertheless, while this solution can be understandable at the constitutional/international level, where citizenship has the function of defining which subject has rights whose violation can give rise to a discrimination, the non-inclusion in the DCFR is – *de jure condendo* – more controversial since there is apparently no reason to tolerate a nationality-grounded discrimination in the sphere of private autonomy. Of course – *de jure condito* – the exclusion could have been technically justified since Art. 19 of the Treaty would have not conferred a sufficient legal basis to also include (third country) nationality-based discriminations, given the narrow interpretation of Art. 18. However, it is questionable if, after the Treaty of Lisbon, there is still no sufficient legal basis for a prohibition of nationality-grounded discrimination, as the EU Charter of Fundamental Rights expressly mentions ‘membership of a national minority’ as a prohibited ground of discrimination (Art. 21). What is more, numerous member states have included ‘nationality’ (although the question sometimes remains open whether this only refer to national origin or also citizenship) in the list of prohibited grounds of discrimination when implementing EU legislation. What is more, the DCFR does not even completely draw from the consolidated EC Treaty, ‘forgetting’ to mention further ‘classical’ grounds of discrimination cited in the Treaty such as religion or belief, disability, age and sexual orientation, also mentioned by the Directive 2000/78 on ‘equal treatment in employment and occupation’. This restrictive choice of the DCFR can hardly be justified, for ‘one should not discriminate between different grounds of discrimination’.

Even more, if one considers that the inclusion of the EU Charter of Fundamental Rights in the Lisbon Treaty has ‘enlarged’ the legal basis for anti-discrimination policies providing a merely exemplificative non-exhaustive list of prohibited grounds of discrimination, a policy choice which is coherent with the innovation entailed in Art. 20, which reads – differently than most national constitutions – that ‘[e]veryone is equal before the law’.

Pursuant to the wording of the DCFR, the refusal to rent an apartment to someone because of racial reasons represents discrimination, but not also the refusal motivated on the fact that the other party is homosexual, Muslim or, let alone, Chinese. The impression thus is that the DCFR – in order not to restrict excessively the principle of contractual freedom and not to take a position in highly political disputes – only

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254 MW Hesselink, *CFR & Social Justice*, at 41. Also the participants in the Working Group on ‘Non-Discrimination’ within the Acquis Group share the view that ‘it is impossible to distinguish between the different forms of discrimination when [formulating] a general principle’, though finding the solution in ‘adopting a relative instead of an absolute prohibition of discrimination’, S Leible, ‘Non-Discrimination’ (2006) 6 ERA-Forum Special Issue on European Contract Law - Developing the Principles for a “Common Frame of Reference” for European Contract Law 76-89, at 82.
255 Indeed, as long as non-discrimination interferes with the decision not to conclude a contract, it is a ‘new level’ of limitation to freedom of contract, H Rösler, ‘Schutz des Schwächeren im Europäischen Vertragsrecht. Typisierte und individuelle Unterlegenheit im Mehrebenenprivatrecht’ (2009) 73 Rabels Zeitschrift für ausländisches und internationales Privatrecht 889-911, at 906. However, the limitation is relative, since in the view of the Working Group on ‘Non-Discrimination’ within the Acquis Group ‘a right to enter into a contract should not be part of the remedies; because such a right would be in strong contrast to the principle of freedom of contract’, S Leible, ‘Non-Discrimination’, at 85.
256 S Leible, ‘Non-Discrimination’, at 81: ‘There is no need to incorporate a further-reaching prohibition of discrimination into the Common Frame of Reference. Every prohibition on discrimination based on other grounds
aims at prohibiting more evident sexual and racial discriminations, and therefore, with regard to nationality issues, is still compatible with liberal (non-racist) forms of (European) nationalism.

