Chapter III

Arguments against denationalisation

The process of Europeanisation of private law has often run into the resistance of the member states. Such resistance is apparently based on the concern of not compromising the national interest and the systematic coherence of the national legal system, and primarily offered by means of a ‘renationalisation’ consisting in the reshaping of European rules in a way that fits the economic or symbolic needs of the nation-state and maintains the decisional power at the national level. The concern that it is the European legislator or judge who decides upon matters of domestic law has been repeatedly expressed with suspicion, but the ‘political’ reasons behind this behaviour remain unexplained. While the reasons that lie behind the resistance of legislators and judges is often hidden and can be examined only with uncertainty, legal scholars have started an extensive debate on the feasibility and desirability of a highly harmonised European private law, in which the political and economic implications of such option are discussed and where objections to denationalisation are explicitly formulated. This chapter therefore specifically looks into that debate to analyse some recurring arguments of resistance to the Europeanisation of private law.

Several authors have manifested concerns about the possibility that a common European law will substitute the variety and richness of local laws, employing economic, political and cultural arguments. This makes the debate a highly multi-disciplinary one, in which the variety of approaches allows to consider the phenomenon of denationalisation of private law from several perspectives. In a broader sense, the debate that has started in Europe is to a large extent paradigmatic of new trends of modern legal scholarship, as a great number of perspectives are employed in order to grasp the characteristics of the process.

In this discussion, several positions can be identified, which in their complexity cannot be simplistically reduced to a linear opposition between those who are ‘in favour’ and those who are ‘against’ Europeanisation. On the contrary, there are a wide range of standpoints, from a strong opposition tout court to any attribution of competences in the field of private law to the European level (even based on the idea
that any form of imitation or legal transplants is simply impossible\textsuperscript{1} to – at the other extreme – the claim of the necessity of a mandatory European civil codification meant to replace all the existing rules lawyers have been familiar with in their national systems for years.\textsuperscript{2} Intermediate views underline the risks that a unified or highly harmonised private law would imply, at the same time do not object but rather endorse a Europeanisation of ‘legal science’, intended as a condition for the establishment of a new generation of truly European lawyers.\textsuperscript{3} Quite on the contrary, in the views of other authors, it is exactly the plurality of legal orders that would allow for those learning and borrowing processes that would promote Europeanisation in this sense.\textsuperscript{4} Many an author also seems to appreciate the idea of an optional instrument,\textsuperscript{5} which is, as in the already mentioned Common European Sales Law, a set of substantive rules that parties could be free to adopt as the system governing their trans-border transactions.

Not dissimilarly from the well-known quarrel between Savigny and Thibaut as to the desirability and feasibility of a nationalisation of German private law, all these positions as to the desirability and feasibility of a Europeanisation of national laws\textsuperscript{6} are based upon certain assumptions as to the role of private law in contemporary societies and could be inspired by several economic and political ideologies. The idea of an optional instrument, for instance, could be linked to the conviction that law should only or chiefly serve as a tool for the regulation of the market, and in this sense it seems rational to offer contracting parties the last word as to the utility of that instrument, while mandatory interventions should be reduced as much as possible since the fundamental principle in contract law should remain party autonomy. The idea of a hard pan-European civil code, on the other hand, could be inspired by a statist vision that aims to create a kind of new super multi-national state out of the European Union. Focusing on political ideologies, what is the role of the nationalist ideology in this discourse? Various arguments employed in the debate seem to share traits with the assumptions of given political theories, including liberal nationalism. Such influence could be easily explained since, as we have seen in the second chapter,

\begin{itemize}
  \item \textsuperscript{1} P Legrand, ‘The Impossibility of Legal Transplants’ (1997) 4 Maastricht journal of European and comparative law 111-124.
  \item \textsuperscript{3} MG Faure, JM Smits, H Schneider (ed) Towards a European ius commune in legal education and research: proceedings of the Conference held at the occasion of the 20th anniversary of the Maastricht Faculty of Law (Antwerp: Intersentia, 2002); A Flessner, ‘Rechtsvereinheitlichung durch Rechtswissenschaft und Juristenausbildung’ (1992) 56 Rabels Zeitschrift für ausländisches und internationales Privatrecht 243-260.
\end{itemize}
Nationalism and Private Law in Europe

Nationalism has been one of the ideological forces that have contributed to the shaping of the modern understanding of law and its relation to the state.

In this chapter, some of the arguments used in the debate on Europeanisation to resist in particular unification or legislative harmonisation of private law will be analysed in order to verify whether nationalist ideology also plays a role therein. The concept of legislative harmonisation is taken to mean the approximation of private law systems by means of mandatory or optional legal instruments elaborated by the political power (top-down) and not also forms of spontaneous ‘bottom-up’ convergences realised through the work of national judges and legal scholars. Keeping in mind that resistance to forced harmonisation does not necessarily entail a rejection of – and can even be functional to – the Europeanisation of law in a broader perspective, it is evident that we can only refer to ‘nationalist arguments’ rather than ‘nationalist scholars’. Quite on the contrary, some authors have explicitly advocated a non-nationalist position; this however does not necessarily exclude that some of their arguments may echo in their structure at least liberal nationalist positions, widespread in the legal studies for the reasons that have been seen and will be further investigated. It should also be repeated that, given the positive nature of this book, the aim of the chapter is not to challenge the validity of the arguments presented, suggesting that these are wrong for whatever reason, but rather to show their political and ideological associations: it does not claim that the arguments of resistance rest on false assumptions, but rather on specific political assumptions, the validity and reasonableness of which can be debated.

Three arguments will be considered: the economic, the social justice, and the cultural argument. Throughout this chapter, it will be shown how they relate to one another and what the ‘political philosophy’ of these positions is, by means of a comparison with the theory of nationalism as opposed to – for the methodological reasons that have been explained earlier – the theories of communitarianism and cosmopolitanism. The argumentative structure of the next sections is as follows: each argument employed in legal studies to object to the further attribution of private law competences to a supranational level is presented, subsequently these arguments are more critically examined in light of insights originating from the political theories of communitarianism and the cosmopolitan idea of ‘multiple identities’; through this juxtaposition, it will emerge what are the assumptions on which both the considered legal arguments and the (liberal) nationalist political principle – as it has been examined in the first chapter – are based.

III.1. The economic argument
Combining insights from law and economics, several commentators have pointed out what the limits of denationalisation should be and what are the reasons to halt, or even invert,\(^7\) the process of Europeanisation. A particular role is played by the economic argument of decentralisation, according to which decentralised legislation presents a series of advantages on centralised forms of governance. On the basis of this

argument drawing specifically on the work of highly influential economists exemplified by Tiebout and Hayek, several legal scholars have affirmed that the harmonisation or even unification of private law systems in Europe represents a hazard, while the same argument is often employed in political discussions as well. However, other commentators have already expressed the suspicion that behind many of those economic arguments ‘there is a fear of colonization, loss of hegemonic status, or cultural decline’.  

Is it then possible that ideological concerns inspire economic arguments? Economic models indeed can give the impression of being technically neutral and therefore, somehow ‘true’. At any rate, it is clear nowadays that also ‘technical’ economic arguments may conceal concerns of a political nature, and a comparison with political arguments in order to identify what their reciprocal influences are is therefore justified.

III.1.1. The ideal locus of private law in the European context

In the debate on the Europeanisation of private law, the point has been made that the European bodies should not expand their competences in the field of private law, since that would imply moving away from the preferences and needs of the citizens. This would probably aggravate the democratic deficit in the European Union and, what is more, would lead to inefficient regulation. In fact, what guarantees that ‘the more remote European legislator is in a better position to assess what consumers in a particular member state really want’? In establishing what governance level is more appropriate to regulate the interests of private citizens, it should be taken in consideration what the capacity of each level is to interpret those interests. In Gellnerian terms, at what level of governance should the ‘political unit’ be located?

Since it is reasonably more difficult to guess the preferences of a large number of people than those of a more limited group, some authors have manifested doubts as to the idea of devolving the competence to regulate private relationships to a supranational level, assuming that the European legislator will be less informed about the needs and preferences of citizens than the national lawmaker: the former is further away from the citizens, whereas the latter has a more direct contact with them and can understand what they really want and what is better for them. The main issue therefore seems to be the knowledge of the needs and preferences of citizens or at least the availability of such information.

III.1.1.1. Normative implications of the argument

Imaging a hierarchical two-layer system, it is suggested that the ‘more remote’ level has an inferior knowledge of the interests of the citizens, while ‘the local level has the

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9 R van den Bergh, ‘Forced Harmonisation of Contract Law in Europe: Not to be Continued’, at 252.
best information on local problems and on the preferences of citizens’.

According to this line of reasoning, two alternative normative consequences follow.

In the first place, attribution of competences in the field of private law on the supranational level should be avoided *tout court* or subjected to a particularly strong ‘burden of proof’: private law legislation should be enacted at the regulatory level that is the nearest to the citizens, while an attribution of this competence to a higher level should be excluded or admitted only as the *extrema ratio*, possibly when empirical data show that the benefits of centralisation would outweigh its disadvantages. In plain words, the competence for private law should be ‘moved to a higher level only when there is a good reason’. The idea, of course, sounds familiar to European lawyers: that is the sense of the principle of subsidiarity that requires the centralised bodies to intervene – provided that a legal basis exists – when decentralised bodies cannot achieve the objective. Or such is, at least, one of the interpretations that can be given of that principle. In contrast to what the European institutions claim, several authors involved in the debate on harmonisation sustain that the real need for moving private and more specifically contract law to a higher level lacks of empirical evidence, so that, in conclusion, that ‘good reason’ seems not to exist or at least not to be sufficiently weighty to win the burden of proof in favour of decentralisation. It is indeed true that the centralist idea behind the projects of private law harmonisation, i.e. that diversity of laws represents an obstacle to the creation of a well-functioning common market, lacks of univocal evidence. Researches have recently highlighted why, for very different reasons notably including psychological motives, the reasoning of the European institutions should be rejected, but even this counter-argument that diversity of laws does not hinder the market seems to lack of empirical evidence.

At any rate, in the view of opponents of Europeanisation, even if empirical data were to confirm – or theoretical arguments were to convince – that good reasons for centralisation actually exist, a mandatory supra-national harmonisation should still be considered the last resort: a classical international negotiation between states may produce more efficient results, since the idea that private parties should be better left free to negotiate their own interests would be applicable also in this case, in which the role of private actors would be played by states. This idea is well-known in politics, as it reflects the ‘first guiding principle’ uttered by Margaret Thatcher, according to which ‘willing and active cooperation between independent sovereign states is the
Arguments against denationalisation

best way to build a successful European Community’, while ‘to try to suppress
nationhood and concentrate power at the centre of a European conglomerate would be
highly damaging and would jeopardise the objectives we seek to achieve’. In this
sense, an inter-state negotiation eventually resulting in an international treaty that
responds to the exigencies of both contracting states would be preferable to a supra-
national system that could occasionally bind even unwilling member states. This
reasoning can also justify the increasing use within the European Union of new ‘non-
authoritative’ modes of governance, such as the so-called Open Method of
Coordination. From this point of view, however, one may even think that the entire
European community should be better disestablished and the state of private law
should better return to the stage prior to supra-nationalism, in the era characterised –
as seen before – by the trust in nations.

Secondly, as a less radical solution, if a given area of law – let us say
consumer law, which is the object of much of European private law regulation –
which aims to be effective and efficient were to be enacted at a non-national level,
that could only be a ‘non-interventionist’ law. Given the impossibility for the more
remote legislator to know the preferences of the citizens, it should be concluded that
the legislator should not be too interventionist. In the multi-level system of European
private law, fields like consumer law – intended as an ‘interventionist law’ – should
consequently be competence of the local level – that is the national – for in order to
protect the interests of consumers, the legislator has first to know what those needs
and interests are. In this view, legal rules can be distinguished between facilitative and
interventionist, with the category of ‘interventionist law’ generally overlapping with
what legal scholars have traditionally known as mandatory law. The core of the
distinction is clearly explained by Grundmann and Kerber:

‘Facilitative law encompasses two different groups of functions, which
both help to save transaction costs: (1) One group encompasses the
functions of the legal order that help the parties to enforce contracts
(‘pacta sunt servanda’; including the services of the court system). (2)
The second group consists of supplying legal standard solutions
(‘default rules’) for typical transaction or cooperation problems. If the
legal order is capable of offering good legal standard solutions for
many different typical problems, the parties can save bargaining (and
therefore transaction) costs by using those standard solutions instead of
writing thick contracts’.

The harmonisation of such facilitative rules should not present particular difficulties,
since inasmuch as they just facilitate commerce, they are normally seen with favour
by every market actor and do not lead to serious contrasts of interests. For instance,
both parties to a contract will agree (at least when they initially sign a contract) that

17 R van den Bergh, ‘Forced Harmonisation of Contract Law in Europe: Not to be Continued’, at 252.
18 S Grundmann and W Kerber, ‘European System of Contract Laws – a Map for Combining the Advantages of
Centralised and Decentralised Rule-making’, in S Grundmann and J Stuyck (ed.), An Academic Green Paper on
what they have negotiated and put down in their agreement will have to be performed. These are, according to the terminology employed by Ogus, ‘homogeneous products’, ‘as to which there is unlikely to be a significant variation in preference as between market actors in different jurisdictions’.\(^{19}\) On the contrary, interventionist rules imply policy choices that are likely to differ and are therefore not suitable for harmonisation.

This conclusion from a law and economics perspective is quite striking for legal scholars, as they would more likely sustain that it is exactly the differences in mandatory rules that represent an impediment in the international commercial relationships at least for reasons of legal certainty, while facilitative rules do not imply this problem; thus, even if the market requires the abolition of the mandatory character of several private law rules, the remaining mandatory rules should be better harmonised as far as possible.\(^{20}\) What is more, even facilitative laws are less ‘neutral’ than they are presented by law and economic scholars, so that also the drafting of mere default rules can be a sensitive matter of preferences. In this sense, Grundmann and Kerber indeed consider the argument of heterogeneous preferences to hold true for both mandatory and facilitative law, or to be even more important in the case of the latter.\(^{21}\) Especially those who adhere to a free-market economy ideology and affirm that it is ‘competition’ that should influence the behaviour of those demanding, and those supplying, law reform\(^ {22}\) will more likely play down the need for harmonisation of interventionist law foremost. This indeed entails mainly mandatory rules that limit private autonomy, so that ‘interventionist’ rules eventually tend to alter the natural dynamics of the economic forces and do not fit into a classical Smithian model. Indeed, if ‘there is no doubt from an economic point of view that markets need an institutional framework in the form of mandatory rules in order to ensure the efficient working of the markets’, it is also true that ‘there is much discussion to what extent mandatory rules are necessary and helpful for solving problems of market failure or for attaining additional aims (beyond economic efficiency)’.\(^ {23}\)

But what does all this mean for the development of a harmonised system of contract law in Europe? This rather abstract point has particularly important consequences and can be explained by way of a concrete example: a chief feature of the European system of consumer law is represented by the right of withdrawal which is acknowledged to consumers under certain circumstances. Although it is manifest that this right is beneficial to single consumers making up for their alleged ‘inferior’ position in front of the business, economic analysis confirms the intuitive impression

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\(^{20}\) This concept is expressed in particular by E McKendrick, *The Creation of a European Law of Contracts. The Role of Standard Form Contracts and Principles of Interpretation* (Deventer: Kluwer, 2004) at 47: ‘I do not wish to suggest that nation-states should immediately abandon all mandatory rules of contract law. These rules should continue to exist where they serve a useful purpose. But where their existence is attributable to the dead-hand of history rather than the needs of the modern world they should be abandoned. Further, where they continue to exist, they should be harmonised to the fullest extent possible so that lawyers in different jurisdictions are not taken by surprise by mandatory rules of which they were wholly unaware’.

\(^{21}\) S Grundmann and W Kerber, ‘European System of Contract Laws – a Map for Combining the Advantages of Centralised and Decentralised Rule-making’ at 300-301.


that in a way such legal remedy is detrimental to the general category of consumers. The right of withdrawal implies costs for the businesses that will later be borne by the consumers themselves, in the form of higher prices for the goods and services they purchase.24 Some consumers could thus actually prefer to give up their right of withdrawal – in particular when they can reasonably foresee that they won’t need to make use of it – and instead pay less and maybe, consequently buy more. This is however impossible under European consumer law, since the right of withdrawal is a mandatory rule that cannot be contractually given up. Would consumers generally prefer to be entitled to withdraw from their contracts paying a little more for this right or rather give up this opportunity and spend less money? And would businesses prefer to maintain a mandatory right of withdrawal or ‘liberalise’ it and offer more competitive prices for their services? It is necessary to know the answer to these questions as to personal preferences before the policy choice whether the right of withdrawal should be mandatory can be made.

As it is argued that this choice cannot be efficiently or democratically made by the ‘higher’ legislator in a way that satisfy everyone’s interests – given that ‘national preferences regarding the level of protection are likely to differ’25 – it follows that the supranational legal intervention should rather be minimalistic, possibly enacting the institutional framework which is necessary to promote competition between national systems, since ‘[g]enerally, more legislators are better than one’26 as long as there are no information deficiencies and people are allowed to choose from a wide range of applicable legal regimes,27 as the well-known Tiebout model28 actually requires. In the opposite case, that ‘interventionist’ legal regime will probably be ineffective and inefficient, and ‘any uniform regulation has to be an unsatisfactory average solution’.29 Nonetheless, the justification of the basic assumption behind these considerations – that the national legislator is in a better position to interpret the interests of the citizens – remains obscure. What does it mean that a ‘distant’ legislator know less about those preferences? And what are the risks of a supranational legislation? The reasons why the ‘more remote’ legislator is considered less able to enact a private law legislation than the national legislator indeed still need to be investigated, and several hypothesis can be formulated.

**III.1.1.2. The challenging nature of distance relationships**

It is a particular concern that the attribution of some competences to a ‘higher’ regulatory level will produce results that do not take into account the interests of those who are at the ‘lower’ level; as Faure puts it in his discussion of the regulatory level for environmental law (a field that was traditionally considered particularly in need of

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24 R van den Bergh, ‘Forced Harmonisation of Contract Law in Europe: Not to be Continued’, at 252.
25 A Ogus, ‘Competition between National Legal Systems’ at 418.
26 R van den Bergh, ‘Forced Harmonisation of Contract Law in Europe: Not to be Continued’, at 256.
centralisation), ‘the further away from the citizens concerned the decision making takes place, the greater the risk is that a countervailing power, taking into account the interests of the citizens, may be lacking’.  

Distance, in this view, leads to serious problems of legitimacy, accountability and transparency. The point is expressed in particularly clear terms in a series of critical articles in which the author deals with the idea of tort law harmonisation. In these writings, the aims of the advocates of centralisation are condemned as being inherently paternalistic and – in a way – also dangerously imperialistic: when advocates of harmonisation indeed argue that a given legal solution is preferable over the one adopted in a given legal system, they are de facto substituting their personal policy evaluation to the one that was democratically formed and expressed by the inhabitants of that country. The point is also made by Ogus: ‘if the argument is for harmonization at a higher level of protection than that provided in some jurisdictions, why should the preferences of their citizens for lower standards at a lower cost be overreached?’.

In plain terms, it could also be true that certain national legal system do not protect consumers in an efficient way, but who are foreign observers to judge and say that such a system should be changed, when people actually chose for it? National legislators and judges – as contestable as their concrete activity can be – know the preferences of their own co-nationals surely better than some obscure bureaucrat in Brussels. Steering clear of easy rhetoric on people’s preferences, Ogus admits that national rules could also not reflect the real inclinations of citizens, but still, if already the national legislator failed in understanding them, no doubt that a ‘foreigner’ will be even less able.

Given these different orders of difficulty, one can posit that decentralisation should at least be the starting point (coherently with what the principle of subsidiarity requires), while centralisation should bear the burden of proof. Thus, the subsidiarity principle should be taken ‘seriously’.

‘[E]ven if one were to agree with these critics of the preference argument that national legislators and judges are not capable of producing legislation which really reflects the preference of the citizens, there is still no reason to assume that the European legislator would do better in that respect. Why should we assume that European bureaucrats in Brussels would be more able to find out what the preferences are of the Portuguese than Portuguese legislators and judges could? Here one can notice that the supporters of harmonisation

35 A Ogus, ‘Competition between National Legal Systems’, at 418
Arguments against denationalisation

are in fact of the opinion that they would know better than national legislators or judges what is good for the European citizens’.

The argument in favour of harmonisation is therefore paternalistic and dangerous, while the starting point should remain that national legislators are in a better position to make regulations that reflect the preferences of their own citizens. The argumentative strength of these considerations is definitely greater when they refer to the Europeanisation of tort law, a field in which the ‘good reasons’ to confer the competence to a higher regulatory level seem to be less evident than in contract law, despite the fact that European institutions also started to indicate tort law as a possible area of harmonisation by means of an optional instrument. The normative consequence is again that the European legislator should abandon the design of harmonising European legal systems when there are differences in the legal systems that can be explained by different preferences.

Nevertheless, it is suggested that it would be possible to unify rules that, also by means of a comparative functionalist analysis, would appear to be an expression of similar policy considerations on what is preferable. In this sense, the normative consequence is quite limitative: only harmonise what is already converging. The reason for this possibility, again, is that where a convergence can be detected, one has to assume that people in those countries share the same preferences, so that there would not be any ‘imposition’ by third foreign subjects but rather a mere technical simplification. In the opposite case, of course, the motto should sound like: ‘where preferences differ: don’t touch!’

### III.1.1.3. Democracy issues

Legislators could also be incompetent corrupt politicians completely uninterested in and unaware of the real needs of citizens, while an hypothetical technical commission formed by distinguished international experts may have a perfect knowledge of the issues at stake, but still this circumstance would not imply that the legislator should be relieved from functions and duties and abdicate in favour of some scientific committee, stakeholders associations or study group on a European civil code. As long as we are dealing with democratic systems – the only imaginable option within

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37 MG Faure, ‘Economic Analysis of Tort Law and the European Civil Code’, at 985. In the Dutch version, published with T. Hartlief, the argument sounds: ‘Zelfs wanneer men met die critici zou aannemen dat nationale wetgevers (en rechters) niet in staat zijn om op voldoende wijze wetgeving (en rechtspraak) te produceren die daadwerkelijk correspondeert met de preferenties van de eigen burgers, dan is er nog steeds geen enkele reden om er van uit te gaan dat de Europese bureaucraten in Brussel beter in staat zijn te achterhalen wat de preferenties zijn van – in dit geval – de Portugezen. Lieveheers van harmonisatie weten eigenlijk beter dan de nationale wetgevers of rechters wat goed is voor de burgers.’ (MG Faure and T. Hartlief (2003), ‘Naar een harmonisatie van aansprakelijkheidsrecht in Europa?’ at 172.). Note that in this version, it is spoken of ‘citizens’ in general and not ‘European citizens’. This slight difference incidentally lets a question arise: if it is comprehensible that the Portuguese legislator is more apt to know the preferences of the Portuguese citizens, why should he also know better the preferences of the ‘European’ citizens? If we assume the existence of a ‘European’ citizen, shouldn’t we also consider the utility of establishing a European legislator too?

38 MG Faure and T Hartlief, ‘Naar een harmonisatie van aansprakelijkheidsrecht in Europa?’ at 172.


40 MG Faure and T Hartlief (2003), ‘Naar een harmonisatie van aansprakelijkheidsrecht in Europa?’ at 175.

the European Union – the legislator remains the only subject democratically legitimated to take any decision on those issues. In contemporary legal orders, there is indeed an intrinsic and inescapable connection between legitimacy of law and democratic processes. The argument presented by Ogus and Faure among others thus reminds us of the democracy issues connected to the process of harmonisation and warns the legal scholars from more or less conscious paternalistic bents and professorial intellectual arrogance. From this perspective, the argument is convincing and in no way refutable by anyone who genuinely supports the democratic ideal; if the alternative presented is between a law which is an expression of the democratic choice of the people on the one hand and a set of obscure legal rules drafted by some foreign ‘bureaucrat’ without any legitimation whatsoever on the other hand, no doubt that the Portuguese legislator – to heed the example made by Faure – has to be preferred over the nameless bureaucrat located in Brussels: the former simply is the only policymaker who is democratically legitimated. All the more considering that there is not even historical evidence that technocracies are per se more efficient than democracies.

In this sense, though it is partially true what critics of the democracy approach like to repeat, that is that civil codifications and other important statutes have historically been drafted by restricted circles of technicians instead of by politicians (whether democratically elected or not) – at least in most cases – democracy still requires an involvement, prior or posterior, of legitimated representative bodies in the drafting of any legal rules, included those of European private law. No wonder that, in this perspective, private law should remain a national competence and the arguments against Europeanisation may sound slightly nationalistic: it has already been observed that nationalism may also represent an instrument of democratisation, inasmuch as it gives an answer to the complicated and essential question as to what is the demos; indeed, the nation. A defence of the nation can more deeply mean a defence of democracy. The political unit with regard to private law, thus, coincides with the national unit.

If one rejects nationalism in any way, and thus also its controversial but undeniable ‘democratic function’, the view that only local legislators are legitimated to draft private law rules becomes disputable. Criticising the ‘democracy thesis’ of those who plead for a democratic process in the drafting of private law rules, Smits for instance affirms that ‘in an increasingly globalizing and interconnected world, there is no necessary relationship between the nation-state and the legitimacy of law’, with the consequence that democratic legitimacy ‘does not have to come about through territorial entities such as national parliaments. There are other methods of

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42 See on this aspect J Habermas, ‘Über den internen Zusammenhang von Rechtsstaat und Demokratie’, in UK Preuss (ed), Zum Begriff der Verfassung, die Ordnung des Politischen (Frankfurt am Main: Fischer, 1994) at 83.

43 The French Code civil can be considered a partial exception, as it is well-known that Napoleon personally participated to and in several parts (particularly in family law) strongly influenced the work of the technical commission; in less remote years, also the Dutch parliament has been actively involved in the drafting of the new civil code of the Netherlands.


Arguments against denationalisation

such as, for instance, competition between legal orders. If a given legal regime meets the favour of citizens involved in commercial transactions and is thus chosen as applicable law, the role of parliamentary bodies that are representative of the citizens seems superfluous. This would have as a consequence that ‘the mere fact that a democratic process took place is then not enough to conclude that a rule is sufficiently legitimate’. This could be one of those cases in which instead of regulating the market, law is legitimated by the market itself.

As an attempt to rethink law in post-nationalist categories, this provocative view is surely stimulating; however, it remains highly contestable. Even if contract law mainly contains rules that may be derogated from, any contract law system also imposes mandatory provisions – and this is particularly the case of European consumer law, as the previous example on the right of withdrawal has pointed out. Can the determination of such rules be left to the competitive mechanism – that is the free choice of contracting parties? The idea that private subjects can contractually create a ‘legal order’ that imposes mandatory rules and negative consequences on third subjects without these parties being involved is simply non-democratic and rather distressing – though de facto not absurd. For these reasons, it seems that such rules cannot be left to the freedom of choice or the jurisdictional competition; in other words, the market. The lack of state involvement in legitimating these rules stands in the way of the elevation of any project of private law rule to the status of applicable law, a fortiori if merely optional, while different legitimacy mechanisms do not seem so far to offer sufficient guarantee of a democratic control over the law-making process. In this sense, even the idea of a European codification or an optional instrument can help bring the production of legal rules – that are today often elaborated by the ‘business community’ – back to a democratic dimension, while the suggestion that such a business community can basically legitimise itself makes the very usefulness of a codification doubtful. The idea of a post-national private law that needs no classic democratic legitimacy is on a closer look inherently libertarian, since such a legal system would have to renounce mandatory rules, whereby the lack of such rules is revelatory of an ideological agenda aimed at giving a marginal role to the state and, therefore, politics. In this sense, for those who fear such an anti-statist agenda, the idea of a non-option supranational instrument to be called ‘code’ becomes on the contrary quite appealing, provided that instead of following a market functionalist approach it entails those solidarity elements that have been apparently developed by the national courts of Europe.

Nevertheless, even repudiating the suggested idea that national parliaments are already obsolete, the unfeasibility of unification of European private law should not be looked upon as the necessary consequence of the interesting objections raised by

51 A Somma, Diritto comunitario vs. diritto comune europeo (Torino: Giappichelli, 2003) at 15.
law and economics scholars. Indeed, the coincidence of nation-state and democracy is just a historical coincidence, not even perfectly brought about in the same way in the world, while in fact those categories remain conceptually distinct and democratic procedures do not necessarily have to take place at the national level.\textsuperscript{52} Within a democratic federal or con-federal multi-layer system in which every regulatory level is provided with democratic legitimacy, the question as to the optimal level of legislation cannot be easily solved resorting to the democracy thesis. It has been noted earlier, that if the alternative is between a democratically elected local legislator and some kind of a-national undefined bureaucrat, there is no much room for discussion. But what if the alternative is between a democratically elected legislator and another lawmaker provided with democratic legitimacy too? This is basically the situation we face today in the European multi-level governance system.

For sure, the question as to the democratic legitimacy of the European Union is an old and highly controversial issue, whose examination goes far beyond the scope of this book and would need a specific account as to its implications for private law. It is indeed common knowledge that the powers of the European Parliament, the only body provided with direct democratic legitimacy, are limited if compared to those of other institutions. On the other hand, the European Parliament has shown to be capable of exercising a considerable pressure and control over the functioning of the other institutions, showing powers that are unknown even to various national parliaments.\textsuperscript{53} Leaving aside the question as to the improvement of democratic legitimacy within the European system, however, the democratic legitimacy of European rules could not be questioned anymore for our purposes, taking into account also the numerous judgments of several European constitutional and supreme courts that already confirmed the compatibility of EU law with the democratic principles under certain conditions. There are many more than a single model of democracy, and one may still have very good and numerous reasons to deem the national legislator as ‘more democratic’ than the European one, but then it would become arbitrary to consider the democracy argument decisive to oppose the Europeanisation of certain private law rules (such as the ‘interventionist’ ones) and not of other (such as the ‘facilitative’ ones) when both are created through the same procedures.

In conclusion, if both the Portuguese legislator and the European ‘bureaucrat’ are democratically legitimated, the answer to the question as to who knows better the preferences of citizens is less self-evident and should be based on other criteria than democratic legitimacy.

\textit{III.1.1.4. Heterogeneity of preferences}

The reason to oppose attribution of competences to a higher regulatory level cannot be exclusively an issue of democratic legitimacy. The main problem with centralisation appears to be that the decisions taken at the centre would disregard the preferences of people on the periphery, that are more likely to be reflected by the legal rules taken at a decentralised level, regardless of the democratic legitimacy of this


Arguments against denationalisation

If a uniform legal regime were to be applied in several different contexts and reflect the interests of many different groups, there is the concrete risk that only one group – undoubtedly the more powerful or overrepresented one – will be able to instill its interests in the legal rules, while the other groups will have to accept a decision they could not contribute to make. This quite concrete concern already gives rise to episodes of legislative resistance both at the European and the national level: the interest of a state are not necessarily the interest of another member state and, limiting ourselves to private law, some legal concepts that are particularly appreciated in given contexts – think of good faith – might not meet the favour of other nations. At the level of scholarly discourse this concern is explicitly addressed and discussed in detail: what critics of harmonisation fear is that a unified legal system will reflect the preference of only one specific people at the expense of the interests of all other peoples, so that harmonisation ends up determining the imposition of the preferences of someone on someone else.54 If this is true, legal diversity appears as a preferable solution, since ‘diverging rules may satisfy a greater number of preferences’. 55 So for example, bearing in mind the example made with regard to the preference as to the options pay-more-and-withdraw and pay-less-and-do-not-withdraw, ‘citizens in different jurisdictions may have different preferences regarding the level of protection to be imposed and the price to be paid for it’. 56 On the basis of these considerations while developing the new field of comparative law and economics, Ogus has intended to challenge the ‘orthodox’ view that convergence of national laws is always desirable and should be obtained even by means of mandatory international instruments.57

Another author, Helmut Wagner, has stated that ‘variety of regulations or laws reflects variety of preferences’,58 but the reasons why a citizen, say a consumer, may prefer a given solution and another consumer in another country a different one are not a matter of mere personal preferences: rather it is in the first place the ‘economic structures’ that are not identical in different countries. Consequently, each country needs a special legal system ‘of its own’ that fits its specific needs. The normative conclusion this time is even more drastic for substantive private law than the one considered before: while Faure advised to harmonise only those aspects which are already converging in order to respect the policy choices behind those rules, in Wagner’s view harmonisation should only focus on procedural law,59 since, as no one would object, differences in procedural systems may indeed represent a considerable obstacle in the establishment of a well-functioning common market much more than differences in substantive laws. But given these premises, the conclusion appears to be even too moderate: do procedural rules not reflect the preferences of the citizens as well? If so, those rules should not be harmonised either, or national preferences as to the procedural system would otherwise be disrespected. Moreover, it could be

54 MG Faure and T Hartlief, ‘Naar een harmonisatie van aansprakelijkheidsrecht in Europa?’ at 176.
incidentally noted that already in the past, differences in preferences and social conditions have been considered an obstacle to the unification of procedural rules, as was the case in the United States when the possibility of enacting a common code of civil procedure was discussed. In other words, there does not seem to be any conceptual reason why procedural rules should be more suitable for harmonisation than substantive rules. If the argument of heterogeneous preferences is correct, then it should be valid always, and not be conveniently employed only to advance or oppose a given economic agenda.

Those who plead for a ‘market of legal rules’ within the European Union would necessarily reject the hypothesis of unification, since this would frustrate the most basic conditions of Tiebout’s model. From this perspective, also cultural pluralism is a value to be safeguarded rather than an obstacle to the efficiency of the market, as this would ‘encourage each region to increasingly specialize in its comparative advantages, which are in part shaped by its specific social capital’. In this sense, as Goode put it addressing the European institutions, varieties of contract laws in Europe should be considered an asset, inasmuch as it allows contracting parties to ‘have a wide range of choice and select their own law or that of another legal system with which they feel comfortable’. Heterogeneity of preferences – rather than democratic legitimacy – seems to be thus the fundamental rationale for decentralisation. However, once it has been clarified that heterogeneous regulations should correspond to heterogeneous preferences, it still remains to be seen why exactly decentralised legislators are in a better position to understand what those preferences are. These argumentations that have been presented in the discourse on European private law constitute the application of theories that had previously been elaborated in economics and occasionally already inspired some policy choices. It is therefore necessary to delve into that disciplinary field to further explore the assumptions and implications of the argument.

III.1.1.5. The decentralisation theorem in economics and politics

The factors that could justify centralisation or decentralisation have been extensively described in the economic literature. In particular, centralisation seems to be a preferable option in presence of strong inter-state externalities, ‘if there is a risk of ‘race to the bottom’ or if significant scale economies and/or transaction cost savings can be achieved by increased legal uniformity’. However, the advantages of a ‘forced’ or ‘negotiated’ harmonisation (as the one that would be achieved by means of international agreements rather than by supra-national instruments) are overshadowed by the benefits of decentralisation. According to this view, decentralisation – intended as devolution of power and responsibility over policies from the national to the local

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60 Supra, ‘Volkgeist after Savigny: in the USA’
Arguments against denationalisation

level— is the guarantee that the necessities of all individuals will be properly dealt with. Local agents will be better informed about the needs of citizens and will therefore be more able to take good decisions; moreover, they will have stronger incentives to take people’s interests into account, so that an ‘agency problem’ is less likely to occur than in a centralised system. The reason seems to be that if the geographical distance between lawmakers and citizens is reduced, it will be easier for the citizens to track the activities of their representatives and keep them in mind the next time they will be called to the polls. This holds true also from the point of view of the enforcement of legal rules, whereby decentralisation seems to be preferable as it reduces the distance between those who are subjected to the law and those who should apply it. On the contrary, in a centralised system such distance would hinder a proper application of legal rules and very likely lead to inefficiencies. Oates has made a strong case for decentralisation in the economic literature. Discussing the subject of fiscal federalism, this author suggested that regional governments are more apt to adopt regulations that reflect the preferences of regional citizens, while a central government could only give a uniform regulation that would disrespect regional interests. Thus, without spillovers, a decentralised system has to be preferred. This is commonly known as Oates’ decentralisation theorem. In 2003 two other scholars, Besley and Coate, built upon that argument and brought it to more radical conclusions: if Oates’ formulation left ‘unclear why a government charged with providing public goods in a centralised system cannot differentiate the levels according to the heterogeneous tastes in each district’, these authors suggested that even if this was the case – i.e. if the central government were to adopt differentiated regulations – these would anyway be inefficient as the centralised and differentiated rules elaborated by representatives of local regions at the centralised level could only take into account the interests and preferences of the citizens of one specific district: ‘The fact that costs are shared in a centralized system, creates a conflict of interest between citizens in different jurisdictions’. From the argument, a pessimistic idea follows which is however not limited to a centralised model but rather to the entire democratic process, as it is assumed that regulatory bodies – as they should express the interests of several different subjects within the centralised system – will be characterised by a ‘conflict of interest’ that will give rise to unsatisfactory or inefficient regulations. In simpler terms, in a centralised – but actually in any democratic – system, some minorities will always have to bear the costs of rules that affect everyone but are de facto decided by the majority. Going further back in

66 R van den Bergh, ‘Private Law in a Globalizing World: Economic Criteria for Choosing the Optimal Regulatory Level in a Multi-Level Government System’, at 62, states that ‘decentralization may thus be advocated because it reduces the agency problem’, specifying in a footnote that ‘there are, naturally, intermediate solutions between full decentralization and full centralization. Decentralized information gathering can help to remove much of the information asymmetry faced by central regulatory agencies. An obvious alternative to the choice between centralization and decentralization is the co-existence of national and supranational procedures’.
69 T Besley and S Coate, ‘Centralized versus Decentralized Provision of Local Public Goods’ at 2612.
70 T Besley and S Coate, ‘Centralized versus Decentralized Provision of Local Public Goods’, at 2628.
history, we see that this argument had been already formulated by the libertarian economist Friedrich August von Hayek with the aim of explaining the ideal distribution of competences within a federal state. Nobel prize for the economics in 1974 (together with Gunnar Myrdal), Friedrich Hayek has left an important mark in contemporary politics and economics and his thought still plays an important role even in the debate on the Europeanisation of private law.\textsuperscript{71} Hayek developed the argument in 1945 in his famed article \textit{The use of knowledge in society}\textsuperscript{72} in which, starting from the consideration that knowledge (or at least some knowledge) in society is generally dispersed rather than concentrated, he suggested that decentralisation is a more desirable option in economy, as it better fits the dispersed nature of knowledge. On the contrary, centralised organs would not be efficient since they would not be able to concentrate all the knowledge they need in order to come up with good decisions. The inefficiency of a centralised system, indeed, lies in the fact that knowledge should be transferred from the periphery to the centre, where a decision should then be made, following a time-consuming and most likely wasteful process. In this perspective, decentralisation will ensure an optimal and more rapid use of knowledge:

‘If we can agree that the economic problem of society is mainly one of rapid adaptation to changes in the particular circumstances of time and place, it would seem to follow that the ultimate decisions must be left to the people who are familiar with these circumstances, who know directly of the relevant changes and of the resources immediately available to meet them. We cannot expect that this problem will be solved by first communicating all this knowledge to a central board which, after integrating all knowledge, issues its orders. We must solve it by some form of decentralisation because only thus can we ensure that the knowledge of the particular circumstances of time and place will be promptly used’.\textsuperscript{73}

From this moment on, the decentralisation theorem enjoyed considerable fortune also in politics, inspiring the activity of many an influential leader and indirectly already playing a role within the process of Europeanisation. Inspired by these considerations and mixing them with concerns of protection of national decision-making power from foreign dominance, Margaret Thatcher expressed her doubts as to a centralised and invasive model of European Communities somehow comparable to socialist regimes:

‘But working together does not require power to be centralised in Brussels or decisions to be taken by an appointed bureaucracy. Indeed, it is ironic that just when those countries such as the Soviet Union, which have tried to run everything from the centre, are learning that success depends on dispersing power and decisions away from the

\textsuperscript{72} FA Hayek, ‘The Use of Knowledge in Society’ (1945) 35 \textit{American Economic Review} 519-530.
\textsuperscript{73} FA Hayek, ‘The Use of Knowledge in Society’, at 524.
Arguments against denationalisation

centre, some in the Community seem to want to move in the opposite
direction. We have not successfully rolled back the frontiers of the
state in Britain, only to see them re-imposed at a European level, with
a European super-state exercising a new dominance from Brussels'. 74

In light of these considerations, it seems that decentralisation should be preferred
inasmuch as it confers the decisional power to those subjects who are more informed
about the issue they have to decide on. In other words, availability of information is
greater at a higher degree of physical proximity to the object to be understood.

III.1.1.6. Problematic aspects of decentralisation for European private law

Considering the particular historical moment in which Hayek wrote his article on the
use of knowledge in society as well as the political views of the author, it is easy to
see that the theory also aimed at creating a limit against centralist tendencies of the
government that in Hayek’s view would have eventually lead to a socialist despotic
state. While the knowledge thesis has been sometimes used uncritically to object to
any form of economic and political centralisation, oddly enough, the argument of
knowledge could be used both to promote and oppose processes of decentralisation,
that furthermore more usually depend on political and historical contingencies than on
economic calculations: 75 in practice, centralisation or decentralisation are not chosen
because of their economic efficiency but rather for political reasons. Rather, if the
main issue is the availability and efficient use of knowledge, the argument of
knowledge does not necessarily lead to the conclusion that decentralisation should be
preferred and could also represent a solid justification for the attribution of some
competences to a federal, supra-national or, theoretically, even a foreign authority
when it is more likely that that authority will be more informed than the local
institutions and can therefore take more efficient decisions. This conclusion should of
course be contested to adhering to the view of Besley and Coate since even if the
central or foreign governance level had more information, its regulations would be
irremediably marked by conflicts of interest and thus inefficient. But, as already
touched upon, this is an intrinsic characteristic of any pluralistic system.