II.3. Denationalisation of Private Law

A brief historical overview has shown how the idea that all law derives from the nation is a comparatively recent by-product of nationalism. Legal positivism determined the overlap of state and law while nationalism determined the coincidence of nation and state. The combination of these views has brought about a political era in which almost all legal concepts are marked by the nation-state. Nonetheless, it was claimed already decades ago that such an era of Staatlichkeit has come to an end.\(^{257}\) If one considers the implication for law, indeed, it appears clear that on the one hand, the nation-state does not seem to be the only creator of private law; on the other hand, the homogeneous application of law within the nation seems to be jeopardised by the loss of homogeneity within the nation-state itself. In this sense, the congruence of nation-state and law, which is in itself particularly recent, already seems to have entered into a state of crisis as a consequence of the alleged crisis of the very concept of nation-state. All in all, the model of the sovereign homogeneous nation-state which is organised according to its own national law started showing its flaws after the World Wars, now aggravated by the astonishing development of communication technologies.\(^{258}\) The question as to whether this new situation should require lawyers to change their ‘conception of law, very much based on the nation-state experience, so as to meet the different conditions of global governance’\(^{259}\) arises. Indeed, the legal scholar can particularly notice one aspect of this situation: while the ‘traditional’ vision conceives the state as the fundamental source of law, in recent years this view has been challenged by the phenomenon of legal pluralism in its many forms.\(^{260}\) Subsequently and in line with the trends of the so-called economic globalisation, private law has witnessed a gradual process of internationalisation, a process that has not proceeded regularly but that has slowed down occasionally, subsequently accelerated and altered in its forms due to the historical events that took place during the twentieth century. With regard to these tendencies, the European situation represents a particular and telling case, as denationalisation has largely coincided with processes of Europeanisation. The establishment of the European communities first and the European Union later has led and is still leading to sensible modifications also in national private law systems, which have occasionally given rise to episodes of resistance and even ‘renationalisation’ of European law.

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\(^{257}\) See C Schmitt, foreword (1963) to Der Begriff des Politischen, (Berlin: Duncker & Humboldt, 2009) at 10.


II.3.1. Internationalisation before the world wars: faith in nations

The phenomenon of legal globalisation is not new. The significance of the globalisation process for national private law became evident already at the end of the nineteenth century: as the economy became more global, law had to respond to the needs of the contracting parties in different countries. It was in this period, already characterised by technological and scientific development, that international trade increased and the phenomenon of ‘globalisation’ in its modern forms emerged. A definitive shift from a rural economy to an economy based on mass production and distribution took place: capitalism was now mature enough to move from a local to a global dimension. According to the Marxist perspective imperialism would have been the highest stage of capitalism, as in the famous words of Lenin.

But legal globalisation has historically assumed very diverse faces. Firstly, during the heyday of colonialism, it coincided with legal colonialism: national law was simply imposed on other countries. This happened explicitly by means of transplants of domestic legal concepts or even through private international law dispositions which favored the application of domestic law abroad, while the local laws and customs of the colonised countries – frequently despised by the colonising forces – could only find a limited application in local disputes provided they were not repugnant to the principles of the Europeans. However, in the relations between economically advanced countries, legal globalisation took on a different aspect: those nation-states freely established uniform rules dealing with legal issues which were particularly significant for trade, so that a considerable number of international conventions on issues relevant for private law appeared. The legal instrument adopted for this particular kind of ‘internationalisation of decisions’ was the international convention, that is, a form of ‘negotiated agreement’ which allowed states to elaborate common solutions to common problems while respecting the independence and autonomy of the states involved. Particularly important conventions of uniform law were created and enacted before the outbreak of the Second World War with the explicit intent to overcome the difficulties linked to the diversity of legislations. Tellingly, these international instruments mainly dealt with the law of transport and payments.