Furthermore, the premise of Hayek’s 1945 paper – as well as most of his work
– is that knowledge in society is dispersed, but it can also be thought that certain kinds
of knowledge are not dispersed in some kind of geographical sense that justifies
decentralisation. In other words, Hayek’s idea cannot be generalised until the point of
comprehending any form of knowledge and any economic or political activity.
Keeping this in mind, the extension of this economic argument in the discussion on
the feasibility of a harmonised system of European private law gives rise to some
questions.

III.1.1.7. Geographical proximity

The argument we have taken into account seems to be fully employable only as far as geographically localised problems are concerned. Only in this case, a strong link between availability of information and physical proximity can be built. Pollution is a clear example, as the knowledge of relevant factors (atmospheric conditions and so on) is more likely to be decentralised. This circumstance could justify a decentralised enforcement of legal rules in the first place, which is requested by reasons of efficiency, but even democracy concerns could require decentralisation with regard to the elaboration of substantive legal rules: in this case it is fully democratic that the inhabitants of the region where a political decision will produce its effects should have the right to contribute to the making of that decision.

However, as the importance of the geographical element decreases, the need for decentralisation seems less compelling. Already the reason why ‘it is more difficult for firms to hide or misrepresent information to decentralized agencies than to a more remote agency’ does not seem self-evident – as if it were possible to understand the balance sheet of a corporation just passing by in front of the corporation building. The opposite may be true: in a centralised and ‘restricted’ context, it is easier for those who are controlled and those who should control to build interpersonal relations that could occasionally lead to dishonest agreements and eventually seriously prejudice law enforcement. There is already some evidence that this factor can frustrate the correct enforcement of substantive private law. An analogous problem of ‘regulatory capture’ may arise since ‘national authorities may be inclined to favour national interests’, which is indeed looked upon as one of the arguments that could speak in favour of centralisation even by law and economics scholars that more explicitly advocate decentralisation.

Furthermore, geographical proximity could justify the decentralisation of the enforcement of legal rules, but the drafting of substantive law implies even more complicated problems: if decentralisation allows law to cope better with the needs of the local communities, what about needs which are not common to a particular local community but rather to a social group, for example consumers? Where are the consumers on the map? Not being a geographical community, it could be argued that decentralisation makes little sense in this case. Moreover, in the presence of externalities or other reasons that could justify centralisation, it would be sensible to opt for the centralisation solution, so that competence could be assumed by the highest hierarchical authority. Is this conclusion in favor of centralisation in

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78 CJ Milhaupt, ‘Beyond Legal Origin: Rethinking Law’s Relationship to the Economy: Implications for Policy’ (2009) 57 American Journal of Comparative Law 831-845, at 843-844: ‘In 2005, the South Korean legislature enacted a provision permitting class action lawsuits for securities fraud claims. Debate over the provision was dominated by the fear of meritless “strike” suits. As a result, measures were taken to circumscribe the procedure and reduce its potential for abuse. Yet since enactment of the provision, only one class action lawsuit has been filed – in 2009 – against a small company. Why? Probably because the South Korean legal profession is still so small and tight knit, and links between the major law firms and major corporate clients are so strong, that it is not economically prudent from a long-term perspective to represent plaintiffs in this type of litigation, however strong the particular claim. In other words, South Korea lacks the entrepreneurial lawyers and attorney fee mechanisms that make class action litigation viable – and subject to abuse – in the United States’.
Arguments against denationalisation

contradiction with the Hayekian model? State’s activities are very diverse in their nature and could require different levels of decentralisation. This aspect is also looked upon as a flaw of a general comprehensive economic model by Besley and Coate themselves:

‘One weakness of the analysis is that we have assumed that the only function of decentralized and centralized governments was providing the public goods in question. In reality, both levels of government determine numerous issues and hence the political consequences of transferring responsibility for one area of spending are likely to be much more subtle than our analysis suggests’.  

Indeed, the reasons that support decentralisation in given state’s areas of activity cannot be generalised until the point of comprehending any imaginable activity. In this line of reasoning, we could wonder whether private law falls under the decentralisation theorem: looking at the real world of practice, after all even decentralised systems like Germany or Switzerland are strongly centralised with regard to private law. If we consider this aspect, a new criticism to the decentralisation argument in the debate on Europeanisation of private law could come from a Hayekian perspective strangely enough. Speaking of a federal nation-state, Hayek indeed distinguished for instance legislation from government, claiming that ‘it is not really necessary always to have both legislative assemblies and governmental assemblies on the same level of the hierarchy’. Here, Hayek was not concerned exclusively with monetary politics: the focus is broader and Hayek aimed at describing the political order of a free people. It is thus spoken of a multi-level government system in which the degree of centralisation can vary according to the activity to be performed by the state (legislation, enforcement of rules etc.). Needless to say, Hayek is considering a federal state, but this line of reasoning could be valid also in the context of the European multi-level system, which is of course no federal state in legal terms but something at least comparable to that in politological terms. Discussing the possible impact of Hayek’s theories for the development of a harmonised private law system in Europe, it has already been suggested that even the most centralist idea of a European civil code could fit in the Hayekian system.

Here it could be useful to make a distinction between legislation and enforcement of legal rules. It is conceivable that one of these activities can be assigned to a particular subject, the one which is more competent or informed, whereas the other can be located at a different governmental level (leaving aside the question as to the public or private nature of the law enforcement). Basically, as the enforcement of law is a more concrete activity which can materially take place in

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80 T Besley and S Coate, ‘Centralized versus Decentralized Provision of Local Public Goods’, at 2628.
82 MW Hesselink, ‘A spontaneous order for Europe?’, at 140.
83 See supra ‘Introduction – Methodology – European Union as multinational and multi-level system’.
84 MW Hesselink, ‘A spontaneous order for Europe?’ at 140: ‘The implication seems to be that Hayek would have looked favourably upon the abolition of national borders, and of the internal market, and of private law legislation on the European rather than the national level. Maybe even a European civil code could fit with Hayek's spontaneous order, especially if it were an optional one’.
a specific space and time, it is more suitable to be assigned to a more localised unit, whereas legislation, being its task the elaboration of ‘general and abstract rules’, could be less dependent on concrete circumstances which are related to a specific territory. Indeed, while it seems to move towards centralisation with regard to the drafting of substantive private law rules, the EU system adopts decentralisation with regard to the enforcement of those harmonised provisions, completely matching the Hayekian model.

Nevertheless, the reasons that support decentralisation in the case of substantive rules also hold true with reference to the enforcement of law – in particular the benefit represented by the learning processes allowed by legal diversity – so that some law and economics scholars claim that both activities – legislation and enforcement – should be better located at the decentralised level.\textsuperscript{85} Then why what is possible within a federal state – as conceived by Hayek – is not within a supranational institution – like the European Union?

\textbf{III.1.1.8. Slippery slope to Balkanisation}

Taking on the normative advice formulated by several law and economics authors, one could think that the efficiency of enforcement and legislation increases at the increasing of decentralisation. If this is true, where should we set the limit? While in the specific context of the European law the decentralisation theorem implies the maintenance of the \textit{status quo} or even a return to a fully national law, the argument could be pulled further to the point of legitimating a further decentralisation, which would have as a result the creation of regional systems of private law. There are indeed good reasons to think that even within several countries, both preferences and economic structures diverge to a point that national law would be inefficient and non-democratic, as it disregards regional preferences. It is indeed clear that within several European states, local identities are sometimes so marked\textsuperscript{86} that ‘local preferences’ should be considered not only to object the attribution of national competences to a supra-national level, but even of local competences to a national level of governance. The same holds true if one relates preferences to objective economic structures (so for example if one maintains that certain consumers prefer lower levels of protection not because this is what they actually wish but rather because they cannot afford the economic consequences of a mandatory right of withdrawal) that strongly vary within most European nations. In other words, the decentralisation theorem transplanted within the legal debate could be used to affirm that even national codifications are inefficient, and would build a convincing argument for decodification or even secession. The point is not exclusively theoretical, indeed, already in the past national law has been criticised for very similar reasons. A historical example can help to highlight the point. In France, one of the arguments used to affirm the need of maintaining the prerogatives of the provincial parliaments was that monarchy would have become despotic if the \textit{corps intermédiaires} were deprived of their rights; these groups ‘considered themselves representatives of the nation’ and claimed that it was

\textsuperscript{85} R van den Bergh, ‘Forced Harmonisation of Contract Law in Europe: Not to be Continued’, at 255; R van den bergh, ‘Private Law in a Globalizing World’, at 62.

rather necessary to restore the ‘corporate freedom’ of local institutions; whereby freedom basically meant political competence.\textsuperscript{87} This idea was advanced by Montesquieu in particular and, ironically enough, was initially advocated even by Portalis, of course when he was still a member of local parliaments instead of the later architect of the French codification.\textsuperscript{88} It was indeed the period in which even Portalis, in quite reactionary terms and long before Savigny, could argue that ‘the dangerous ambition to make a new civil code’ had to be given up, and it was rather necessary to go back to Roman law, the law of all nations.\textsuperscript{89} The argument of ‘corporate freedom’ – that ‘provided a political-theoretical argument against centralisation of the authority to make laws and against the introduction of legal unity’\textsuperscript{90} – did not achieve the aims of avoiding a codification of French law, but in the course of the eighteenth century became quite popular, evolving in the theory of federalism.\textsuperscript{91} If that argument had been followed in those years, one can presume that no codification of French law would have taken place and the history of European law would have been very different. It is to say the least ironic, that the \textit{Code civil} passed from being considered as an instrument that disrespected local peculiarities and preferences to the manifestation of those preferences, as it is nowadays intended in the modern discourse on European private law. This consideration opens up an intricate problem: does national law express the preferences and interests of the citizens or does it also deceive local interests? More fundamentally, are preferences homogeneous within the nation or can they vary within it?

\section*{III.1.2. The argument in light of different political theories}

The transposition in the legal discourse of the decentralisation theorem elaborated in the economic literature leads to affirming that, since preferences vary among countries, it is convenient not to unify or further harmonise private law or at least some aspects of it such as mandatory rules: approximation of laws would overlook national preferences impeding a beneficial competition between legal orders as well as valuable inter-state learning processes. At the same time, as it has been shown, the application of that argument in the context of European private law gives rise to a few questions. Summing up some of the controversial aspects of the arguments employed: it is on the one hand claimed that preferences vary among countries and therefore a centralised system would disregard these element resulting in inefficient legislation. However, the cultural variety within Europe and even nation-states may lead us to think that preferences may vary not only among but also within nations. To claim on the contrary that conflict of interests will arise only in case of centralised legislation at the European level but not also within a national pluralistic system seems to imply that the interests within that system are basically homogeneous. History shows that

\begin{itemize}
  \item \textsuperscript{87} PAJ van den Berg, \textit{The politics of European codification. A history of the unification of law in France, Prussia, the Austrian monarchy and the Netherlands} (Groningen: Europa Law Publishing, 2007) at 29-30 and 267-268.
  \item \textsuperscript{88} PAJ van den Berg, \textit{The politics of European codification}, at 30.
  \item \textsuperscript{90} PAJ van den Berg, \textit{The politics of European codification}, at 30.
  \item \textsuperscript{91} PAJ van den Berg, \textit{The politics of European codification}, at 30.
\end{itemize}
this line of reasoning was used even to object to national codification, how can the same argument now support the idea of a national legislation? On the other hand, it is said that decentralisation should be preferred because local institutions are ‘closer’ to citizens and have therefore a better knowledge of the needs and preferences of those, being so able to come up with better decisions. However, only in some cases does geographical vicinity seem to be synonymous with availability of knowledge. What about communities that are not geographically based? In this situation, there could be strong reasons to support centralisation, as the rationale for decentralisation fades out. Why should private law legislation be national (i.e. decentralised) also in these cases? All these open questions can be answered only adopting a broader perspective and inquiring political theories.

**III.1.2.1. Communitarian and cosmopolitan perspectives**

It should be noticed that the objections that so far have been raised against the economic argument are not extemporaneous but rather rest upon certain views which have already been extensively discussed by political scientists. In particular, these objections are based on the positions advocated by the philosophies of communitarianism and cosmopolitanism. The objection based on the idea that preferences can vary also within nations is a classic communitarian argument, while arguing that preferences can vary also beyond and across nations is a point connected to a particular kind of cosmopolitanism. Both philosophies can be opposed to nationalist assumptions. Most definitely, nationalism and communitarianism share various features, in particular they both sustain that the decisional power (the political unit, in Gellnerian terms) should be acknowledged to a specific homogeneous group. The radical distinction however concerns the qualification of this group, which is invariably the nation for nationalism while it can be represented by different geographic or social groups for communitarians. In this sense communitarianism and nationalism can clash, since according to the communitarian thought even within the nation there are groups that are entitled to some kind of recognition. Transposed in the legal discourse, this argument implies that private law has not necessarily to be enacted at the level of the nation-state but could also be created by particular groups within the nation. Nationalism, on the other hand, takes into consideration only a particular group, indeed, the nation; in this sense the political claims of all other groups even within the nation are played down, denied or even, as the many notorious historical experiences reveal, repressed. In this perspective, acknowledging only one particular social unit has the practical merit to set a limit to dangers of ‘Balkanisation’.

This point has already been made in the debate on Europeanisation, to object to the rationale of the decentralisation thesis: if we were to agree that the closer the legislator the better, then we would open a whirl of decentralisation that would most likely lead to perpetual secessions. Even if the idea of enacting local private laws can sound provocative, the argument underlying such a proposal is not and does not count as a paradox without links to the ‘real’ political world: several groups that advance independence – or at least autonomy – claims against established states actually ask
Arguments against denationalisation

for a separate legislation that would better fits their needs, as already happened, for example, in the Spanish region of Catalonia. Certain legal scholars have moreover explicitly advocated a communitarian politics of recognition even in private law systems characterised by an increasing multiculturalism, and in this sense different from the typical law of homogeneous nation-states. Why then should private law operate exclusively at the national level instead of a sub-national one?

Cosmopolitans, at the other end, tend to see a homogeneity beyond local and national communities. In this view, the idea that preferences differ in different countries does not automatically lead to the necessity of fragmentation of the world order in a myriad of differentiated political units. We could trace back the thought of Amartya Sen to the philosophy of cosmopolitanism; his idea of multiple identities in particular represents a strong argument for assuming that even if some preferences may be different in different countries, there are still indefinite numbers of other ways in which preferences may differ. Given the fact that personal identity is not determined exclusively by national belonging but rather a multitude of different group allegiances, it could be concluded that – following these identities – also people’s preferences are not determined (only) by their nationality but also – and sometimes even more evidently – by their other identities of different natures: local, social, political, sexual and so on. Transposing this line of reasoning to the legal studies, the conclusion can be drawn that it makes little sense to claim that private law should be national because this reflects the preferences of the people, since there is no reason to consider those preferences depending exclusively on national identity. So, following the recurring example of a consumer, there are good reasons to believe that, independently of their nationality, most consumers share some basic preferences rooted in their identity as consumers, in certain case overarching their identities of Portuguese, German, Englishman and so on. Quite on the contrary, nationalist ideology tends to deny or at least underestimate such a plurality of identities, arguing that the national identity is the one that most notably forge human identity. Why then should private law operate exclusively at the national level instead of a supranational one? In political science, these arguments are usually employed to object to the moral and political assumptions of nationalism. Consequently, in the legal discourse, they can challenge legal nationalist assumptions.

III.1.2.2. Nationalist perspective

Only liberal nationalists seem to be able to delineate a coherent theoretical justification in opposition to the points raised from a communitarian and a cosmopolitan perspective. As already mentioned in the first chapter, the liberal nationalist philosopher Miller claims that thinking that assigning responsibility for the rights and welfare of the ‘Swedes to other Swedes’ is convenient because of reasons


94 Supra, second chapter on ‘Nationalism’.
of administrative ease and physical proximity would be a mistake. The reason why they are ‘better informed’ than outsiders is rather that there is a cultural similarity between co-nationals.

‘Why does it make sense to assign responsibility for the rights and welfare of Swedes to other Swedes? […] Two bad answers to this question are physical proximity and administrative ease. Neither of these has any intrinsic connection with nationality. Physical proximity suggests taking responsibility for those in your locality regardless of their nationality. Administrative ease brings us back once again to states, as the institutions that are currently most effective in protecting rights and delivering welfare; but it provides no answer to the such questions as ‘Why should the boundaries of the states be located here rather than there?’ ‘Why not have sub-national or supra-national units performing these tasks?’ A better answer is that cultural similarities mean that co-nationals are better informed about one another than they are about outsiders, and therefore better placed to say, for example, when their fellows are in need, or are deprived of their rights’

Once this point, which is ‘the strongest argument that can be given, from a universalistic point of view, for acknowledging special obligations to compatriots’, has been made, it makes no sense to ask whether it is fair that the state only takes care of its citizens’ needs: if it did otherwise, its legislation would be on the one hand detrimental to its own citizens and, on the other hand, inefficient for outsiders – whose inscrutable real needs would not be understood by another nation-state. Knowledge is divorced from geographic proximity and comes to coincide with culture.

Such emphasis on the cultural element is easily explicable, since having abandoned criteria like ethnos, religion, and language, nationalists assumed a subjective/objective cultural criterion in order to determine who belongs to the nation. People sharing a culture also share a nationality. The argument thus becomes to some extent circular: co-nationals know better each other’s needs because they share the same culture, i.e. because they are co-nationals. This is a circularity which is determined by an alleged overlap between personal and collective identity: the nationalist theory of identity is built upon the assumption that each nation has a unique character, from which national characteristics stem and are shared by every citizen. Given their theories on identity and culture which ignore the relevance of sub-national and supra-national divisions and identities, liberal nationalists can simply pay no attention to questions like who is ‘closer’ to a non-geographical community or whether it is not more efficient to enact regional private laws to mirror better the

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interests of more restricted infra-national communities: those communities, in a liberal nationalist perspective, are simply irrelevant, as the political unit can only coincide with the national one. In this sense, the nationalist argument, mainly based on the assumption of the cultural similarity between citizens, may justify why even private law should be maintained national, avoiding furthermore the risk of a legal Balkanisation.

III.1.2.3. ‘Cultural similarity’ underlying the economic argument

Provided that the philosophies of nationalism, cosmopolitanism and communitarianism would offer different answers to the question as to whether private law should be better placed at the national or the European level, the question now arises whether the economic argument employed in the debate on Europeanisation can be linked to (liberal) nationalism, that is, if it presents the features of the nationalist argument. The reason why liberal nationalists deem the national level as the best governance level is not that there is some kind of geographical proximity – as the Hayekian model seems on the contrary to assume – but rather a cultural similarity within the nation. Since liberal nationalism bases its conclusions on an alleged cultural similarity of co-nationals, it should be verified whether also the economic argument as it has been used in the debate on Europeanisation assigns cultural similarity a pivotal role.

Probably with the intent of making up for one of the alleged weak points of economics – that is to create abstract models that forget the particular specificity of certain contexts – law and economics authors who used the decentralisation theorem to object to Europeanisation indeed seem to put particular emphasis on the element of culture. While liberal nationalists speak of a kind of general ‘culture’ that binds all nationals, legal scholars speak of a particular ‘legal culture’, which seems to be highly dependent on the nation. For instance, legal culture is present in the views of Gerhard Wagner, who acknowledges that legal diversity reflects different preferences which are expressions of cultural diversity and therefore pleads for a European system characterised by more competition between legal orders instead of unification of contract law. A similar point is made by Rachlinski, who adheres to the idea that different legal rules ‘might be’ the expression of different cultural norms. He however adds to the debate an interesting perspective: different laws can be the product, more than different legal cultures, of different ‘cognitive errors’, but also these cognitive errors are mostly depending on the national context and the particular national history: ‘mistakes in judgment about risk, in particular, are so sensitive to context that minor variations in a nation’s history or lawmaking process creates differential sensitivity to cognitive errors’. Helmut Wagner emphasises the fact that preferences are not only a matter of personal predilections but also have a more objective dimension: variety of regulations or laws reflects variety of preferences, which in turn depends on

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different economic structures. The normative conclusion of this author is that harmonisation is not only undesirable, but rather radically impossible. He expresses in behavioral terms an argument which now sounds familiar to our ears:

‘Harmonization of behavioral structures, and therefore of the forms of realization of formal law, cannot be ordered from above simply through a formal decree. In other words, uniformity of law cannot be created by just imposing rules through public policy. Compliance with the law requires more than just rules. It must match the legal culture of a country’. \(^{103}\)

The point clearly echoes Savigny’s criticism that the ‘arbitrariness’ of the legislator cannot affect the law, which is rather expression of the ‘spirit of the nation’: the *Volksgeist*, evidently defined in cultural terms under influence of Romanticism and whose conceptual and historical links to German cultural nationalism have already been extensively discussed. Starting from the consideration that preferences are heterogeneous because they reflect diversity of economic structure, Wagner ends up alleging that rules are something more: the expression of a particular culture insensitive to the change imposed by political power. More exactly, such culture is the legal culture of a country so that culture – in its ‘legal’ version – and nationality come to coincide. But such harmony of nationality and culture is exactly the point on which liberal nationalist assumptions depend. Preferences are the expression of different ‘cultures and lifestyles’, while culture is assumed to be national. Consequently preferences are thought to be so strictly linked to the nation that ‘the arguments in favour of decentralization become the more powerful the larger is the number of nations involved’. \(^{104}\) No place is left for sub-national or non-national preferences.