Legal globalisation was the result of collaboration rather than imposition, the key word to describe internationalisation of law in this period is internationalism. Indeed, at that moment, nationalism had already conferred the state the exclusive monopoly on law production and the idea of a world order based on independent nation-states gained momentum: prior to the First World War nationalism had still

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262 VI Lenin, Imperialism, the highest stage of capitalism: a popular outline [1917] Eng. trans. (London: Lawrence & Wishart, 1948)
265 The most important that deserve to be mentioned are the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading signed in Brussels in 1924, the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air of 1929, and the Convention portant loi uniforme sur les lettres de change et billets à ordre of 1930.
been a liberal phenomenon. This may contribute to explain the ‘apparent paradox’ that so many uniform law conventions were signed exactly in the years in which the idea of ‘national law’ became dominant and several states adopted a civil codification. It was above all the needs of the economy that forced law to a non-national dimension. Indeed, in a way, national codifications arrived a bit too late: nationalism created the nation-state when this was necessary for the new economic order required by the industrial revolution, however, when civil codifications finally accomplished their end, economic actors were already looking beyond their national boundaries, demanding a broader legal unification. In this context, the idea of legal unification was perceived as achievable: it was openly spoken of as a worldwide private law in terms that were in no way utopian as even the contributions from the first congress of comparative law association in Paris in 1900 testify. The attention paid to the interests of business, which coincide with the interest of the state economic system, even forced newly expanding fascist regimes to find a compromise between legal nationalism and international cooperation.

In a spirit of friendly relations between nations, French and Italian jurists worked together in order to come up with a sole codification for the contract law of both countries. But its publication year, 1927, doomed this project to failure. At the dawn of the new world conflict, comparative law became the preferred instrument to promote the knowledge of domestic law in other countries, favoring the relations between those – like Germany and Italy – that were ideologically akin. Times were not suitable for discourses on legal unification.

In the years before the rise of the Nazi power, the German Professor Ernst Rabel drafted an accurate comparative study on the law of sale in which the hypothesis of a global unification of laws was also addressed. The study, which was completed in 1929 incited the freshly established International Institute for the Unification of Private Law (Unidroit) to engage in the unification of this area of law. However, after the not particularly successful experience of the 1964 Hague Sales Conventions, the United Nations Convention on Contracts for the International Sale of Goods was finally signed in Vienna only in 1980, at the end of a long and complex elaboration. Such a hiatus between the first draft and the final version can be explained by the outbreak of the world wars. Those conflicts have not only materially delayed the works of the commissions, but rather and more importantly have led to dramatic changes in the previous world order and the rise of new political oppositions (North vs. South, West vs. East) which have left their mark in the process of private law unification.

268 A Somma, I giuristi e l’Asse culturale Roma-Berlino (Frankfurt am Main: Klostermann, 2005) at 313 ff.
269 A Somma, I giuristi e l’Asse culturale Roma-Berlino, at 323 ff.
II.3.2. Internationalisation after the world wars: distrust in nations

The events linked to the Second World War stopped the processes of legal internationalisation for some time only. At the end of the 1960s, the distinguished comparative lawyer David noted that ‘this nationalization of the law is distressing from the intellectual point of view, and even from the practical point of view it is contrary to all common-sense in the world of today’, but timid allusions to the desirability of a private law for all of Europe not limited to the nation-states are even older and were quite widespread in those years. Although nationalisation of private law took place just a few decades earlier – an extremely short period of time, measured by the yardstick of history – it was already maintained that private law nationalisation was unsuitable for the needs of ‘the world of today’. In what was ‘the world of today’ different from the world of Portalis, Thibaut and Savigny as well as that of jurists from dictatorships who revived the national roots of the legal systems of their countries?

The events linked to the wars led to a shrinking of the weight of national sovereignty. Following the conflict, more voices pleaded continuously for a limitation of the power of the nation-states, with the intent to reduce the risk that these states would reiterate the same errors. The favoured instrument to this end was the international organisation, optimistically considered a fundamental tool for universal peacekeeping, since all decisions had to be discussed and agreed to by the representatives of national governments. After 1945 therefore the number of international organisations grew exponentially to more than three hundred. International treaties increasingly established ad hoc institutions with the aim of guarding the specific performance of the obligations arising from the treaties. The change, however, was not only quantitative but also qualitative. The model of internationalisation by means of negotiated agreement was overcome in some parts of the world by a new ‘supranational decision-making’ mechanism. The key word to describe internationalisation of law in this period is supra-nationalism.

However, such development – that does not replace traditional internationalism but rather supplements it – poses important questions as to democratic legitimacy: indeed, international organisations have always been a matter of foreign politics, which is usually a competence of governments rather than parliaments. For the reason that supranational laws can find a direct application in national systems without requiring a new act of the parliament aside from the initial delegation, the democratic control on these acts remains limited. For this reason, the most successful international organisations soon underwent a process of democratisation. As a consequence thereof, the traditional nature of the international

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273 For references, see EA Kramer, Europäische Privatrechtsvereinheitlichung. Institutionen, Methoden, Perspektiven, (Saarbrücken: Europa-Institut der Universität des Saarlandes, 1988) at 3 ff.
275 K Goldmann, Transforming the European Nation-State, at 15.
276 K Goldmann, Transforming the European Nation-State, at 15 ff.
organisation has been altered: from the model of the confederation – Staatenbund – it is now moving toward the model of federation – Bundesstaat – with an abandonment of the principle of unanimity in favour of the principle of majority. The level of evolution that has been achieved so far is a new intermediate model – Staatenverbund – that reaches the border between internationalisation and nationalisation, since ‘it is difficult to conceive of even more radical internationalization than this, since the next major step would be akin to the formation of a federal state, and then the term internationalization would lose its relevance’. 277 The confederative model based on the principle of unanimity and attenuated democratic legitimacy was typical of the world order prior to the world wars, when nationalism was perceived as a liberal principle which would have ensured international peace: according to that model there was no space for entities higher than the nation-state – that would have been similar to a despotic empire – and all international law was based on the spontaneous cooperation of equal subjects, as a kind of private law of the states. On the contrary, the federative model based on the principle of majority and a higher democratic control meets the needs of a world order which, though still based on the nationalist credo proclaimed in the principle of external and internal self-determination, moves towards the constitution of a hierarchy in which national sovereignty is not boundless and can be limited by the decisions of entities on a higher level than the nation-state. The clearest example of these tendencies is the process of European legal integration.

II.3.3. Europeanisation and Re-nationalisation

It has been said that the question as to the legal nature of the European communities is as old as the European communities themselves. 278 The reason why thus far this question has only obtained the answer ‘neither confederation nor federation’, at first sight quite unsatisfactory, is that the European project still carries traces of the historical period in which it developed. As a reaction to the nationalist excesses of the Second World War, the European communities express a new type of supranationalism still based on the persistent will of all member-states but also on an innovative capacity to bind those states and occasionally their citizens, which has developed and increased over time. The tension with the nationalist principle is clear inasmuch as the voting mechanisms of the EU would allow a decision to be taken without the consent of the representatives of the nation that will be affected by that decision (dissociation of political and national unit). It must be indeed remembered that according to the German Constitutional Court, the source of legitimacy of the European Union is twofold and cannot be solved through sole initial consent to the treaty (Legitimation), but must persist and be expressed in the possibility to democratically participate in the decision-making process exercising an influence (Einflußnahme). 279 It is nonetheless clear that nation-states have no ‘intention’ of being wrecked and rather persist in maintaining their prerogatives and competences at

277 K Goldmann, Transforming the European Nation-State, at 16.
278 C Busse, Die völkerrechtliche Einordnung der Europäischen Union (Köln-Berlin: Heymann, 1999) at 33.
279 In the Maastricht decision the Court stated that ‘Das Demokratieprinzip hindert mithin die Bundesrepublik nicht an einer Mitgliedschaft im einer – supranational organisierten – zwischenstaatlichen Gemeinschaft. Voraussetzung der Mitgliedschaft ist aber, daß eine vom Volk ausgehende Legitimation und Einflußnahme auch innerhalb eines Staatenverbundes gesichert ist’. 
the national level.\textsuperscript{280} The tension between Community and domestic law is particularly clear with regard to constitutional law issues and has already determined a delicate contrast between the Court of Justice of the European Union and several European constitutional courts. However, tensions have not characterised only constitutional issues, a considerable degree of resistance to Europeanisation has also affected private law.