The importance of the consequences that stem from the argument of legal culture are pivotal, since it is argued that the congruence of culture and nation makes it impossible for the legislator to modify rules that are rooted in the ‘culture of the country’. The concept of legal culture would therefore deserve a specific account, which is furthermore highly needed if one considers the indeterminateness of the idea. This would of course go far beyond the aims of law and economic scholars, who therefore just tend to accept the interpretation that has been given by other scholars. Van den Bergh, for instance, refers\(^ {105}\) to the ideas made famous by the comparative lawyer Pierre Legrand, whose conclusion consists in the ‘impossibility of legal transplants’ because of the cultural roots of private law rules. Legal culture therefore hinders plans for legal harmonisation in several ways and the economic costs to supersede this obstacle would outweigh the benefits of harmonisation, which is for sure a strong counter-argument even if economic data were to confirm the need of harmonisation which is propagandised in particular by the European Commission. In conclusion:

\(^{103}\) H Wagner, ‘Economic Analysis of Cross-Border Legal Uncertainty’, at 42.
\(^{104}\) R van den Bergh, ‘Private Law in a Globalizing World’, at 92.
\(^{105}\) R van den Bergh, ‘Forced Harmonisation of Contract Law in Europe’, at 254.
Arguments against denationalisation

‘The transaction cost savings stressed by the Commission may be outweighed by the costs of formulating uniform principles, reaching agreement on common principles, formulating new rules in accordance with these principles and subsequently adapting national legal systems. The latter costs should not be underestimated, since private law is deeply entrenched in national legal culture: the legal language, the conceptual structure and procedures may vary significantly across jurisdictions’. 106

At last, thus, the economic argument flows into a ‘cultural argument’ that intends culture mainly in national terms and according to which cultural diversity among nations determine different preferences and impedes the application of laws which are expression of different cultural traditions. Even the more explicitly economic dimension of contract law is ‘conditioned by and embedded in cultural understandings and identity’, 107 so that it becomes clear that the whole process of Europeanisation will have to deal with the diversity in legal cultures of the member states. The degree to which such ‘cultural argument’ can in turn be related to nationalism must be further investigated.

III.2. The social justice argument

Those who employ the economic argument to oppose Europeanisation assume that divergences in preferences in different nations would require different private laws instead of a unified or highly harmonised supra-national system. A similar point, anyway, could also be made to affirm that a highly harmonised legal system would produce results that are not only inefficient from an economic perspective, but even undesirable from a viewpoint mainly concerned with different values, like first and foremost social justice. This is a concern in particular for those who advocate that private law should contribute to the establishment of a society that pursues not only economic welfare but also ideals of justice and that it is now time for the European institutions to move on from the classic market-functionalist approach. 108

Among scholars interested in the subject of European private law, the social justice argument has hardly ever been employed to object to the European harmonisation project tout court; nonetheless, those who are particularly concerned with the dimension of social justice have often proved to perceive plans of forced harmonisation as a possible danger to the social character of private law of Europe. This position is actually even more widespread outside of the scholarly legal debate, where a form of left-wing Euroscepticism has developed based on the concern that the European Union be the Trojan horse for neoliberal politics detrimental to social justice. What is then the relevance of the social justice dimension for European private law? Keeping the example which has been made previously, the choice for a

given level of consumer protection – that underlines several rules of consumer law such as the ones that make the right of withdrawal non-disposable – attains for sure at economic evaluations – as already law and economic scholars have pointed out – but even more importantly also at basic considerations of justice. Several mandatory contract law rules are indeed aimed at restraining private autonomy in order to ensure the protection of those subjects that under certain circumstances are presumed to be ‘weaker’ than other contracting parties. In this sense, rules that aim to make up for such an unbalance and re-establish a contracting equilibrium can be considered social contract law.\textsuperscript{109}

However, also in this regard, people could have different preferences; some might think that the situation of inexperience and informative deficit in which the consumer is makes it ‘fair’ to derogate from the principle that agreements must be kept, while others might dispute this view, calling upon the authority of the old adage \textit{qui dit contractuel dit juste}. The unfair terms directive offers an even clearer example: while the text provides a list of terms that can be considered unfair, it is first necessary to understand what is concretely meant by the concept of ‘unfairness’ referred to by the directive. From this point of view, the specification that a term is unfair when it determines in a specific case a significant imbalance in the parties’ rights is not completely satisfactory, as we still need a preliminary conception of fairness in order to consider an imbalance significant for the purposes of the directive. As a result, what is considered an unfair term somewhere could be acceptable somewhere else, leading to problems for legal uniformity in Europe. In other words, also the ‘idea of just’ is not univocal but rather can change in different opinions and contexts. A unified legal regime – say, a European norm deeming the invalidity of a particular contract term or establishing a non-disposable right of withdrawal for ‘weak’ contracting parties – could only entail one of these different ideas of what is just, so that the imposition of that rule on people who do not share the same value could end up producing \textit{unjust} results.

This can have important practical consequences in the dynamics of the harmonisation process; if their aim is to establish a uniform system, European institutions will have to opt for one specific idea of justice, through a political decision. It is exactly this aspect that leads to concerns among those interested in justice; indeed it has been pointed out that given the market-functionalist approach of the Commission,\textsuperscript{110} it is likely that European rules could be less protective than national ones, resulting in a de-socialisation of private law. For instance, Nordic systems seem to be more protective for the weaker party than other European legal orders and if European rules were to mirror the values – therefore the idea of justice and consequently the level of consumer protection\textsuperscript{111} – of Central, Southern or Eastern Europeans countries, the impact of European law on Nordic laws would be

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\item\textsuperscript{109} T Wilhelmsson, \textit{Social Contract Law and European Integration} (Aldershot: Dartmouth, 1995)
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Arguments against denationalisation

detrimental to consumers. Such European rules would be perceived as ‘unjust’ in those countries, almost certainly leading to resistance. This risk is actually concrete: even if the academic project of CFR acknowledges justice the status of fundamental principle there are still completely different understandings of the meaning of the concept of justice,\(^\text{112}\) while the DCFR seems to opt for the traditional notion of corrective justice, in so doing showing quite a conservative approach.\(^\text{113}\) This would furthermore create a dangerous path, as in the scenario of the competition between legal orders a process of imitation could arise, possibly fostered by the creation of a new optional legal regime. In this sense, even empirical data seem to confirm that forms of ‘social dumping’ could crop up.\(^\text{114}\) However, results perceived as being ‘unjust’ would be produced even in the opposite case, in other words if particularly elevated standards of justice were imposed on people whose conception of those values is different: this would be the case if European rules were to introduce solidarity elements in a context that favours a more individualistic approach, as it seems to be the case with the English common law or more recently with Eastern countries. This seems to point to the conclusion that attenuation of legal diversity in matters of social justice will produce per se unjust results.

III.2.1. Social Justice in the European context

It is necessary to briefly address the question of social justice in private law, in order to understand what the practical relevance of the theoretical discussion is. At first sight, the problem could indeed seem exclusively theoretical, as ‘justice’ is one of those redundant words that abound in the speeches of philosophers and politicians, but that would be out of place in the reasoning of a private lawyer. The question of social justice is nonetheless only one of the aspects of the question as to the ‘political’ nature of private law, while discussions as to the ‘social’ character of private law in Europe are particularly deep-rooted and of substantial practical relevance. It would here suffice to mention the well-known and fierce criticism of Otto von Gierke to the first draft of the BGB, blamed for being too individualistic and insensitive to the social question, which led to the introduction of the two famous ‘drops of socialist oil’ in the definitive version of that code. Though it is indeed only after the development of a mature form of capitalism and the consequent rise of socialism that the ‘social question’ started affecting more and more private law\(^\text{115}\) – until the peak represented by the introduction in several post Second World War constitutions of the principle that private property must serve a social function – it cannot be denied that the pursuit of some idea of justice has always represented one of the objectives also of any private law system. This for sure still leaves open the question as to what model of


\(^{115}\) See G Solari, Socialismo e diritto privato. Influenza delle odierne dottrine socialiste sul diritto privato [1906] (Milano: Giuffrè, 1980).
justice has to underlie private law – the traditional view being that this should only be some kind of ‘commutative’ justice in an Aristotelian sense.

While this is not the place to tackle the intricate issues of social justice in private law it can here be noticed that within the European context the topic has become particularly topical, at least after the publication in 2004 of a Manifesto for Social Justice in European Contract Law,\textsuperscript{116} elaborated and undersigned by numerous European comparative and private law scholars. The Manifesto in particular denounces the technocratic approach adopted by the European bodies with the aim of hiding from the citizens the real political issues\textsuperscript{117} and blames the institutions for chiefly pursuing an economic agenda that disregards social issues: in this sense, European rules are mainly thought to foster trans-border commerce, leaving aside aspects of social justice.\textsuperscript{118} The European Union admittedly appears as ‘unbalanced in that the economics enjoys primacy over social concerns’:\textsuperscript{119} But while it is understandable that the European communities – born as an international organisation with limited competences in the field of the economy – at least initially issued rules aimed at achieving economic objectives, in the actual scenario which is characterised by an enlargement of competences and thus the swift towards a quasi-federalist structure, there is a concrete risk that the Europeanisation of more and more aspects of private law will lead to a system exclusively inspired by the idea of efficiency rather than justice – which has always been ingrained in private law. As the Manifesto states,

‘The Commission, quite properly, addresses issues within the framework of its own competence and the powers of the European Community. It is extremely doubtful that the European Treaty confers powers on European institutions to enact a European law of contract, once this project is understood as setting an agenda that necessarily goes beyond measures of integration of the single market. Thus, to progress any further with any rapidity, the agenda has had to be confined to an examination of technical problems, and more fundamental political questions have had to be suppressed. But there is a real danger that, by ignoring these political issues, we will end up with a lop-sided European contract law: one that furthers market integration, but is inadequate to secure social justice’.\textsuperscript{121}

\textsuperscript{118} The criticism that ‘a discussion on the political, economic and social implications of contract law was almost completely avoided’ had already been made by B Lurger, ‘The ‘Social’ Side of Contract Law and the New Principle of Regard and Fairness’, at 380.
But given the problems represented by the difficult compatibility of justice and harmonisation, how would it be possible to promote justice through European private law? In the words of the Manifesto, the creation of a harmonised system of law that takes into account questions of social justice is not only possible but even desirable. Interestingly enough, the Manifesto considers that ‘a shared vision of social justice in the market order would provide the basis for greater approximation of national laws’\(^\text{122}\) still respecting the cultural diversity of the states. This is indeed interesting, as the basic objections to harmonisation from the social justice perspective would seem to be that if a ‘shared vision of social justice’ lacks and rather there are several visions which are linked to the cultural specificity of the different member states, it becomes impossible to achieve harmonisation and to respect social justice at the same time.

Unfortunately, the concrete way in which such a reconciliation of shared values and respect for diversity should be brought about is not explicitly addressed by the Manifesto, so that opinions as to this pivotal aspect diverge even among the members of the Social Justice Group itself. The generic words adopted by the Manifesto indeed allowed different and opposite views to coexist within the group itself, where at least two main different current of opinions were represented: those considering that the respect for differences and the preservation of diversity of culture is per se an aspect of justice, and those sustaining that cultural diversity and social justice are rather separated issues.\(^\text{123}\) The idea that preservation of cultural diversity is in itself a matter of justice is sustained in particular by Sefton-Green\(^\text{124}\) while it is denied by Collins, who rather argues that ‘[w]e do not need to conserve the differences between national private law systems for the sake of social justice’. However, while the question whether diversity is part of justice is debated, the idea that where conceptions of justice are different harmonisation should not intervene is more widespread.\(^\text{125}\)

### III.2.1.1. Normative implications of the argument

Analogously to what we have seen with regard to the economic argument, two normative consequences can be derived in order not to produce ‘unjust’ results by means of Europeanisation. In the first place, the process of ‘forced’ legal harmonisation – by means of mandatory interventions of the European institutions – should be stopped, in order to avoid the imposition on people of legal rules that they would perceive as being unjust. As national systems show divergences in underlying values, in particular the idea of a uniform code is not particularly appealing.\(^\text{126}\) As an alternative, Europeanisation could continue only at the cost of overlooking questions of social justice or dealing with those questions only at a particularly abstract level.

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Rather than a suggestion, this second scenario is depicted as a risk for the movement towards higher harmonisation and even a particularly concrete one, if one only considers the specific dynamics of Europeanisation, which tend to generalise minimum liberal principles included in the ‘bourgeoisie’ codifications of the member states. In this sense, a return to liberalism would be the ‘price to be paid’ for a ‘harmonised Europeanisation’ which at this point sounds less appealing than a more social-justice-friendly fragmented one.\footnote{127 T Wilhelmsson, ‘Private Law in the EU: Harmonized or Fragmented Europeanisation?’ (2002) 10 European Review of Private Law 77-94, at 84 ff.}

In both cases, the social justice argument does not exclude the possibility of a future agreement between the member states – similar to the idea advanced in law and economics to favour inter-national rather than supra-national instruments – that permits to elaborate a common scheme of social justice, which would also be an important step in the way toward the construction of a European identity.\footnote{128 R Sefton-Green, ‘Social Justice and European Identity in European Contract Law’, at 286.} However, as long as ‘the differences between national legal systems reveal divergent views about desired patterns of social welfare’, the promotion of social justice can only ‘encourag[e] further dialogue’ instead of requiring imperative political interventions.\footnote{129 H Collins, ‘Does Social Justice Require the Preservation of Diversity in the Private Laws of Member States of Europe?’, at 175. In the same sense JM Smits, The good Samaritan in European private law: on the perils of principles without a programme and a programme for the future (Deventer: Kluwer, 2000) at 45, declares to ‘believe in as much uniformity as is possible without sacrificing national moralities in Europe', coherently with his idea of a spontaneous order for European contract law.} Harmonisation in this area should not be abandoned, but rather postponed. Practically, this would amount to an exclusion of social contract law from the European level and its allocation at the national one, where it has traditionally resided. These European private lawyers therefore confirm the historical trend – evident to political scientists – of relegating social solidarity to the nation-state.\footnote{130 J Habermas, ‘The European Nation-State and the Pressure of Globalization’ (1999) 235 New Left Review 46-59, at 57.}

### III.2.1.2. Absence of a European model of social justice

Allegedly, harmonisation of social contract law could be satisfactorily realised only if there were a consensus in Europe as to fundamental values such as the protection of weaker parties. It is therefore suggested that until member states reach a sufficient agreement as to certain values – not all of them easily sharable by all states – mandatory intervention is not a desirable option.\footnote{131 R Sefton-Green, ‘Cultural Diversity and the Idea of a European Civil Code’, at 87-88.} In other words, a highly harmonised system of law requires the existence of a common social and cultural background\footnote{132 R Goode, ‘Contract and Commercial Law: the Logic and Limits of Harmonisation’ (2003) 7.4. Electronic Journal of Comparative Law.} without which uniform rules would necessarily disrespect this particular ‘relativistic’ dimension of justice. Nowadays, if uniform rules were to be established, we would have to admit that there exists something as a common European idea of justice or a whole of sufficiently shared values exist: this is something that some authors both in sociology and the legal studies tend to deny, affirming that the ‘European social model’ is not universal not even in Europe,\footnote{133} or...
more radically that there are some insuperable differences as to those values. Critics claim that the proposed idea of a Europeanisation of tort law rests upon the idea that different national ideas of justice, one French, one German, one Dutch and so on, should be replaced by a sole European justice, which nonetheless does not seem to exist at the present day. Not even in contract law can one find a uniformity of views as to the idea of social justice that should informs rules. European Union law seems to be developing a new concept of justice, which is nonetheless very different from the traditional ‘social’ understanding of the nation state and rather appears as an ‘access’ justice which is functional to the internal market. Conceptions of social justice at the national level, on the contrary, continue to diverge. Wilhelmsson, for instance, distinguished different ‘varieties of welfarism’ that reflect on contract law systems too. These varieties are characterised by different policy choices made in striking a balance between the opposite values of contractual freedom and fairness. According to this view too, it seems that at the present day ‘no agreement exists among Member States on where to draw the line between the two principles of contractual freedom and regard and fairness: the strong liberal traditions of some Member States are confronted with traditions of strong social protection of others’.

### III.2.1.3. Fundamental rights and harmonisation

In order to verify whether a convergence exists at the operational level of the legal rule, it is of primary importance to look at the activities of the courts rather than just at the black letter rule, and this holds true also for those who intend to verify whether shared conceptions of justice exist in the European systems. Certainly, in civil law jurisdictions judges’ hands are relatively tied, since their main task is the application of statutes they do not create; however, even adhering to a strictly positivist vision of the legal system, the judiciary can still play a fundamental role to instill social values

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133 R Dahrendorf, *Why Europe? On the purposes of the EU after enlargement* (Maastricht: Universiteit Maastricht, 2004) at 17: ‘It is of course not the model of the United Kingdom. Nor is it the model of most of the new members of the European Union, because they are far too poor to introduce the kind of welfare state that is characteristic of older members of the European Union. So one can have doubts about the importance of the European social model. Still, it is a subject that concerns Europeans – and if one reads carefully, a subject that appears in the treaty’.


135 MG Faure and T Hartlief ‘Naar een harmonisatie van aansprakelijkheidsrecht in Europa? Een kritisch rechtseconomisch perspectief’, at 176: ‘Waarom zou een Duits slachtoffer van een ongeval in Spanje minder vergaand moeten worden beschermd in het Spaanse aansprakelijkheidsrecht dan ‘thuis’? In het verlengde van het voorgaande ligt een argument dat voor voorstanders wellicht belangrijker is dan zij in eerste instantie willen toegeven: verschillen behoren als zodanig te worden vermeden, juist omdat wij inmiddels in een Europees verband samenleven waarin geen ruimte meer zou bestaan voor een Franse, Duitse of Nederlandse rechtvaardigheid. Wij hebben zojuist als typisch voorbeeld van een dergelijke benadering Magnus en Fedtke opgevoerd. Waar men dan kennelijk vanuit gaat is dat er zoiets bestaat als een ‘Europese’ rechtvaardigheid die aanspraak op algemene gelding kan maken’. Also MW Hesselink, *DCFR & Social Justice*, at 27, points out that a lower degree of Europeanisation is the price to be paid for higher (local) foreseeability.


in private law in the rooms of autonomy courts still have in those systems. General clauses are a typical example of such room for autonomy as they still need to be filled with contents that are not laid down in the statutes. An instrument which is increasingly employed by judges in order to fill those rooms of autonomy and achieve ‘just’ outcomes consists in making reference to overarching and super-primary principles of the legal orders and for this purpose, a particular importance has been assumed in recent years by the category of fundamental human rights that are normally laid down in national constitutions and international conventions.  

While it is in general evident that a process of ‘constitutionalisation of private law’ is underway in Europe, it is still discussed whether the Drittwirkung of constitutional provisions should be direct or rather indirect. In the former case, these norms will directly address private citizens so that the distinction between public and private is overcome; in the latter case, on the contrary, constitutional provisions will address citizens only through private law rules that will have to be interpreted in light of those overarching principles. In this latter strategy a particular role is played by general clauses, which need to be ‘filled’ with values that are not laid down in civil codifications and that judges look for elsewhere in the legal system. In this sense, general clauses are – as in the words of Larenz – ‘Rechtsfortbildung mit Rücksicht auf ein rechtsetthisches Prinzip’. Also tort law clearly benefits from a dialogue with constitutional principles, so for example the list of constitutionally protected interests of several charters of rights can help the judge and the interpreter understand what kind of damages can be recovered in certain tort law systems.

Thus, while the legislator instills social justice mainly by means of mandatory rules, judges instill social justice by mainly interpreting open clauses in light of constitutional provisions and fundamental rights. Also making use of this technique, judges have contributed to nuancing the traditionally conservative character of private law systems and introducing elements of solidarity. Such use of fundamental rights in case-law represents an interesting development from a historical perspective: while early socialists criticised the concept of human rights – in particular those laid down in the revolutionary Déclaration des droits de l’Homme et du Citoyen – as an essentially bourgeois concept elaborated to hallow individualistic principles to the detriment of the working classes, in contemporary legal systems fundamental rights

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142 K Larenz, Methodenlehre der Rechtswissenschaft (Berlin: Springer, 1991) at 421.
143 C Mak, Fundamental Rights in European Contract Law, at 38 ff.
144 G Alpa, L’arte di giudicare (Roma: Laterza, 1996) at 3 ff.
have evolved into a more social ‘second generation’ and have been mainly employed by judges (also constitutional judges) to restrict individualistic principles in order to ensure solidarity and protect the weaker subjects. If this is true, then a form of harmonisation of social contract law could spontaneously take place or at least be more easily achieved by means of supranational instruments. Indeed, not only comparative private lawyers have made efforts to identify a ‘common core’ of the European systems: also public lawyers discuss the existence of a European ‘constitutional heritage’, which is an expression frequently employed by the Court of Justice of the European Union to underline how the European institutions respect fundamental rights that member states already recognise.

That convergence can be achieved by means of the activity of national courts is, however, not self-evident, and two criticisms can actually emerge: in the first place, it remains to be seen whether such a constitutional heritage in Europe actually exists or is rather a rhetorical formula used to advance the process of construction of a European identity. If it is true that most European constitutions take their roots in the same historical period or exhibit ideological links, some aspects may still diverge in particular when it comes to the most controversial social rights and the definition of the role of the welfare state. The enlargement of the Union to include Eastern countries – for which constitutions mostly symbolise the transition from a different political context than the one experienced in Western countries – can only increase this complexity. In the second place and more importantly, even if constitutions show similar wordings, the concrete interpretation of those provisions may take diverging paths in different jurisdictions. Needless to say that such risk is not theoretical at all, considering that constitutional provisions are by their very nature broad and principles need to be balanced with each other. The basic question is therefore whether the fundamental rights and values that are laid down in international conventions and national constitutions can ‘represent a ‘common core’ of European principles and values that could further the harmonization of the contract laws of EU member states’. In this respect, while some scholars think that a certain degree of convergence can already be detected in the judgments of different courts in Europe, other commentators warn that constitutional values are not reliable instruments for

146 A Pizzorusso, Il patrimonio costituzionale europeo (Bologna: il Mulino, 2002).
147 ‘The enlargement decision has been the single most important constitutional decision taken in the last decade and arguably longer. For good or for bad, the change in the number of Member States, in Europe’s population size, in its geography and topography and its cultural and political mix are all on a scale of magnitude which will make the new Europe a very, very different polity independently of any constitutional structure adopted’, according to JHH Weiler, JHH, ‘A Constitution for Europe? Some Hard Choices’ (2004) 40 Journal of Common Market Studies 563-580, at 564.
149 A Colombi Ciacchi, ‘The Constitutionalization of European Contract Law’ at 177-178, where it is concluded that ‘national courts all across Europe tend to refer to Constitutions and human rights to promote social and distributive justice, equality, democracy and laicism in contract law. This is true both for the horizontal application of social rights and traditional fundamental rights and liberties.’
achieving unity, as they are such general concepts that their understanding essentially differ in different member states.\textsuperscript{150}

The problem could seem to be exclusively ‘technical’: given that a uniform interpretation is not provided by any court, national interpretations have no guidance and therefore diverge. In this case, a central court with the aim of providing a uniform interpretation could at least reduce the problem, but at the present day a similar institution does not exist and it is very unlikely that it will be created in the near future, as it would first have to obtain the legal competence to interpret national constitutional provisions. But more importantly, these divergences do not appear to be merely accidental; they are rather expressions of diverging policy considerations; indeed ‘[o]ur constitutions are said to encapsulate fundamental values of the polity and this, in turn, is said to be a reflection of our collective identity as a people, as a nation, as a state, as a Community, as a Union’.\textsuperscript{151} If this is true, it would not suffice to confer the authority of interpreting these provisions to a supra-national court (which is, as already said, a politically titanic undertaking), as this would amount to an imposition of certain values on people who do not share them. In this sense, the fact that interpretations diverge in Europe would be not only due to the technical circumstance that a central authority in charge of giving a uniform version is lacking.

The differences in fundamental values then reflect on private law when judges employ constitutional concepts to give substance to open rules like good faith, good morals and so on. If it is true that ‘the norm that contracts against public policy should have no effect may be universal, […] it should be filled with national conceptions of what these fundamental principles mean’\textsuperscript{152} (italics in the original). Critics then argue that even if the category of fundamental rights can be employed to ‘warn’ the interpreter in exceptional situations in which the outcome of legal rules is too severe or ‘unjust’, as a matter of facts these concepts remain ‘inherently vague’,\textsuperscript{153} maybe too much to fit into the systematic coherence of a private law system. Also the new list of fundamental rights of the Charter of Nice is not much of help in this sense.\textsuperscript{154} As there is no universal conception as of yet, ‘we should stop claiming that the use of fundamental rights in private law offers any real guidance in the harmonization process’;\textsuperscript{155} by the same token, concepts like human dignity or public policy are ‘essentially local and we should not try to harmonize them on basis of common principles or rules’.\textsuperscript{156}

\textbf{III.2.1.4. The stance of European law}

The idea that differences in the interpretation of constitutional concepts are manifestation of different fundamental values in societies seems to inspire the case-law of the Court of Justice of the European Union, as the famous \textit{Omega} case shows.

Specifically, this was not exactly a private law case, but its implications for that field of law too are self-evident. In that occasion, on the basis of the public law clause of public policy (öffentlich Ordnung), German authorities impeded the commercialisation of a laser-game for the simulation of killing of people, considered to be offensive of the ‘human dignity’ that is guaranteed by the German Constitution.

As in the concrete case this decision amounted to a limitation to the freedoms to provide services and of movements of goods guaranteed by the European treaties, the national judge that had to adjudicate the issue referred to the Court of Justice in order to know whether it was ‘compatible with the provisions on freedom to provide services and the free movement of goods contained in the Treaty establishing the European Community for a particular commercial activity – in this case the operation of a so called “laserdrome” involving simulated killing action – to be prohibited under national law because it offends the values enshrined in the constitution’. Confronted with the question, the European Court recognised the legitimacy of the prohibition of commercialisation of the game in Germany, confirming its previous case-law pursuant to which the protection of constitutional values may limit European fundamental freedoms and added that respect for human dignity is a common principle shared in all European countries. At the same time, nevertheless, the Court avoided to infer the existence of a general European understanding of human dignity, specifying that ‘[i]t is not indispensable in that respect for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected’ and that ‘the specific circumstances which may justify recourse to the concept of public policy may vary from one country to another and from one era to another’.

In light of this judgment, although the protection of human dignity can be said to be part of the European constitutional heritage – as we can find this or analogous principles laid down not only in the German Grundgesetz but in many other charters – its concrete relevance for the interpretation of ordinary rules end up varying among different countries. In the specific case, for instance, the decision of the German authorities could be justified by the fact that Germany may be more sensitive when it comes to constitutional values and human dignity probably in reason of its more dramatic history, while other countries like the United Kingdom may be more liberal and allow the game, although protection of human dignity is obviously a value in both nations. The reference to the ‘specific circumstances’ that differ between ‘countries’ and ‘eras’ – which per se pretty much resembles the ideas of Volksgeist and Zeitgeist – alludes to the fact that even values which are more or less universal end up taking different shapes when applied in different contexts.

The ‘localist’ decision of the European court can be read in political terms too. The solution is of course moderate and aimed at avoiding important ‘domino’ repercussions for the European system. The Court of Justice would have otherwise created a common European interpretation of human dignity valid for all countries.

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157 C-36/02, Para. 37.
158 C-36/02, Para. 31.
Furthermore, interpreting a concept which is laid down in a national constitution, it would have ended up ‘invading’ an extremely sensitive area of competence of the national institutions and in particular the constitutional courts, likely giving rise to new tensions between the European judge and the national highest courts. In this sense, the judgment of the Court should not be taken as a statement as to the necessarily localist nature of general concepts like human dignity and the resulting impossibility of elaborating trans-national notions of it. The case is rather telling of a new tendency of the Court of Justice: less exuberant than some time ago, the Court is in this particular historical moment more interested in a ‘constitutional dialogue’ with member states rather than in imposing politically important decisions on them. In this sense, it prefers to refer to the constitutional values of the member states rather than directly stating what those values entail.160

In this light, European projects of directives or other instruments that contain open norms – like good faith, unconscionability, good morals and so on – would not really help the process of harmonisation. This new Flucht in die Generalklauseln has been indeed the object of several criticisms based on a two-fold argument: on the one hand the vagueness of these provisions necessarily increases legal uncertainty,161 on the other hand general clauses represent the delegation of the task of defining standards of justice from the legislator to non-democratically legitimated judges.162 As a matter of fact, not even the academic projects of private law codification/compilation seem to take a clear position with regard to this aspect. It is difficult to predict how the trend of the Court of Justice could be reconciled with the dispositions contained in the DCFR. This instrument indeed limits itself to establishing the nullity of those contracts that infringe ‘a principle recognised as fundamental in the laws of the Member States of the European Union’.163 Not even other academic projects of European codification directly cope with this aspect, the Gandolfi Code, for example, reads that contracts should have a lawful content, that is not contrary to mandatory rules laid down in the code itself, ‘in Community or national laws, nor to public policy or morals’,164 while comments do not explicitly address the issue of the national or supranational nature of the concepts. The European Common Sales Law even plainly ignores the question, not referring to public policy and good morals. The (deliberately?) vague wording of the DCFR had immediately led to doubts and questions as to the correct interpretation of the rule, in particular as to what these

161 H Eidenmüller, F Faust, HC Grigoleit, N Jansen, G Wagner, R Zimmermann, ‘Der Gemeinsame Referenzrahmen für das Europäische Privatrecht’, at 69. See also A Zoppini, ‘La concorrenza tra gli ordinamenti giuridici’ in A Zoppini (ed), La concorrenza tra ordinamenti giuridici (Roma: Laterza, 2004) at 33-34, ‘In effetti, è ragionevole quantomeno dubitare che codificare il diritto dei contratti sia per sé sufficiente ad attingere un’uniformità in termini di diritto effettivo. Intanto, se la tecnica normativa dell’unificazione è quella affidata alle clausole generali […] come fanno taluni dei testi sin qui elaborati […] è logico attendersi che le differenze, culturali ed economiche, oggi presenti tra i diversi ordinamenti riemergano e si riflettano al momento della concretizzazione nel diritto giurisprudenziale: a formulazioni normative differite si sostituiranno, insomma, regole giurisprudenziali differite. È noto, infatti, che l’interpretazione della regola di diritto da parte del giudice, e più in generale di ogni interprete, opera attraverso meccanismi di precomprensione che sono il portato della stratificazione della cultura individuale e collettiva’.
163 Article II.-7:301 DCFR
fundamental principles are, or, in other words, ‘from where’ these come: are these principles common to the member states, so that they should be acknowledged in all countries, or can they also be national ones (similarly to mandatory rules)?\textsuperscript{165} Despite the vagueness of the wording, the commentary to the DCFR makes some points clear, to begin with specifying what fundamental principles are (a concept which is, already in the introduction to the DCFR, ‘susceptible to different interpretations’\textsuperscript{166}): these are general ‘constitutional’ principles like those laid down in the ECHR and the Treaty of Nice. The commentary – echoing the PECL – explains that the aim of the provision is:

‘to avoid the varying national concepts of immorality, illegality at common law, public policy, \textit{ordre public} and \textit{bonos mores} [sic.], by invoking a necessarily broad idea of fundamental principles found across the European Union, including EU law […] Merely national concepts as such have no effect under the Article and may not be invoked directly, although comparative study can give further help in the identification and elucidation of principles recognized as fundamental in the laws of the Member States’.\textsuperscript{167}

While the conception of fundamental principles is therefore pan-European and does not take into account local variations, it still admits that ‘[t]he public policy underpinning principles recognised as fundamental may change over time, in accordance with the prevailing norms of society as they develop’.\textsuperscript{168} Thus, a social understanding of certain values can evolve in time, but not vary among countries: the \textit{Zeitgeist} remains, while the national \textit{Volksgeist} is ignored. In this sense, the DCFR goes much beyond the Court of Justice in \textit{Omega}.

\section*{III.2.2. The argument in light of different political theories}

The idea that the inexistence of a strong sense of solidarity among the European countries as well as of a shared understanding of justice represents an obstacle for European economic integration has been expressed since decades in the economics and political science. It was already Hayek – an author normally opposed to nationalism – who highlighted that such flaw would result in the systematic oppression of larger communities on smaller nations, while the lurking risk remains


\textsuperscript{167} DCFR, Vol. 1, at 536.

\textsuperscript{168} DCFR, Vol. 1, at 537.
Nationalism and Private Law in Europe

that ‘as there is less community of views, the necessity to rely on force and coercion increases’.  

‘Who imagines that there exists any common ideals of distributive justice such as will make the Norwegian fisherman consent to forgo the prospect of economic improvement in order to help his Portuguese fellow, or the Dutch worker to pay more for his bicycle to help the Coventry mechanic, or the French peasant to pay more taxes to assist the industrialisation of Italy?’

The ‘localist’ trend in the understanding of justice and other fundamental values which emerge in the legal studies is therefore not accidental but rather coherent with general trends described in political theory. When they affirm that Europeanisation should not extend to those areas that are sensitive to the different understandings of social justice in given societies and that cultural plurality is per se a matter of justice, legal scholars are basically repeating communitarian arguments. Opponents of harmonisation, more in particular, depart from the relativist and the tolerance thesis of communitarianism to embrace an alleged equivalence of community and nation which is typical of liberal nationalism.

**III.2.2.1. Communitarian perspective**

The communitarian thesis as to the relativity of justice originated from a criticism to Rawls’ conception of justice, blamed for being insensitive toward context specificities. In opposition to Rawls, communitarians claimed that it is impossible to elaborate a universally applicable theory of justice, for different communities will have different conceptions of what is valuable so that even their idea of justice will be dependent on their conception of the good. More specifically, the argument is twofold and based on a relativist theory sustaining that values differ from one community to another and a tolerance theory which states that those differences have to be respected and maintained; no one should interfere with the practices of other groups as this would mean act unjustly and could lead to totalitarian degenerations. As Walzer formulates this point:

‘We do justice to actual men and women by respecting their particular creations. And they claim justice, and resist tyranny, by insisting on the meaning of social goods among themselves. Justice is rooted in the distinct understandings of places, honors, jobs, things of all sorts, that constitute a shared way of life. To override those understandings is (always) to act unjustly’.

169 FA von Hayek, ‘The Road to Serfdom’ (London: Routledge, 2007) at 228
170 FA von Hayek, ‘The Road to Serfdom’, at 228
171 Of course these two assumptions can be criticised for not being consistent with each other, as also the idea of tolerance is a relativist principle that could be shared or not by certain communities, so that the tolerance thesis asserts what the relativist thesis denies: S Caney, ‘Liberalism and Communitarianism: a Misconceived Debate’ (1992) 40 Political Studies 273-289, at 288.
In this sense, the idea advanced in the debate on social justice in European contract law that the respect for the differences is in itself required by the idea of justice takes its roots in the communitarian thesis. Discussing Europeanisation of private law, Collins makes exactly the same criticism of communitarian to the ‘original position’ of Rawls, which seems the position of some ‘mythical figure, one who cannot exist in reality, for everyone has a socially constituted identity and is born to the ties of various communities such as family and groups’. However, if we were to take communitarians ‘seriously’ we should admit that not only a supranational but even a national system of social justice is unjust, as it overrides the understanding of justice which are spread among the different communities (not to be intended in a merely geographical sense) within the nation. In this sense, the logical consequence to be drawn would be that the national legal system cannot be monistic but should rather tolerate the coexistence of different systems, each of them mirroring the ‘shared way of life’ of a different community. This is indeed the conclusion coherently drawn by Smits, who explicitly refers to Walzer, when he pleads for different legal systems within a single nation and the overcoming of the traditional national narrowness of private law. Indeed the communitarian argument provides a strong theoretical point against unification of law not only at a supranational level, but at a national level too, so that it could have even represented an argument against the nationalism of the past centuries. Indeed, even if at that time the philosophical trend of communitarianism was still far from arising, the argument of the differences in the ‘shared ways of life’ was already used to object to codification processes. The reader will recall Carter’s defense of the American common law against Field’s project of civil codification, based on the idea that while codifications only express the will of the legislator, common law spontaneously arises from popular ideals of justice, which are considered to be ‘national’ (although it has already been pointed out that the import of this Savignian theme in the particular American context led to several inconsistencies in Carter’s argumentation).

In other words, communitarian theories cannot be consistently used to defend national law, unless one intends to qualify the ‘relevant unit’ of community as a nation. This is what in particular liberal nationalist theories do. The price to be paid is, of course, the concealing of intra-national differences, obtained through the argument of the preponderance of the ‘cultural’ identity over all other possible forms of multiple allegiances.

III.2.2.2. Nationalist perspective

While communitarians speak generally of a ‘community’ as bearer of specific conceptions of justice, it is liberal nationalists who more precisely demarcate the concept of community and maintain that ‘the scope of social justice should be limited

175 JM Smits, ‘Multiculturalisme en Europees privaatrecht’, at 291.
by the boundaries of national political communities’. The first chapter has
highlighted how liberal nationalism derives a ‘morality of partiality’ (that is the
political and ethic justification for a favorable treatment towards co-nationals) from
the idea that justice is a national concept. In this sense, Miller argues that – given that
nationality is the main source of solidarity – a political order that considers social
justice as a value to be pursued should necessarily be national. Unlike anti-nationalist
liberals like Hayek, who conceived of social justice as a dangerous ‘mirage’ that
would have opened the path to totalitarianism, liberal nationalists like Miller indeed
acknowledge justice a very important role in the organisation of society. Given the
idea that solidarity is only possible within a national community, this position leads to
the conclusion that a state should better be national, for the own sake of social justice:
‘Social justice will always be easier to achieve in states with strong national identities
and without internal communal divisions’.
This position is justified on the basis of a two-fold argument: on the one hand,
nationality is the most important source of identification for people, so that a genuine
sense of solidarity will naturally arise only vis-à-vis co-nationals and, on the other
hand, different nations have different conceptions of what is just.
As to the first point, Miller praises communities based on nationality, noticing that

‘The community that is formed in this way becomes a natural reference
group when people ask themselves whether the share of resources they
are getting is fair or not. They compare themselves primarily with
fellow members rather than with outsiders when thinking about
whether their income is too low or whether the educational
opportunities available to their children are adequate. […] Sometimes
our sense of justice may be more forcefully engaged by distribution in
smaller units such as workplaces, but it is very hard to imagine this
happening within units larger than nation-states. A Spaniard who feels
that he is being underpaid may be comparing himself with other
Spaniards generally, or with other workers in his factory or village, but
he will not be comparing himself with Germans or Americans, say’.

Turning to the second aspect, Miller criticises in particular the idea of a global or
trans-national justice, as it endeavors to reproduce, on a supranational level,
distributive mechanisms that can only work within national communities. Once
political communities are organised on a national basis, particular schemes of justice
will be applicable in that context but not outside it; in this sense, adopting Rawls’
starting point, it is almost as if each country had ‘an original position of its own’.

‘[N]ational political cultures include a range of shared understanding
that form an essential background to principles of social justice. As I

177 D Miller, *On Nationality*, at 32.
178 D Miller, *On Nationality*, at 96.
have shown, the idea of social justice presupposes that there is agreement both about the basis on which people can make just claims to resources and about the value of the resources that are being distributed. [...] Because these shared understandings are so easily taken for granted within national communities, we may overlook the difficulty involved even in specifying what distributive justice would mean across such communities. Finally, for social justice to become an operative ideal that guides people’s everyday behavior, those concerned must have sufficient assurance that the restraint they show in following fair principles and procedures will be matched by similar restraint on the part of others. [...] Nation-states can help to provide such an assurance’.

The whole theory combines communitarian relativistic and tolerance thesis with a basic assumption: ‘National identities tend to create strong bonds of solidarity among those who share them, bonds that are strong enough to override individual differences of religion, ethnicity, and so forth’. As already discussed, this is the core of the nationalist theory of identity, the idea, in other words, that the identity of a person is chiefly determined by his national belonging. Although people can develop different kinds of moral bonds, these prove to be of a second range when compared to bonds based on national identity. The theoretical reason behind this assumption seems to be a ‘primordialist’ conception of the nation, looked upon as an extended family: where people share a common ancestry and are seen as members of the same family. It naturally follows that among them particular kinds of moral obligations should exist, similar to those keeping families together.

III.2.2.3. Fortune of communitarian and nationalist conceptions

The communitarian and nationalist suggestion that the idea of justice is determined primarily nationally is particularly widespread in political science: it is actually amazing how the nationalist principle ‘somehow creeps into apparently universalist theories by the back door’. In this sense, the most remarkable example is represented by the thought of John Rawls. Even though Rawls’ celebrated liberal theory of justice gives the impression of being applicable generally to all peoples and countries, this is not meant to be a universal proposition. Rawls himself strikingly admits that ‘[t]he boundaries of these schemes are given by the notion of a self-contained national community’. What is more, his conception of a national community is an astonishingly archaic one, much more ‘primordialist’ than those adopted by nationalists like Miller and Tamir themselves: the community is mainly closed and self-contained; ‘We enter it only by birth and exit only by death’.
conception is more difficult to reconcile even with a theory of constitutional patriotism than Miller’s theories are. Moreover, unlike liberal nationalists who have made a remarkable effort in this sense, Rawls does not even attempt to give a theoretical justification for the national narrowness of his theory: the fact that his theory of justice can work only within a national community is taken for granted without being questioned.\(^{187}\) Outside of the nation, on the other hand, an international conception of justice will only affect nation-states but not also citizens of those political communities.