The term ‘resistance’ has been used by numerous authors\textsuperscript{281} with slightly different meanings to describe phenomena quite diverse from one another but still sharing the lack of readiness of member-states to open up their domestic system to rules and legal principles elaborated at a non-national level. In this sense, speaking of ‘resistance’ can be very misleading, since it seems to allude to a clear and unitary strategy of antagonism between a domestic and a European system in a world scenario possibly characterised by a competition between legal orders. Quite on the contrary, resistance involves different actors and strategies that could also be moved by different concerns. As a scholar puts it, ‘resistance to private-law harmonization does not mobilise en bloc all components of each legal system (courts, legislators and legal scholars). Rather, it takes unpredictable, uneven forms and is, therefore, much harder to detect’.\textsuperscript{282} Resistance is rather ‘some national discomfort with any European attack on the “internal coherence” of the civil-code structure (or of its equivalents in non-codified systems)’.\textsuperscript{283} The definition can only be vague and generic, inclusive of several different tendencies. Ten years later another scholar spoke of ‘resistance’ in a more narrow sense with regard to the minimalistic approach chosen by certain member states with regard to the implementation of directives in national codes, as opposed to the different strategies of ‘surrender’ and ‘segregation’.\textsuperscript{284} Member states resist European law inasmuch as they comply with it only to the extent that is necessary not to violate primary obligations but without any effort to use directives as an opportunity for internal law reform.

In particular legislative and judicial forms of resistance can be distinguished. The first type of resistance is the ‘discomfort’ suffered by national legislators, who tend to deviate from European prescriptions in order to reduce their effect on the domestic systems. Judicial resistance, on the contrary, is the ‘discomfort’ felt by national judges in the application of European rules, though this appears to be less bothersome than the discomfort of the legislators. In particular the strategies that have been adopted by national legislators to implement European directives in the field of private law can often be seen as efforts to re-nationalise Community law. The choices


\textsuperscript{283} D Caruso, ‘The Missing View of the Cathedral’ at 14.

\textsuperscript{284} MW Hesselink, ‘The Ideal of Codification and the Dynamics of Europeanisation’, at 295 ff.
of the legislators seem indeed due to policy considerations and conceive the desire to maintain the decisions taken at the national level even when these evidently conflict with those taken at the European level. Even when implementation strategies do not imply infringements of EU law, they seem to aim at making the latter more consistent with domestic law, preserving the internal coherence of the national system regardless of its compatibility with the solutions adopted in other countries and even with the primary aim of safeguarding the ideal of codification. This latter is a concern in particular for legal scholars, who, in several countries, have been extremely critical towards plans for Europeanisation of private law in particular when these interfere with the tradition and the internal coherence of national codifications. Several explanations may be found to explain why legal orders tend to maintain their systems and leave specific codifications as unaltered as possible: economic reasons (it could be argued for instance that legal practitioners may oppose ambitious projects of Europeanisation because they would be forced to become familiar with a totally new instrument, furthermore reducing a legal diversity from which they could economically benefit by selling their technical knowledge of foreign law), inertia bias, social acceptance of older norms and even the idea that what