Despite such limits, Rawls’ view is generally regarded as the basis for a universal theory of justice. The reason why such feature of Rawls’ system was not detected by many of the commentators involved in the discourse on justice is that, according to one view, most of them ‘share the same unconsidered assumptions’ of Rawls.\(^ {188}\) This is indeed very likely, as in particular during the 1980s communitarian theories – of which liberal nationalism appears to be a specification – were quite successful and spread in academia and politics. Rawls himself has been influenced by thinkers such as Sandel, MacIntyre and Walzer, and elaborated his theory further in the attempt to accommodate the communitarian critique to his ideas of ‘original position’ and ‘veil of ignorance’, accused for being unrealistic abstractions insensitive to cultural specificities.\(^ {189}\)

All this considered, it is not surprising that even within the realm of legal studies, several scholars concerned with the issue of social justice have ended up embracing the idea that social justice – for several reasons – can be better achieved at a national level. Though this view is dominant nowadays, it remains nonetheless philosophically questionable and alternatives are imaginable.

### III.2.2.4. Cosmopolitan perspective

Although it is true that mechanisms of social justice have been historically employed in particular within nation-states, the idea that transnational forms of justice are per se impossible is controversial. In the first place, the theoretical justification of a nationalist conception does not stand the criticism of ‘modernist’ theories of nationalism: if nations are considered to be cultural artefacts or pure ‘imagined’ communities, the idea of the extended family appears to be pure nation-building propaganda, so that the whole idea that solidarity can be naturally felt only towards a co-national is undermined. In the second place, theories of justice that are not limited

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\(^{187}\) This aspect of Rawls’ theory is critically discussed by M. Canovan, *Nationhood and Political Theory* at 32 ff. At 33 she writes: ‘Given the generality and abstraction of Rawls’ approach, one might reasonably expect that political frontiers, with all their implications for differential rights and benefits, must be one of the main sources of injustice with which he is concerned. However, this expectation is disappointed. Not only does it eventually emerge that Rawls is assuming for the purposes of his theory ‘the notion of a self-contained national community’; more seriously, he makes no attempt to justify this concession to sheer contingency or to explain why co-nationals should have special claims upon one another whereas (for example) fellow members of a superior caste do not. […] Evidently the existing borders of states are simply given; within the boundaries of the US, citizens are to live together on terms of fair cooperation, but no explanation is given why the moral relations between individuals inside those borders should be different from their relations with individuals who happen to be outside. This omission is all the more striking because Rawls reiterates the principle that mere good fortune is not a sufficient justification for social privilege’.

\(^ {188}\) M. Canovan, *Nationhood and Political Theory*, at 33.

Arguments against denationalisation

to nationally constituted communities have already been elaborated. These theories share a cosmopolitan perspective, inasmuch as they assume that people should be considered not as nationals – and distinguished on the basis of national, social or other collective categories – but rather as persons.\textsuperscript{190}

Inspired by these considerations, political philosophers have challenged the nationalistic assimilation of collective and personal identity and subsequently started speaking of forms of international and global justice, whose first aim is the eradication of global poverty.\textsuperscript{191} Regardless of its practicability, this attempt is philosophically quite interesting, for thus far transnational theories of justice did not manage to pierce the veil of the nation and only contributed to a ‘moralisation’ of international relationships. A non-nationalist theory of justice would possibly imagine a sort of ‘international original position’ to which all nations would agree and that could serve to derive a standard of fairness that could guide the relations between nations rather than citizens (international justice);\textsuperscript{192} nevertheless it is evident that this would only serve to give (quite minimalistic) standards of justice in public international law and not to create direct links between people across nations,\textsuperscript{193} coherently with a statist and nationalist view of the world order.\textsuperscript{194} Theorists of global justice – most of whom generally describe themselves as cosmopolitans\textsuperscript{195} – on the contrary aim at a theory that can directly reach private citizens without passing through the state.\textsuperscript{196} In this sense, it would be possible to affirm, at least at a theoretical level and without considering the viability of such solution on pragmatic grounds, that even citizens of rich countries have solidarity obligations towards citizens of poor countries and not only – as liberal nationalists seem to imply – poor co-nationals. Such obligations can only be justified if one accepts the idea that there is a ‘good’ that is basic or universal enough to be valuable for every human being, for the mere fact of having the ‘identity’ of human being and regardless of national or community ties.

However, such a cosmopolitan theory of justice which is constructed upon these premises is hardly employable to create standards of social justice applicable in a more restricted international context – as the European continent can be – in which

\textsuperscript{193} The point is clearly summarised by C Beitz, ‘Rawls’s Law of Peoples’, at 694-695, opposing Rawls’ model to cosmopolitanism: ‘Imagine two societies, each satisfying principles of liberal justice, in a world that complies fully with the Law of Peoples. The worst-off representative person in the first society is worse off in absolute terms than the worst-off person in the second society. According to the Law of Peoples, once we are assured that each society’s institutions are just, there is nothing further to be said. According to the cosmopolitan view (or anyway a plausible interpretation of it), the residual inequality is an injustice, or at least might be so under certain conditions — for example, if it were produced by aspects of the global basic structure and if there were a feasible strategy available to improve the position of the globally worse-off person — and therefore requires remediation.’
\textsuperscript{194} ‘La differenza tra l’approccio globale e l’approccio internazionale è data dal fatto che la seconda prospettiva è ancora portatrice del retaggio statalistico del diritto internazionale della pace di Westfalia, anche se il diritto internazionale attuale include come soggetti sia gli individui, sia gli stati, sia altre organizzazioni di varia natura’, I. Trujillo, \textit{Giustizia globale. Le nuove frontiere dell’uguaglianza} (Bologna: Il Mulino, 2007) at 126.
\textsuperscript{196} A Sen, ‘Justice across Borders’, at 40-41.
no such considerable differences exist in the welfare of people and the basic needs of all people are generally acknowledged and already taken care of by the nation-state. Indeed, the values that are truly universal are particularly basic: for instance, a universal standard of justice can be identified in the idea that every human being should have enough food, but it is hard to isolate a universal standard of, say, consumer protection. This marks a criticism which is not new in political philosophy and was directed in particular to the universalisation of social rights. Specifically, it suffices to mention Hayek’s sarcastic remark concerning the inclusion of a ‘right to periodic holidays with pay’ in the UN Universal Declaration of Human Rights of 1948:

‘The conception of ‘universal right’ which assures to the peasant, to the Eskimo and presumably to the Abominable Snowman, ‘periodic holidays with pay’ shows the absurdity of the whole thing. Even the slightest amount of ordinary common sense ought to have told the authors of the document that what they decreed as universal rights were for the present and for any foreseeable future utterly impossible of achievement’. 197

Hayek’s distrust toward any allusion to social justice or social right leads him to employ – again – an argument which is similar to those employed by the theorists of several schools of thought: firstly Romantics, nationalists and contemporary communitarians and later, more surprisingly, postmodernists and even exponents of the critical legal studies movement. 198 However, an answer that could be given to this criticism is that even the right to paid holidays is just the particular expression, probably formulated in overly Western-centric terms, of the more universal right to rest.199 This right would not meet with objections even if granted to the Abominable Snowman as well. In this sense, universal rights have application and forms that can vary in different contexts. But in saying this, we end up once again depending on nations as political communities in which those general and universal ideas have to be concretised and obtain a specific meaning according to particular circumstances – similarly to what the Court of Justice of the European Union has sustained in the Omega case.200 No wonder such a weak understanding does not alter that much and can even be reconciled with nationalist theories, especially considering that the latter do not simplistically plead for a sort of national egoism and insensitivity to the most basic needs of non-nationals – as the principle that all human beings have equal moral dignity is widely accepted201 – but rather affirm that, although there are also obligations towards non-nationals, these are less strong than those towards fellow

198 M Barberis, Europa del diritto, at 177.
199 M Barberis, Europa del diritto, at 177.
200 Omega, C-36/02, Para. 31.
201 If this is the moral claim of a ‘weak’ version of cosmopolitanism, that is that ‘[t]he various good and bad things that can happen to people should be valued in the same way no matter who those people are and where in the world they’, then ‘we could safely say that we are all cosmopolitans now’, D Miller, National Responsibility and Global Justice, at 28.
nationals. In Miller’s view, obligations towards non-nationals are indeed quite thin and can be summarised in two principles: *protecting basic rights* and *preventing exploitation*. All this reinforces nationalists’ convictions that an international (similar to the model of Rawls’ law of peoples) or weak *global* justice is not impossible, but that at the same time *social* justice necessarily requires a more restricted political community. On the one hand, if all of these premises are true, the use of a theory of international justice for the purposes of the harmonisation process in Europe is quite disappointing, as it does not help elaborating standards of social justice that could be applicable in all countries and indirectly ends up confirming the strength of particularistic conceptions. On the other hand, a theory of global justice based on the idea of multiple identities can basically challenge nationalistic interpretations and lead to the conclusion that differences in the conception of justice among countries are not as important as those *across* countries.

The pessimistic conclusions on the possibility of elaborating an extensive theory of global justice can indeed be drawn only if one is willing to build a global theory of justice on the basis of the most basic ‘identity’ shared by people regardless of their nationality: their human nature. Since this element is extremely minimalistic, it is no wonder that even the contents of a theory of justice are minimalistic as well (and thus of limited utility for the citizens of European countries in their reciprocal relations). On the contrary, the idea of plural identities allows us to imagine a potentially unlimited number of different and sometimes even conflicting allegiances: if it is true that all people share a common identity of human beings, it is also true that many other people share identities as Englishmen, women, feminists, workers, consumers and so on. These identities are not necessarily linked to specific geographic territories, ‘thus collectivities of many different types may be invoked as bases of commitments and obligations that reach across national borders’. If one acknowledges this aspect, the idea that justice can only exist within certain nation-states has to be rejected, as it would imply the limitation of the idea of justice to a particular national identity regardless of all other allegiances.

In this sense, the implications for legal studies would be that instead of looking at the divergences and convergences between conceptions of justice in the different member states – assuming that these are homogeneous within those countries – it would be useful to compare the ‘ideas of justice’ of different political, social or economic actors. In this sense, it is conceivable that the same idea of justice that is normally presupposed by the legislation of a particular country will be shared – or opposed – by different subjects sharing the same non-national identity in different countries regardless of their nationality.

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202 D Miller, *National Responsibility and Global Justice*, at 28-29: ‘A world in which there is a starving peasant in Ethiopia is to that extent as bad as a world in which there is a starving peasant in Poland, all else being equal. The fate of both these people makes a claim on us. But this does not by itself settle whether, as moral agents, we have an equal responsibility to respond to both claims. The fact that both cases of starvation are equally bad does not tell me whether I have more reason or less to go to the aid of the Ethiopian than to go to the aid of the Pole. On the contrary, as an agent I may well have an obligation grounded in moral reasons to act to help one of these people before the other - to take a straightforward case. I may have entered an undertaking to support food aid to Ethiopia. This obligation cannot be defeated merely by pointing out that the condition of both people is equally a matter of moral concern.’


204 A Sen, ‘Justice across Borders’, at 42.
III.3. The cultural argument

The usual argument employed by the European Commission to foster the process of Europeanisation is that some differences in the private law systems of the member states represent a hindrance to the establishment of a well-functioning internal market, so that, provided that there is an appropriate legal basis for the European institutions to intervene, these should be eliminated. The Court of Justice already ruled on the issue in order to define better what the legal basis is, specifying that the mere existence of a difference that can theoretically hinder the market is not in itself a sufficient reason to legitimise an action by the European institutions. The position of many opponents of Europeanisation goes beyond such perspective. In their views, there exist differences that – even if they could represent an obstacle to the establishment of the common market – are still valuable and should therefore be preserved. What is the factor that makes a rule resistant to Europeanisation even if it can hinder the establishment of a well-functioning market?

The concept of culture is of particular importance in this regard. According to the cultural argument, some of the differences that can be found in the legal systems of the member states are not accidental but rather expression of different national cultures and in this sense, if it is true that culture is a value deserving respect, the European institutions should not extend their harmonising actions to those culturally determined aspects. To make a paradoxical example, one of the reasons why consumers prefer not to make the most of the common market and purchase goods from foreign businesses is presumably that they do not have sufficient knowledge of foreign languages; it would therefore be economically efficient to fight linguistic diversity and promote the use of a unique language in Europe at least for economic transactions, but – imagining for a moment that this were possible – this would be highly detrimental to that cultural richness which is seen as a source of pride for Europe. In the same way, as cultural manifestations, also legal differences – often in the specific guise of national codifications – should not be contrasted but rather protected, even if efficiency concerns called for unification.

At the basis of the cultural argument lie two intertwined convictions. In the first place, cultural plurality is a value in and of itself that should be conserved, while the aims of the European institutions are a threat to such a cultural diversity. The implication is that Europeanisation becomes undesirable, for legal harmonisation would amount to disrespecting local cultures. In the second place, culture ‘comes before law’: since law is so deeply rooted in the cultural dimension of a nation, plans for Europeanisation will necessarily mean resistance due to the difficulty of ‘transplanting’ law in a completely different cultural context. The implication is that Europeanisation is more than undesirable, simply impossible.

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205 Most recently, see COM(2010) 348 final, 1.
206 ECJ Tobacco (C-380/03)
207 ‘Unfortunately, a common law requires common statutes, principles and mentalities, but also a unique culture of thought. Fortunately, efficiency is too weak a flag to break the rich European cultural diversity, expressed through different languages, thought systems, mentalities and values, which even get over a unique law’, S. Sánchez Lorenzo, ‘What Do We Mean when We Say ‘Folklore’’, at 219.
As the previous sections have shown, even other arguments eventually reveal to be based on the cultural argument itself; so for example the economic argument is founded on the assumption that preferences between countries will diverge as they are rooted in different cultures, which makes the idea of forced harmonisation – as a form of centralisation – inefficient. Also the different ideas of justice we can find in Europe and that could hinder the process of harmonisation are one of those aspects that contribute to making the ‘culture’ of a given nation, since ‘cultural diversity is entwined with issues of social justice’;\(^\text{208}\) for instance, ‘[w]hat in England is regarded as a consequence of the rule of law, of victim protection or of social justice may be regarded differently in Germany because these ideas are strongly related to different cultural values’.\(^\text{209}\) Both assumptions upon which the cultural argument is based need to be clarified; in other words we have to address why cultural pluralism is valuable and what the relation between law and culture is.

### III.3.1. Culture as a value

In recent decades, the argument that plurality of cultures is a value in itself became popular as an important aspect of post-modernism. Post-modernism is the vague denomination that is given to a series of cultural trends which share an emphasis on the importance of plurality and cultural diversities, in opposition to the abstractness and uniformity of post-War modernism.\(^\text{210}\) According to this line of thought (or maybe more precisely, according to this sensibility), differences are considered per se positive, as an expression of the variety and imagining capacity of humans.\(^\text{211}\) Cultural diversity is praised in and of itself and regardless of the concrete contents of a given culture, and its protection is assumed as a means for guaranteeing human ‘well-being’\(^\text{212}\) and international peace,\(^\text{213}\) while the so-called ‘cultural rights’ are declared ‘an integral part of human rights, which are universal, indivisible and interdependent’.\(^\text{214}\)

Similar considerations have also entered jurisprudence, in particular thanks to the American movement of critical legal studies. But the post-modernism which is conveyed by scholars inspired by the critical legal studies movement can take a very

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\(^{212}\) A Łopatka, ‘Cultural Diversity and Cultural Human Rights’ in G Doeker-Mach and KA Ziegert (ed), Law and Legal Culture in Comparative Perspective (Stuttgart: Franz Steiner Verlag, 2004) at 216: ‘As biological diversity is a common heritage of mankind, the preservation of cultural diversity is necessary for the well-being of humanity’.

\(^{213}\) See the UNESCO Universal Declaration on Cultural Diversity of 2001.

\(^{214}\) UNESCO Universal Declaration on Cultural Diversity of 2001, art. 5.
different form in Europe, where ‘post-modernism might become an easy legitimization of a status quo that is most of the time chauvinistic in the defence of the tradition of the nation state, of its locally produced law and of its local bar’.  

In Europe therefore post-modernism, which moreover remains a politically ambiguous denomination, contributes to the preservation of the legal status quo, in this sense displaying conservatism, which represents an interesting ideological twist, since critical studies in America generally developed as a progressive movement. Under post-modernism, the philosophical justification of the cultural argument can be identified. Supposedly, in the first decade of the new millennium, post-modernist thought has nonetheless entered a state of crisis due to a changed geo-political world scenario in which the aprioristic praise for diversity seems to have left space for a new desire of simplicity and certainty also in law. In Europe, nevertheless, the post-modernist argument of cultural diversity continues to be widely used, probably for the reason that in the context of the European Union, this is not a mere rhetorical argument but has some legal strength too.

It is known that the treaties bind the European institutions to respect of the cultural identity of the member states. While the Treaty of Maastricht focused on the respect of national identities, the Treaty of Lisbon has put even more emphasis on the cultural aspect in order to reassure European sceptics. The Treaty on European Union now reads that the EU ‘shall respect its rich cultural and linguistic diversity, and shall ensure that Europe’s cultural heritage is safeguarded and enhanced’ (Art. 2). This appears as one of those ‘political’ provisions that were determined by new trends of Euroscepticism and neo-nationalism and represents a vague, though important, counterbalance to the acquisition of competences by the European bodies. It is downright questionable whether legal diversity can be considered to fall within the scope of the provisions on cultural identities in the sense of the treaties, if only because the treaties elsewhere expressly and prominently consider the approximation of national legislations as one of their aims. But while it is disputable whether legal differences could represent a cultural value in need for protection, the inescapable vagueness of expressions such as culture makes it possible to conceive of law itself as an aspect of culture. In particular several critics of harmonisation like to remind us that ‘law is essentially a cultural product’, so that Europeanisation in certain areas of law would be not only politically undesirable but even legally impossible, given the provisions of the treaties. These provisions are indeed explicitly

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220 Title VII Chapter 3, TEU.
221 The lawyer who feels more confident with concepts that are clearly defined, anyway, would be glad to know that something resembling a legal definition of culture can be found in the UNESCO Universal Declaration on Cultural Diversity of 2001: in quite broad terms, culture is there ‘regarded as the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs’. The lack of any reference to ‘law’ in this list is evident.
222 S Sánchez Lorenzo, ‘What Do We Mean when We Say ‘Folklore’?’, at 200.
Arguments against denationalisation referred to by several authors to challenge the existence of an appropriate legal basis for the European institutions to unify private laws.223

Nevertheless, while no-one could seriously question that jurisprudence represents one of the most important manifestations of human culture, it remains actually harder to consider legal rules themselves as pieces of culture in need for protection: legal rules perform specific socio-economic functions and cannot be considered as something different, as pieces of ‘art’ without altering their original function. If this is true, the idea that plurality is per se something positive cannot be applied to legal rules. This would be indeed a merely ‘esthetic’ vision of law, that has to be rejected in light of the consideration, expressed by other scholars, that the result is all that matters: a rule need not be ‘beautiful’, but only ‘useful’.224

III.3.2. Interactions of law and culture

Less lyrically but probably more seriously, the relation between law and culture can be seen as a derivative one: law derives from the culture of a given society and in this sense it is linked only to that society. Although it can be artificial to consider legal rules as pieces of culture themselves, rules have been generated within a specific cultural context in which they found their reason for existence. So for example, Roman law would not have elaborated something like the actio de feris, which dealt with damages caused by wild animals extraneous to the Italian peninsula, if at a certain moment in history an increasing number of exotic creatures had not been imported from distant territories for the amusement of the rich Romans. Only a cultural-historical analysis reveals the deep raison d’être of that rule. Outside of those cultural contexts, there is furthermore the risk that legal rules will lose their original meaning. In this sense, there are rules, and differences between rules, that are ‘culturally conditioned’.225

The link between law and society was emphasised in particular under the influence of Romanticism and represented a fundamental theoretical element of the Historical School of Law. Hugo’s example of the link between regulation of monogamy and fertility of women can be recalled here. Generally speaking, the idea that there is a link between law and culture is neither new nor controversial in the history of thought. More recently, even comparative lawyers have emphasised the necessity of acknowledging the cultural context in which legal rules operate and ‘immerge’ in such a new dimension before any comparative research is undertaken.