286 For an overview on the procedures adopted in different member states for transposing EU directives, see B Steunenberg and WJM Voermans, The Transposition of EC Directives: A Comparative Study of Instruments, Techniques and Processes in Six EU Member States (Leiden University, Leiden/ Research and Documentation Centre of the Ministry of Justice Paper, 2006); H Schulte-Nölke, C Twigg-Flesner, M Ebbers, EC Consumer Law Compendium. The Consumer Acquis and its transposition in the Member States (Munich: Sellier, 2008).
288 This is particularly evident in the case of the implementation of the Directive on Takeover Bids, which was adopted in 2004 under the EU Financial Services Action Plan after a long and complicated elaboration. Due to the impossibility of reaching a consensus as to its most controversial and divisive aspect – the neutrality rule – the directive granted leeway for the member states to adopt or reject that rule. According to the report of the Commission – eighteen member states opted for the neutrality rule, but for only one of them (Malta) this represented an innovation. In conclusion, the Report on the implementation of the Directive on Takeover Bids, SEC(2007) 268, at 10 noticed that ‘[e] large number of Member States have shown strong reluctance to lift takeover barriers. The new board neutrality regime may even result in the emergence of new obstacles on the market of corporate control. The number of Member States implementing the Directive in a seemingly protectionist way is unexpectedly large’.
292 Discussing a scenario in which competition between legal orders make possible for private parties to choose the applicable law, A Oug, ‘The Contribution of Economic Analysis of Law to Legal Transplants’, in JM Smits (ed), The Contribution of Mixed Legal Systems to European Private Law (Antwerp: Intersentia, 2001) at 28 describes what the reactions of the professional lawyers could be when faced with legal diversity: ‘some lawyers may benefit from the increased demand for their services following migration to their jurisdiction or adoption of it under a choice-of-law clause. […] On the other hand, it is perhaps equally likely that the majority of lawyers would benefit from resisting the competitive processes, maintaining their control over the supply of domestic legal skills and driving increased income from unreformed and more costly legal principles’. See also U Mattei, ‘The Professional Project. Scholars’, in U Mattei, The European Codification Process. Cut and Paste (The Hague: Kluwer Law International, 2003) at 75.
293 The idea that an older law is per se better than a recent one due to the fact that the code of behavior made obligatory by the law gets accepted by people over time goes back to Aristotle: ‘For the habit of lightly changing the laws is an evil, and, when the advantage is small, some errors both of lawgivers and rulers had better be left; the citizen will not gain so much by making the change as he will lose by the habit of disobedience. The analogy of the arts is false; a change in a law is a very different thing from a change in an art. For the law has no power to command obedience except that of habit, which can only be given by time, so that a readiness to change from old to new laws enfeebles the power of the law’, Politics, at 81.
has been reached through long and strenuous effort is particularly valuable in itself and should be therefore maintained. With their usual succinct and incisive jargon, behavioural economists and accordingly law and economics scholars call this latter aspect the endowment effect, which, combined with path dependence, determines a favour for the status quo, a conservatism from which it is very difficult and costly to escape. Without resorting to abstruse mathematical formulae, a classical jurist expressed the sense of the concept with regard to the idea of codification in a much more vibrant way already many decades ago, long before the creation of the European communities:

‘Un Code, une fois promulgué, acquiert un prestige tel qu’il voile, pur un temps, aux yeux des jurisconsultes, le jeu de l’évolution du Droit. Ce prestige tient à deux causes : à la grandeur de l’effort nécessaire pour mener à bien l’œuvre de codification, et a l’avantage que présente pour le commerce juridique la condensation des lois en articles brefs et précis. De là naît la tendance à considérer l’œuvre nouvelle comme un monument définitif, indestructible, dont il faut respecter l’ordonnance, auquel on ne doit toucher qu’avec circonspection, et lorsqu’une modification en a été reconnue absolument indispensable. Aussi les projets de réforme sont-ils pendant de longues années vus avec défaveur et combattus par ceux mêmes qui ont pour mission d’interpréter la loi’. 294

More explicitly, other commentators have complained about the risk of dislocating the political unit from the national to the supranational level: because of an extensive Europeanisation of national law and the generalisation of European consumer law solutions to the status of general law, the interpretation of key areas of the national legal system will be delegated to the Court of Justice of the European Union, so that, in the future the rules of the BGB – in the case of Germany – will be developed not by the praxis of the German courts but by the European judges.295 This outcome is considered undesirable and a consequence of a legal science that, inspired by an excessive legal positivism,296 has cut off the links with the ius commune, natural and Roman law that lie at the basis of all other legal systems of Europe, forgetting the legacy of Savigny.297 Similar concerns are not new and were already famously expressed in England by Lord Denning, who denounced that ‘[o]ur sovereignty has