223 C van Dam, ‘European Tort Law and the Many Cultures of Europe’, at 78; S Sánchez Lorenzo, ‘What Do We Mean when We Say ‘Folklore’?’, at 198.
224 G Alpa, ‘La competizione tra ordinamenti: un approccio realistico’, in A Zoppini (ed), La concorrenza tra ordinamenti giuridici (Roma: Laterza, 2004) at 48: ‘quasi che la pluralità di regole fosse di per sé un bene, un vantaggio, esprimeva un valore positivo, ed invece l’uniformità fosse di per sé un male, uno svantaggio, esprimeva un disvalore. Insomma, una concezione “estetica” degli ordinamenti che allieta lo sguardo del giurista come la pittura, la flora, la fauna, con i loro molteplici colori, allietano lo sguardo di chiunque, in un mondo che sarebbe molto più noioso se quella dimensione fosse dissolta dalla uniformità. Nella realtà delle cose, la diversità o l’omologazione sono apprezzabili per i contenuti che esse recano, piuttosto che non per le differenze o le convergenze che esse esprimono. In altri termini la norma non è bella in sé, ma è utile per la funzione che assolve. Può esser bella la forma letteraria con cui è redatta, può affascinare il suo ritmo, come Stendhal era affascinato dallo stile del Code Napoléon, ma non per il solo fatto di essere diversa da un’altra. Siamo in un’altra dimensione, che qui non rileva. Mentre ciò che rileva è il risultato’.225
However, this dependence of law on society has hardly been considered a threat _per se_ to possibilities of legal transplants or even unification, and indeed there does not seem to be a necessary contradiction between those: as even the classic textbooks of the discipline report, the necessity of considering the cultural background of legal rules is part of the methodology of comparative law, while legal unification is one of its possible functions. So for example, the leading German comparative lawyer of his time, Ernst Rabel was aware of the fact that foreign law could be understood only taking its socio-economic background in consideration, but this did not prevent him from laying the foundations of a sales law regulation that could bind very different states transnationally.

A certain degree of tension nonetheless exists. As projects of unification and supranational harmonisation have more recently become more audacious, the unquestionable link between law and culture has been considered to be so close-knit that it impedes rules to travel outside of the culture that generated them. As they are culturally ‘constrained’, legal rules cannot allegedly be transferred from a context to a different one without undergoing processes of alteration, giving rise to something that, in the European context, has been termed ‘legal irritants’. These problems are not new and a vivacious academic debate has started as to the possibility of successful legal transplants. In the American context this debate focused on the general theory of comparative law, where in particular the ideas of Watson and Friedman were discussed. The same terms of this dispute cropped up later in the European context, as the activity of the European institutions confronted legal scholars with a myriad of legal transplants every year. These transplants are even more problematic, as they can be compared to ‘artificial transplant organs’ rather than ‘human’. In this context, the argument based on legal culture has assumed a new connotation.

### III.3.2.1. Transferability thesis

The idea that legal rules can be borrowed, transplanted, copied, supra-nationally imposed and so on – in less metaphorical terms transferred – from one country to another has been sustained by several scholars, while historians can straightforwardly find confirmations for this thesis. As generally understood, Watson sustained that legal rules can be transplanted, noticing that even transplanted rules do not show particular differences from one country to another due to diverging cultural conditions. According to this viewpoint, it can be in the end seriously questioned whether, as ‘historically conditioned their origins might be’, legal rules have some ‘inherent close relationship with a particular people, time or place’. The link between law and people or time (Volksgeist and Zeitgeist) would appear as a mere

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229 C van Dam, ‘European Tort Law and the Many Cultures of Europe’, at 76.
Romantic hypothesis with no anchorage in reality. What is more, while cultural factors may serve to explain why a given foreign rule is borrowed in some country, Sacco points out that all nations have occasionally preferred non-historical models to solutions hallowed by national culture and tradition. Not even cultural differences in the mentality of those who work with legal rules seem to represent a serious obstacle for mutual comprehension, unlike diversities in rules of practical relevance: ‘Commercial lawyers and businessmen in Scotland and England do not in general perceive differences in habits of thought, but only – and often with irritation, differences in rules’. By the same token, one can wonder whether in the world of the large international law-firms a distinction such as the one between a classically Roman concept like *causa* and the common law consideration really matters. On the basis of this disillusioned view on the relation between law and culture, Lando suggested the possibility that legal unification may be achieved in the European context even through imperative instruments, including a supra-national civil code: according to this understanding the cultural argument does not stand on the way towards harmonisation, for the mere reason that ‘[c]ontract law and commercial law are not folklore’.

In conclusion, the existence of a link between law and culture is not radically denied by the advocates of codifications, but it is not seen as an unbridgeable obstacle in processes of reduction of the legal diversity: even Thibaut was well aware of the argument founded on the ‘Geist des Volkes’ – based on the thesis of Montesquieu and subsequently made famous by Savigny – nonetheless these arguments were considered insufficient and too vague to seriously object a precise political proposal as a civil codification for Germany. In the same way, the *Volksgeist* theory did not manage to convince those lawyers who were used to work with statutes adopted on the model of foreign legislation – first and foremost the French codification – who could easily appreciate how those theoretical concerns were disproportionate in relation to the reality of practice.

**III.3.2.2. Non-transferability thesis**

In the American context, it was in particular Friedman, the leading exponent of the *Law and Sociology* movement, who highlighted how law reflects the particular characteristics of society in a given period and consequently evolves over time together with those social conditions. This idea does not imply that legal borrowing is *de facto* impossible, but quite on the contrary seems to suggest that imported law is

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235 This aspect is dealt with by S Leible, ‘Marktintegration und Privatrechtsvereinheitlichung’, at 37.
236 *See supra* second chapter on ‘Nationalism’, ‘Diffusion and impact of the Volksgeist theory. In other European countries’.
normally adapted successfully. In this respect, indeed, ‘Friedman is as optimistic as Watson concerning the extent to which legal transfers take place successfully’. A more radical criticism has been later directed to the transferability thesis by the French-Canadian Pierre Legrand, in a series of publications in which the link between law and culture is strongly emphasised and represented as an insurmountable obstacle to legal transplants. According to this view, culture determines people’s mentalities so that both the application of law and the drafting of supranational rules will always be filtered by the culturally determined mentality of the legal actors, while circulation of rules will not be possible without exposing these to substantive changes due to a series of obstacles mainly rooted in a diversity of mentalities. Such obstacles concern in the first place the problem of legal translation and in the second place the impossibility for a concept – even if perfectly translated – to mean the exact same thing in two different contexts. Legrand resorts to the famous example made by the linguist Benjamin, according to whom the two words meaning ‘bread’ in German and French do not actually mean exactly the same thing in those languages, because of the very different set of ideas, images and expectations that people in different cultural contexts bind to those words. If this is true in relation to simple concepts like ‘bread’, the implications for the much more complex legal system would be enormous.

In reality, the idea that black letter rules can be easily transferred while the transplant of ‘law’ requires bigger effort is widespread in legal studies. However, according to Legrand’s view, processes of legal transplants and legal harmonisation are radically impossible. If law is taken away from the cultural context in which it was generated and to which it is bi-univocally tied and implanted into an alien context, there is a high probability that it will end up meaning something completely different from what it meant in the original context. Surely, the black letter rules can be applied to different contexts, and the lawyer involved in a simple comparison of written rules will not notice anything particular, but in reality the transplant is likely to lead to explicit resistance, rejection or, even more insidiously for the legal unity, to diverse interpretations in different contexts. In this perspective, legal culture has become the most important and undetermined of those veiled formants defined as crypto-types.

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238 D Nelken, ‘Towards a Sociology of Legal Adaption’, at 13. Also according to R Cotterrell, ‘Comparative Law and Legal Culture’, at 719, ‘Watson’s view of the nature and effects of legal culture is much closer to Lawrence Friedman’s than to that of most contemporary cultural comparatists’, while the main differences can be imputed to the fact that Friedman is mainly concerned with the ‘external’ legal culture of the population, while Watson with the ‘internal’ culture of the lawyers, which leads the latter to ignore some sociological aspects.
239 P Legrand, ‘The Impossibility of Legal Transplants’, at 117.
240 Discussing the nature of the reception of Roman law in the German territories, already F Wieacker, A History of Private Law in Europe: with particular reference to Germany (Oxford: Clarendon) at 93, explains that ‘The idea of “reception” may also lead one to think, quite wrongly, that foreign law can somehow be taken over as a whole without at the same time being digested and thereby altered in the process. This fallacy results from the simplistic view that law is a kind of material substance which one can “hand on” and “pick up”, whereas in fact it is a multilayered cultural interfusion of great complexity and variability, an amalgam of group processes, historical and social, intellectual and psychological’.
III.3.3. Law and culture in the European context

In general comparative law, the theories on the cultural origin of law warn the comparative lawyer that even when legal rules share the same wording it is necessary to look at different factors – or formants, in the terminology developed by Sacco\textsuperscript{242} – to have a realistic look on the functioning of a legal system. In the light of the debate on Europeanisation, the idea casts more serious doubts on the ‘top-down’ harmonisation which has been pursued so far – as this is mainly concerned with the unification of legislations leaving the other ‘formants’ untouched.

The strongest use of the cultural argument to reject Europeanisation aims has been made by Legrand himself, whose position coherent with his premise as to the impossibility of legal transplant is amply known and does not require a new account, while it will here suffice to mention his ‘political’ criticism to the state of comparative law in Europe. According to this viewpoint, since there is no specific need for suppressing differences just for the sake of universalism, the intents of the comparative lawyers aimed at discovering the existence of an ancestral ‘common core’ of different legal orders seem biased, since authors ‘are expected to subscribe to a script of underlying unity and transcendent universalism where particularism is assumed to be secondary and fated to play but a peripheral role in the future of human affairs’.\textsuperscript{243} Adhering to such a ‘script of transcendent universalism’ is required to present oneself credentials as a good European,\textsuperscript{244} in other terms a form of ‘politically correctness à l’européenne’.\textsuperscript{245} Comparative lawyers in Europe, in this sense, have deliberately chosen not to see what seems manifest if one only looks at the cultural aspects of law: legal orders are not even converging.\textsuperscript{246} In this sense, national legal cultures are jeopardised by the harmonisation process, which is not innocuously aimed at removing positivistic obstacles in the path towards the convergence of legal systems towards a shared legal culture.

III.3.3.1. Normative implications

Disregarding culture would mean disrespecting national identities. As culture is something important for the very identity of communities, ‘the gains in efficiency and welfare achieved by a single market should always be balanced against the threat to meaning and identity posed by disruption of communities’.\textsuperscript{247} Harmonisation implies a reduction of diversities and if one assumes that diversities are something valuable to a certain extent even protected by the treaties – an asset rather than a burden\textsuperscript{248} – a considerable tension arises,\textsuperscript{249} since as even advocates of legislative Europeanisation

\textsuperscript{242} R Sacco, ‘Formante’, 438-442.
\textsuperscript{244} P Legrand, ‘On the Unbearable Localness of the Law’, at 66.
\textsuperscript{245} P Legrand, ‘On the Unbearable Localness of the Law’, at 66.
\textsuperscript{247} H Collins, ‘European Private Law and the Cultural Identity of the States’, at 358.
\textsuperscript{248} C van Dam, ‘European Tort Law and the Many Cultures of Europea’, at 80.
\textsuperscript{249} H Collins, ‘European Private Law and the Cultural Identity of States’, at 353.
have to acknowledge ‘you cannot have both unity and diversity, and that also holds true of European civil law’, at least in theory. Also sociologists have approached the cultural dimension of the process of European integration from the conviction that unification can be hampered by the existence of different and contrasting values. In this sense, the normative conclusion drawn by opponents of Europeanisation who employ the cultural argument is quite radical: legal harmonisation in Europe should or even could not extend to those aspects of law that are expression of national cultural specificities. ‘If private law is a part of the culture of each Member State, this assumption – together with the proportionality principle [...] – will mean a limit for the feasibility and scope of the unification of European private law’. Authors adopting a more moderate view also highlight that a possible contrast between harmonisation and multiculturalism may reveal the flaws of Europeanisation, whose plans should be more respectful towards cultural differentiations.

As long as it refers to rules that are expression of ‘cultural specificities’, the idea that Europeanisation should not extend to culturally constrained rules surpasses the legal discourse and impacts the more general political debate on Europe. After all, the idea of a limitation of the competences of the European institutions to merely economical rather than political subjects was, and to a certain extent still is, a well-defined political direction. Coherently with this inspiration, it was originally claimed that in particular those areas of law that are more evidently ‘political’ had to be excluded from harmonisation. In this sense, it was considered that family law and – outside of the realm of private law – criminal law had to remain untouched by European institutions. In this regard, the concerns of the Eurosceptic and the plans of the European institutions were unlikely to collide, as the aim of the Community was initially just to establish an economic market, in which aspects of family and criminal law were not of primary importance. Expressions like European family law and European criminal law were discussed only years later mainly in the academic environment, and only more recently aroused a more concrete interest in the European institutions, turning in particular into rules concerning conflicts of laws and civil procedure. Thus, it comes as no surprise that the cultural argument has been expressed in particular in the discussions of family lawyers, among the most of whom the conviction as to the unbreakable link between law and culture – or even religion – is particularly widespread, while the European institutions have generally accepted


\[252\] S Sánchez Lorenzo, ‘What Do We Mean when We Say ‘Folklore’?’, at 198.

\[253\] R Sefton-Green, ‘Multiculturalism, Europhilia and harmonization: harmony or disharmony?’, at 66: ‘multiculturalism does not always, nor necessarily, clash with harmonization. However, when multiculturalism does clash directly with harmonization, particularly in the case of complete harmonization, this may indicate that such harmonization is not the right model in the EU, or that we are not yet ready for it.’. Insisting with harmonisation in these cases could on the contrary lead to ‘legal nationalism’, informally intended as synonym of conservatism.


\[255\] See for example, Commission, Green Paper on Succession and wills, COM(2005)65.
this assumption and respected the consequence thereof.\textsuperscript{256} Against this background, the limits of private law Europeanisation should appear quite clear, with an exclusion of family law and an inclusion of contract and commercial law, which, again, are not ‘folklore’.\textsuperscript{257}

\section*{III.3.3.2. Distinguishing cultural and technical aspects}

The suggestion that aspects of the legal orders that are more clearly linked to national culture should not be regulated by non-national institutions echoes the economic argument that only ‘facilitative’ aspects of contract law should be harmonised but not also others as to which important political divergences can still exist. However, in the same way as it was unclear why only certain contract law rules had to be considered as neutrally facilitative, a hypothetical distinction between ‘culturally determined’ and ‘neutral’ legal rules – the former falling outside of the competences of the European institutions and the latter being easily modifiable – proves to be tricky. Political scientists also have highlighted that the idea of a distinction between economic matters – to be demanded to the European level – and cultural ones – prerogative of member states – is imaginable in theory but still highly problematic.\textsuperscript{258} In jurisprudence, such a clear-cut distinction has fallen apart together with the distinction between political and technical issues of private law. If contract law rules are politically determined then also cultural factors play an important role in those, as they lie behind the political choices. The border between cultural and neutral aspects becomes even more blurred adopting a political and ideological understanding of legal culture.\textsuperscript{259} Of course, an emphasis on the political nature of legal culture helps bringing clarity to the otherwise extremely nebulous concept of culture, nonetheless, it shows how behind a resistance to Europeanisation may lie a mere political concern of power-distribution between the different levels of a multi-layer system.

Several authors have specifically highlighted how apparently technical aspects of legal orders are on the contrary coherent to specific cultural characteristics of particular countries. This concerns all branches of private law: labour law can easily be influenced by the pressure exercised by the crowd, but also apparently technical contract law rules such as the unilateral termination of the contract are culturally constrained inasmuch as they are coherent with a set of values and beliefs typical of nation-states.\textsuperscript{260} Tort law is no exception, and mechanisms such as strict liability remain controversial issues as to which there is allegedly no convergence in European legal systems, as a consequence of the fact that ‘in many respects national private law, for example victim protection in tort law, is such a manifestation of national culture’.\textsuperscript{261}

\begin{footnotes}
\item[260] R Sefton-Green, ‘Cultural Diversity and the Idea of a European Civil Code’, at 84. Also the Danish government, in its response to the first communication of the Commission highlighted that ‘closely linked with the different cultural and legal traditions of the Member States, which must be kept in mind, particularly when considering any harmonisation’ (para 14).
\item[261] C van Dam, ‘European Tort Law and the Many Cultures of Europe’, at 76.
\end{footnotes}
In other terms, given a broad understanding of culture that includes also political factors, it becomes impossible to distinguish between political and technical as well as culturally oriented and neutral aspects of the legal system. All rules are rooted in a certain legal tradition or have been adopted to respond to particular needs that cropped up in a society in a particular moment, so that even cultural identity ‘cannot be limited conveniently to some non-economic sphere, leaving Europe a free hand to implement the single market’.\(^\text{262}\) Even more if one only considers that economic choices also are culturally constrained, since each member state ‘has explored and constructed through its laws and social practices a different interpretation of liberalism and market economy, so that any imposed homogeneity in private law would challenge the sources of personal identity of members of that society’.\(^\text{263}\) After all, the very idea of the *Volksgeist* explained the origin and development of the whole body of civil law and not only of family or criminal law.

Given the premise of the cultural origin of private law, the only coherent conclusion would be that the whole process of *forced* Europeanisation ‘top-down’ should be limited or completely abandoned, and in this perspective in particular the idea of a European civil code, which is the more radical (but still the less likely) form of Europeanisation one could think of, could only be considered Machiavellian\(^\text{264}\) or even diabolic.\(^\text{265}\) Of all the suggested forms of approximation of laws in Europe,\(^\text{266}\) the possibility of enacting a common civil code is indeed the option that raises the most criticisms from a law and culture perspective. It is in fact alleged that such an instrument would represent a political hazard: it would disrespect the cultural plurality of the Union and represent an arrogant act of legal imperialism, as it would authoritatively impose a dramatic change also on the English common law system.\(^\text{267}\) Nonetheless, even within the civil law family there is a concrete risk that the provisions of a code will reflect solutions which are typical to one specific country only. The prevalence of the German component within the networks in charge of drafting and evaluating a Common Frame of Reference is in this sense well-known and has already led to reactions from other countries aiming at a more important role in the Europeanisation process.\(^\text{268}\) The optional system of sales law, inasmuch as it does not replace national rules, on the contrary appears to be more respectful of cultural differences, so that even the Commission presented it as ‘an innovative approach because, in line with the principle of proportionality, it preserves Member States’ legal traditions and cultures whilst giving the choice to businesses to use it’,\(^\text{269}\) although this reassurance has not prevented several national parliaments from

\(^{262}\) H Collins, ‘European Private Law and the Cultural Identity of the States’, at 359.


\(^{264}\) S Sánchez Lorenzo, ‘What Do We Mean when We Say ‘Folklore’?’, at 219.


\(^{269}\) COM(2011) 636 final, at 12.
complaining about the non-compliance of the proposal with the principle of subsidiarity.  

III.3.3.3. Inescapability of national categories?

The implications of the cultural constraints thesis are particularly radical and put in question the very possibility of achieving a real uniformity: the supranational rules would easily conflict with the national rules inspired by different cultural values, giving rise to resistance or even a vivid ‘clash of cultures’. This eventuality becomes more concrete if one agrees with Legrand that to escape one’s cultural formation is radically impossible; one who has been formed as a German scholar, for example, will always be a German scholar even when he or she is entrusted to draft a supranational legal instrument, that he will probably make as abstract as possible unconsciously repeating the features of his own national codification.

Though expressed in perhaps excessively provocative terms that easily attract fierce critics, the thesis can avail itself of a series of factual elements that seem to confirm the existence of national biases. Whether one considers it an inescapable destiny to which one is doomed by one’s own culture or not, the impression that national actors try more or less consciously to steer the process of Europeanisation into a national direction is in fact strong. In the previous chapter the issue of the renationalisation of European law at the ‘political’ levels has been addressed and considered in terms of intention of advancing the national interest to comply with the principle of coincidence of national and political unit; but also legal scholars occasionally give the impression of trying to recreate their own national categories at the supranational level, so that one could speculate that, independently of more or less political concerns, it is really ‘mentalities’ that are nationalistically structured. So for example, in a vivid report from a famous conference in the Hague in 1997 in which international scholars gathered to discuss the possibility of a European civil code, Mattei depicts the distinguished speakers as chauvinistic advocates of their own national codes as a model for a possible supranational codification: the Dutch presidency willing to promote its already ‘cosmopolitan’ code, the French already convinced of the historical superiority of the Code Civil, the German persuaded that the general part of the BGB can still be valuable to a European Code and so on, with the exception of the English, it goes without saying, certain of the uselessness of a civil codification. Each delegate expressed loyalty to the stereotype others expected them to embody. The impression that even comparative lawyers involved in the process of Europeanisation of private law are in a way biased by their national background is shared also by Markesinis, who recalls the reaction of distinguished

270 See in particular the reasoned opinions of the English House of Commons and the German Bundestag concerning a draft Regulation on a Common European Sales Law for the European Union, 2011.
271 C van Dam, ‘European Tort Law and the Many Cultures of Europe’, at 80. and also H Collins, ‘European Private Law and the Cultural Identity of the States’, at 358.
German comparative lawyers to the proposal made in a conference in Paris to extend to Europe the French regime on traffic accidents.274

All these examples of ‘militant parochialism’, to quote Mattei, can be optimistically considered coincidences, or realistically determined by more complex reasons than just attachment to the own national categories as those who reported them seem to imply. However, in the perspective of Legrand’s cultural determinism, all these behaviours find a coherent and rational explanation which goes completely beyond a simple distrust of foreign law: those behaviours are rather culturally necessary. If it is true that legal mentality conditions every activity and choice, then German, French, English scholars simply cannot behave differently from how they do because such is the mentality they acquired growing up in a particular cultural context: once you formed yourself as a jurist studying the BGB, you simply cannot avoid noticing – perhaps loathing, perhaps being fascinated by – the a-systematic character of the English common law and vice versa.