295 MJ Schermaier, ‘Una superficiale e arbitraria modifica del BGB? Perché la riforma dello Schuldrecht si è rivelata un insuccesso’ (2005) 9 Contratto e impresa / Europa 898-919, at 906. This concern follows the famous pronounced in England by Lord Denning: ‘Our sovereignty has been taken away by the European Court of Justice. It has made many decisions impinging on our statute law and says that we are to obey its decisions instead of our own statute law… Our courts must no longer enforce our national laws. They must enforce Community law… No longer is European law an incoming tide flowing up the estuaries of England. It is now like a tidal wave bringing down our sea walls and flowing inland over our fields and houses – to the dismay of all’, Court of Appeal, Bulmer vs Bollinger [1974].
296 MJ Schermaier, ‘Una superficiale e arbitraria modifica del BGB?’, at 900.
297 MJ Schermaier, ‘Una superficiale e arbitraria modifica del BGB?’, at 918. This severe judgment is referred to the German reform of the Schuldrecht not only for having improperly generalised European consumer law, making it the basis of the new German general contract law, but also for having taken Europeanisation as an excuse to make more general negative changes in the BGB, that could only found a justification in ‘legal politics propaganda’ (at 917, quoting the Münchner Kommentar zum BGB, Vor § 275 par. 25).
been taken away by the European Court of Justice. It has made many decisions impinging on our statute law and says that we are to obey its decisions instead of our own statute law… Our courts must no longer enforce our national laws. They must enforce Community law.’

It has been pointed out that the resistance offered by legislators and governments is nonetheless stronger than the resistance offered by judges, who on the contrary

‘have often used the leverage of EC law to denounce or even make up for the shortcomings of their own national systems. By complying with Brussels rule even beyond the mandates of their own States’ legislators, courts have experienced a veritable institutional empowerment.’

This is comprehensible, since while legislators’ resistance affects the formation of law before this comes into force, judges can only react afterwards, so that their ability to ‘resist’ is more limited. This is not to say that no resistance can be given by the judiciary, even if this is less easily detectable. In some jurisdictions, in particular, the highest courts have often resorted to a strict formalism in order to limit the influence of Community law on the domestic provisions. In this sense, the apparent neutrality of formalism has become a suitable means of resistance. National judges may indeed quite easily use ‘renationalising’ interpretations of community law, intentional or merely consequences of a physiological home-ward bias. Resistance at this level can take different forms – often not easily detectable – such as rejection and avoidance; but more subtly and often judges could be led to an interpretation of community law in light of their particular national system.

The particular reluctance to refer to the Court of Justice of the European Union of certain constitutional and highest national courts is quite striking, even if it is impossible to conclude that this aversion is necessarily condemnable as an expression of hostility against European law. This path has been followed in particular by the German Bundesverfassungsgericht and for a long time by the Italian Corte Costituzionale. The Italian Constitutional Court is indeed an institution whose approach to European law seems to have been characterised by ‘a sort of procedural mutual exclusion between EC law and domestic constitutional law’, a ‘rebelliousness’ formally justified on the basis of the argument that the

298 Court of Appeal, Bulmer vs Bollinger [1974].
301 L Niglia, ‘The Non-Europeanisation of Private Law’ (2001) 4 European Review of Private Law 575-599, at 580 ff. According to this author, the reluctance of national courts is such that Europeanisation of private law appears as a normative discourse of legal scholarship rather than reality, at 598-599.
Constitutional Court is not a ‘court’ or a ‘tribunal’ in the sense in which Article 267 TFEU speaks of and is therefore not legitimated to refer to the European Court.\textsuperscript{305} Also in this case, thus, a ‘strict formalism’ has been the way chosen to maintain the separation of European and domestic law. However, following the example given by the Belgian and more recently the Austrian Constitutional Courts, the Italian Corte Costituzionale changed its approach and referred for the first time to the Court of Justice in 2008;\textsuperscript{306} this judgment has been considered as the beginning of a new dialogue between the Italian and the European Court.\textsuperscript{307} It is generally acknowledged that in some countries even high courts are unwilling to refer to the European Court for primary ruling, a striking tendency that has also been explained by that ‘cultural stickiness’ that hampers adaptation when important changes takes place.\textsuperscript{308} The annual reports on the activities of the European Court of Justice offer again an insightful overview of the bent of the national courts (also including constitutional courts) for referring for a preliminary ruling.\textsuperscript{309} The judges who most often refer to the Court of Justice reside in Luxembourg, Austria, Belgium and the Netherlands. The Greeks and the judges of the Nordic countries are also particularly ‘Euro-friendly’ and while the propensity to refer to the Court of Justice is higher in Germany than it is in Italy, it remains comprehensibly lower in the new member states. While the low propensity of the recently acceded member states does not astonish, the low propensity shown by the French and Spanish judges and even more by the British and Portuguese courts is more striking.\textsuperscript{310}

At this point, one could wonder how many of these strands of resistance exemplify widespread tendencies in all national societies. Are the opinions of Lord

\textsuperscript{305} Italian Corte Costituzionale, Ordinanza 536/1995.


\textsuperscript{309} In the ranking of the countries from which more references came since the 1960s the first positions are occupied by Germany (1672), Italy (978), France (755), the Netherlands (719), Belgium (779). More distant is the United Kingdom (448). As it is clear these are, excluding the UK, the countries which – together with Luxembourg – founded the European Communities, so that their primacy in this ranking can be easily understood on the basis of a mere time factor, which risk to conceal other relevant trends. For example, though it acceded to the EU only in 2004, Lithuania already referred 5 times to the Court of Justice, which is a considerable number for a country of 3 million inhabitants, if compared with the 64 references of Portugal, which acceded to the EU in 1986 and has a population of 11 million people. However, the trend does not change considerably even considering a different and more recent period of time which comprehends the Eastern enlargement of 2004: the ranking would then be Germany (308), Italy (182), the Netherlands (137), Belgium (108), France (100), Austria (84) and the United Kingdom (74).

\textsuperscript{310} The differences emerging from the report of the Court of Justice have very likely much to do with the population of the state: in a highly populated country it is most likely that there will be more judges who will refer more times to the European Court than in a small country with few courts. It is then useful to also consider the population of each country. A more precise calculation should be based on the number of cases of each country, but homogeneous statistics for all European countries as to this element are not available. Dividing the approximate number of inhabitants of each country – as reported by the Eurostat – by the number of references to the ECJ made by the judges of those country since 2004, we obtain these results, whereby a higher number indicates a major reluctance to refer to the ECJ: Luxembourg 62775, Austria 99677, Belgium 100254, the Netherlands 120988, Greece 185419, Finland 243203, Denmark 252140, Germany 265446, Sweden 301545, Italy 331853, Estonia 335068, Cyprus 400925, Ireland 635839, France 647094, Lithuania 665845, Spain 698290, Latvia 749653, United Kingdom 838401, Portugal 1063688, Czech Republic 1501771, Slovakia 2712028, Poland 2725992, Bulgaria 3788375, Romania 10733087.
Denning representative of a national cultural trait? The intricate relation between legal cultures and the more general national culture will deserve further analysis and can be effectively investigated only in the scholarship debate on European private law.

311 The idea that the Court of Justice is some kind of foreign institutions adjudicating on issues of national competence is indeed quite widespread among English Eurosceptics, see for example C Booker and R North, *The Castle of Lies. Why Britain Must Get Out of Europe*, (London: Duckworth, 1996) at 195.