III.3.3.4. Future convergence or eternal divergence?

In the end, the main reason why the process of Europeanisation should be slowed down or even stopped is that cultures in Europe are still too differentiated to be authoritatively brought together in a unique legal system: as Van Dam clearly summarised, ‘[p]rovided that cultural values are not converging, it can be submitted that legal systems are not converging inasmuch as they are the outward manifestation of national cultures’.275 This still leaves open the possibility that, if cultures reduce their distance, a harmonisation can be achieved with regard to those aspects as to which a political and a ‘cultural’ consent can be easily reached. In plain terms, the convergence of legal systems presupposes a convergence of national values. Such a merging of legal cultures could be obtained by means of a Europeanisation of the legal education,276 but a convergence of more general societal values seems less likely to be expected. As politics and cultures are strictly bound, the main issue is that Europe is not culturally mature enough to have its laws unified.

But if the creation – even by means of legislative action – of a highly harmonised system of European private law has to wait until all legal scholars (agree to the fact that they) are finally ready, it is justifiable to foresee that national codifications still have many years before them.277 While some authors enthusiastically consider that European private lawyers are now ready to take on this demanding role, other scholars advance doubts as to such ripeness278 as well as on the likelihood of a future convergence: allegedly there are certain cultural differences, such as the divide between civil and common law, that are simply unbridgeable.279

275 C van Dam, ‘European Tort Law and the Many Cultures of Europe’, at 76.
277 As to the German BGB, an authoritative ‘diagnosis’ recognizes to it another 20 or 30 years of ‘life’, U Drobnig, ‘Abschied vom BGB?’ (2007) 85 Deutsche Richterzeitung 257-261.
278 BS Markesinis, ‘Why a code is not the best why to advance the cause of European legal unity’, at 522.
279 P Legrand, ‘European Legal Systems are not Converging’, at 63: ‘the common law mentalité is not only different, but is actually irreducibly different, from the civil law mentalité as found in Continental Europe’. 
A pessimistic view on the likelihood of a future convergence is coherent with and somehow implied by the cultural argument: although culture can change slightly over time, sociologists affirm that the societal development is subject to path dependence, so that even if it is possible that different cultures change over time, they will do it mostly following their own paths also when exposed to the same influences. In this sense, they cannot be expected to converge: ‘Economic development tends to push societies, in a common direction, but rather than converging, they seem to move on parallel trajectories, shaped by their cultural heritage’. Even the process of economic integration in Europe cannot therefore be considered sufficient to allow a common culture to develop.

But couldn’t a convergence of legal cultures in Europe be fostered by means of an authoritative legal instrument? In such perspective, law would be intended as one of those many sociological factors that influence societies, contributing to create the values that are followed in those social organisations. Sociologists of law have already discussed this aspect and even identified a series of factors that are necessary for law to ‘forge’ society. Generally speaking, if these criteria are followed, it is likely that the legal rule will steer the cultural development of society, in the opposite case, it will run against resistance. If this is true, then, cultural constraints should not be necessarily considered as a hindrance for Europeanisation, as harmonised rules could simply change culture. This view is nonetheless rejected by the opponents of Europeanisation who even consider the idea of using law to instil values in the population as a pure Machiavellian idea. According to this understanding, law could only be harmonised at a later stage where a cultural convergence has been already achieved, but not before in order to foster that convergence. In this sense, though authors generally recognise that culture is something that evolves over times, legal culture is then represented as something steady that cannot be easily changed – certainly not by law – and in this sense comes to coincide with the similar but not identical concept of ‘legal tradition’.

It is not difficult to identify the historical antecedents of this argument. More exactly, this represents a new version of the Volksgeistdenken in the European context. In particular the view of Legrand reveals that underlying this approach to legal culture there is ‘the unspoken – yet at times almost explicit – view that law is the ‘spirit of the people’’. In the same way, Savigny did not reject a priori the possibility of a simple compilation of German law, but rather considered that the legal scholarship was not ripe yet for such a demanding role, with the result that the project had to be postponed to an indefinite date.

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281 S Sánchez Lorenzo, ‘What Do We Mean when We Say ‘Folklore’?’, at 219.
III.3.4. Analysing cultures

The debate on Europeanisation is strongly polarised when it comes to legal culture, and suffers from a lack of clarity as to the very concept around which it revolves. It has been repeatedly pointed out that notions like culture and legal culture are extremely vague and different interpretations can be given thereof; it suffices here to note that the expression ‘legal culture’, together with its homologues in other languages, has been used in several ways in legal studies, from an almost perfect synonym of ‘legal history’, to an equivalent of ‘legal style’, an element traditionally used by comparative lawyers to distinguish between legal families. Legal sociologists have elaborated on the concept using it in more precise ways. In this field, in particular, it refers to the relation between the rule and the people’s habits; as in a famous definition, this represents ‘the values and attitudes which bind the system together, and which determine the place of the legal system in the culture of the society as a whole’.

III.3.4.1. Legal culture and comparative law

Unfortunately, while one can at least have some intuitive idea as to what the concept of legal culture may mean, it remains more complicated to concretely identify and distinguish cultures, ‘measuring’ them and making usefully employable instruments of legal analysis out of them. This engenders a considerable limit on the debate on Europeanisation, since as long as one does not have an idea as to what legal culture concretely means, there is a constant risk of using that more evocative name – which within the European context has a particular importance given the treaty provisions on the respect of cultural identities – to describe what was already known with other terms. So for example, there seems to be a certain tendency to repeat classical categories of comparative law, distinguishing Roman-Germanic, common law, non-European and still some years ago, socialist legal cultures, just like comparative lawyers have distinguished legal families on the basis of the criterion of legal style. As it can be used to repeat classic distinctions of comparative law, the notion of legal culture also bears the risk of being burdened by the same ideological and political biases that can affect traditional comparative research, starting from the well-known Western-centric bias and the consequent excessive attention on the common law/civil law distinction. In this sense, after a ‘second generation’ of comparative lawyers played down the differences between civil and common law systems in light of the functional method or even historical analysis, the cultural argument accentuates

286 For example, HW Ehrmann, Comparative Legal Cultures (London: Prentice-Hall, 1976) at 13.
287 See K Zweigert and H Kötz, Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts (Tübingen: Mohr, 1996).
once again that distinction as one of the most fundamental ones; this time, nonetheless, the differentiation would not reside in the legal rules but rather in the ‘mentality’ of lawyers. It is not the concrete function performed by the rules that has to be investigated to verify whether there is convergence or divergence but rather ‘the nature of legal reasoning, the significance of systematisation, the character of rules, the role of facts and the meaning of rights’. A slight change in the standpoint from which one observes the legal systems leads to radically different outcomes: whereas a functionalist perspective brought to light similarities, the postmodern cultural perspective highlights diversity. It was again Legrand who spoke of a difference at the ‘cultural’ level that would make the distance unbridgeable and even a dialogue between common and civil lawyers impossible, openly in contrast to the transferability thesis mentioned previously.

The notion of legal culture could therefore be employed to reaffirm at a non-positivistic level differences that already exist between positivist systems. This leads to the problem that basically any difference which can be found between two or more legal systems may be imputed to a difference in mentalities; if culture is identified with ‘mentality’, then its analysis becomes all the more difficult and even arbitrary. There are nonetheless frameworks employable to investigate this aspect of culture that can – and indeed have been – used in legal studies.

III.3.4.2. Cultural classifications

The vagueness of the term makes it indeed possible to present as ‘cultural’ any kind of difference that could be more precisely explained in a political, historical or sociological way, while the knowledge we have of the different legal cultures is mostly anecdotal when not plainly based on widespread stereotypes. This leads to the question as to whether it is possible to identify the real contents of legal cultures and ‘measure’ them in a more scientific way. Is it possible to analyse the category of legal culture intended as ‘legal mentality’ without repeating distinctions already visible at a positivistic level and getting a grasp on the importance of the cultural constraints on legal rules? Sociologists have already tried to develop frameworks to analyse general cultural diversity. One of the best employable instruments to this end is a study by the Dutch organisational sociologist Geert Hofstede, first published in 1980. Since then, the study has met with considerable fortune, used as a framework to analyse cultural diversity and, possibly, ‘predict’ the impact of certain behaviours in culturally different contexts.

The study has been regularly referred to by several scholars from different backgrounds including legal scholars, who have tried to link particular social facts such as legal rules to the general culture of the nation, coming very close to

289 P Legrand, ‘European Legal Systems are not Converging’, at 63.
291 ‘Since the later 1980s the idea of dimensions of national cultures has become part of what Kuhn called ‘normal science’. The message of the first edition of this book has been integrated into the state of the art in various disciplines dealing with culture. The four or five dimensions I introduced have become part of intercultural training programs and of textbooks and readers in cross-cultural psychology, organizational psychology and sociology, management and communications. They have also been used in a number of other areas and disciplines’, as affirmed by Hofstede himself, G Hofstede, ‘Dimensions do not exist: A reply to Brendan McSweeney’ (2002) 55 Human Relations 1355-1361, at 1356.
defining methodically the contents of the thus far almost mythical notion of *Volksgeist*. It is therefore necessary to focus here on that study in order to have a more comprehensive view on the cultural argument.

The author based his study on numerous sources but most fundamentally on an international survey conducted to investigate the business cultures of a large and transnational group of employees at a large multinational corporation. The results of the study have been published in a long series of articles and were reorganised and updated years later in a new publication. The author enthusiastically claimed to have discovered a series of interesting differences in the mentality not only of those who participated in the survey but, more generally speaking, among nationalities. In order to ‘measure’ cultures, he made use of a set of different indexes called ‘dimensions of culture’: power-distance, individualism vs. collectivism, masculinity vs. femininity, uncertainty avoidance, long and short-term orientation. In other words, the study would empirically show that different social groups would have different values that are now identified, so that we can distinguish groups in which for instance hierarchical stratification is more accentuated and accepted than others, groups that are more or less individualistic, where disputes tend to be solved in a more or less friendly way, and so forth. All these differences could be ascribed to a difference in mentality. The practical implications of those dimensions are basically unlimited, with successive generations of scholars in different fields building upon (and sometimes improving) that original framework. All these features define the ‘culture’ of a particular group, or, the ‘software of the mind’ of people.

Such software of the mind is something people are not born with but rather grow up with, and it determines the way in which our minds work, it cannot be kept hidden and there is no easy escape from it: ‘We are from the Netherlands,’ say the authors of the study, ‘and even when we write in English, the Dutch software of our minds will remain evident to the careful reader’. Just like language, this is something which a child normally learns from his or her parents, through a mechanism that could be defined as homeostasis: ‘Parents tend to reproduce the

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293 These are called dimension exactly because a dimension is ‘an aspect of a phenomenon that can be measured (expressed in a number)’, G Hofstede and GJ Hofstede, *Cultures and Organizations*, at 400.
294 ‘The extent to which the less powerful members of institutions and organizations within a country expect and accept that power is distributed unequally’, G Hofstede and GJ Hofstede, *Cultures and Organizations*, at 401.
295 *Individualism* stands for a society in which the ties between individuals are loose: everyone is expected to look after himself and his or her immediate family only; ‘Collectivism’ stands for a society in which people from birth onward are integrated into strong, cohesive in-groups, which throughout people’s lifetime continue to protect them in exchange for unquestioning loyalty’, G Hofstede and GJ Hofstede, *Cultures and Organizations*, at 401, 399.
296 *Masculinity* stands for a society in which emotional gender roles are clearly distinct: men are supposed to be assertive, tough, and focused on material success; women are supposed to be more modest, tender and concerned with the quality of life’, ‘Femininity’ stands for a society in which emotional gender roles overlap: both men and women are supposed to be modest, tender and concerned with the quality of life’, G Hofstede and GJ Hofstede, *Cultures and Organizations*, at 402, 401.
297 ‘The extent to which the members of a culture feel threatened by ambiguous or unknown situations’, G Hofstede and GJ Hofstede, *Cultures and Organizations*, at 403.
298 *Long-term orientation* stands for the fostering of virtues oriented toward future rewards, in particular perseverance and thrift’, ‘Short-term orientation’ stands for the fostering of virtues related to the past and present – in particular, respect for tradition, preservation of “face”, and fulfilling social obligations’, G Hofstede and GJ Hofstede, *Cultures and Organizations*, at 401, 403.
299 G Hofstede and GJ Hofstede, *Cultures and Organizations*, at XI.

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182
Arguments against denationalisation

education that they received, whether they want to or not, \(^{300}\) with the implications that ‘culture reproduces itself’ and cultural belonging becomes a matter of pure moulding, normally independent from personal choices. The question can crop up whether such ‘mental software’ can also be ‘uninstalled’; leaving metaphors aside, one could ask whether new cultures can also be learnt later in life, given up or modified. Hofstede’s study seems to suggest that this is theoretically possible\(^ {301}\) but still practically improbable. In particular, the author highlights that while the superficially visible aspects of culture – the so-called practices – may easily vary, there is a set of more fundamental values learnt during childhood that tend to persist and replicate themselves.\(^ {302}\) This explains why most of the cultural features we can find in nations today were already identifiable hundreds of years ago; so for example the strong ‘uncertainty avoidance’ of Spain is assumed to imply a particular fear of the stranger which in turn can be considered the cause of the Reconquista of Spain from the Moors, a historical event that lasted centuries and was concluded only at the end of the fifteenth century.\(^ {303}\) In history, changes in cultures are therefore quite relative and often the results of military conquest or even consequence of pre-existing cultural values\(^ {304}\) – a form of path dependence – while ‘[r]esearch about the development of cultural values has shown repeatedly that there is little evidence of international convergence over time, except an increase of individualism for countries having become wealthier’.\(^ {305}\) The importance of social change is therefore played down.

III.3.4.3. Controversial aspects of cultural classifications

It can be supposed that the success of the study has been also favoured by a renewed interest in the relation between diversity and globalisation in the geopolitically turbulent recent years, in which Huntington among others advanced a theory on the alleged clash of civilisations, a theory which met with wide success in the academic and above all political discourse.\(^ {306}\) Such fortune, anyway, should not conceal the fact that the study of Hofstede has also provoked and still provokes diverse criticisms for

\(^{300}\) G Hofstede and GJ Hofstede, *Cultures and Organizations*, at 10.

\(^{301}\) This ‘open’ character of the culture defined by Hofstede is emphasised in particular by JM Smits, ‘Legal Culture as Mental Software’, at 147-149.

\(^{302}\) G Hofstede and GJ Hofstede, *Cultures and Organizations*, at 11-13.

\(^{303}\) G Hofstede and GJ Hofstede, *Cultures and Organizations*, at 197.

\(^{304}\) G Hofstede and GJ Hofstede, *Cultures and Organizations*, at 17.

\(^{305}\) G Hofstede and GJ Hofstede, *Cultures and Organizations*, at 366. This aspect also allows Hofstede to reject the criticism that the materials he employed for this study was too old to properly reflect actual national cultures: G Hofstede, ‘Dimensions do not exist’, at 1356.

\(^{306}\) See SP Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York: Simon & Schuster, 1996). No wonder that the text on the back cover of the second edition of *Cultures and Organizations* opens with the sentence ‘the world is a more dangerously divided place today than it was at the end of the Cold War’. Some years before Huntington’s work was published, Hofstede insisted on the increasing importance of national identities in a world scenario characterised by escalating tensions between nations and pleaded for ‘een herkenning van de actualiteit van de vraag naar nationale (juist: *nationale*) cultuurverschillen’. Allegedly, ‘binnen een E.E.G. die tracht zijn markten te integreren, binnen een Atlantisch bondgenootschap, Oost-West en Noord-Zuid conflicten en dialogen, spelen behalve geld en macht ook ideeën mee die aanwijsbaar van land tot land verschillen, en die we met ‘cultuur’ kunnen aanduiden’, G Hofstede, ‘Commentaar naar aanleiding van J. Th. Leerssen ‘Over nationale identiteit’ (1989) 16 *Theoretische geschiedenis* 360-365 at 361.
various reasons. While this is not the place to engage in a discussion as to the validity of that model or even more generally the existence or contents of national cultures or ‘characters’ – those that are often striking enough to allow co-nationals to recognise each other even abroad – it is important to focus on some of those critiques, as they highlight methodological assumptions which can be relevant in the study of nationalism. In other words, those criticisms (which are not free from criticism themselves) help us see the nationalistic relevance of cultural classifications rather than their radical inexactness. Therefore, the main criticisms that have been made against Hofstede will be presented here and subsequently applied in the context of legal studies. Considering these critical aspects, it will emerge that even if the existence of national cultures could be proven, it is still problematic to link these to specific institutional and legal developments, proving the existence of the Volksgeist as well as its impact on private law.

It is necessary to abandon for a moment legal studies to discover that the scholars of comparative literature in particular, who have focused on the study of the way in which the image of other groups and a contrario of the self is artificially constructed through stereotypisation, have seriously challenged the validity of that research and indirectly highlighted its contiguity with nationalist practices.

III.3.4.3.1. Culture as nation

Doubts have been cast already on the methodological correctness of the use of questionnaires, but regardless of the procedural problems in using statistics, Hofstede’s framework was heavily criticised for its primary focus on the differences between ‘national’ cultures. This appears as intrinsically nationally biased, as the author admittedly devoted his studies to the ‘cultural category’ of the nation-state. Indeed, the author mostly identifies cultures with nations, coherently speaking of ‘dimensions of national cultures’ and distinguishing on the basis of these indexes national categories as the German, the French, the Italian, the Dutch and so on.

However, it has been suggested by critics that the contrast between categories such as ‘Dutch’ and ‘German’ has an absolutising effect that diverts from sub-national differences and trans-national similarities. This systematisation would lead to an artificial emphasis on cultural uniformity within nations – with the consequent

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307 Hofstede himself has often replied to the criticisms directed to his work starting vivacious discussions. Particularly animated have been the diatribes with Joep Leerssen (whose field of comparative literature has been looked down upon as a mere ‘hobby’, see G Hofstede, ‘Commentaar’, at 361) and Brendan McSweeney (considered a ‘British accountant’ with little authority to challenge a study praised by distinguished anthropologists, see G Hofstede, ‘Dimensions do not exist’, at 1360 and the reply “I am not British, nor as it happens an accountant […] I […] am the research director of a department of accounting, finance, and management at a leading UK research university” of McSweeney, ‘The essentials of scholarship. A reply to Geert Hofstede’ (2002) 55 Human Relations 1363-1372), whose works it will be here referred. For those who observe such stimulating and energetic contrapositions, it can be surely an amusing relief to learn that, being Dutch, Hofstede may share a cultural trait according to which, at least, “[s]cientific opponents can be personal friends”, G Hofstede and GJ Hofstede, Cultures and Organizations, at 203.

308 See B McSweeney, ‘Hofstede’s model of national cultural differences and their consequences: A triumph or faith – a failure of analysis’ (2002) 55 Human Relations 89-118, at 93 ff, who contests the narrow number of respondents to the questionnaires as well as their representativeness of a general national culture rather than a specific business culture.

309 G Hofstede and GF Hofstede, Cultures and Organizations, at 364.

assumption that the national culture is shared by all or most people in that territory – which conceals the strong differentiations within those.  One could indeed ask why the differences between different regions of a country should be less significant than those between countries, so that the choice for the national dimension seems ultimately quite arbitrary, while organising the results along national lines necessarily ends up highlighting differences between nations, just like distinguishing the respondents to the questionnaires along religious or ethnic lines would have brought to light the cultural diversity of those religious and ethnic groups. How is this preference for the nation justifiable?

Replying to this criticism, Hofstede clarified that the reason behind such a preference for the nation is mainly of a methodological nature: no ideological reasons but simply, there would be a greater availability of information regarding national cultures. This of course opens up the question as to whether those other studies and materials employed to obtain information on nations are also biased by methodological nationalism. What is more, the methodological choice for the national unit, although imprecise, remains ‘better than nothing’. But these reasons alone seem rather insufficient to justify a central methodological choice with such important implications. Indeed there is something more than a mere practical reason: Hofstede also justifies his choice on the basis of the argument that people usually tend to distinguish others primarily on the basis of national identities, so that certain behaviours are labelled as ‘typically American’, ‘typically German’ and so on.

However, in this regard, one should bear in mind what the modernist view on nationalism would have to say. The fact that people tend to see themselves as co-nationals has little to do with anthropological cultural similarity and much to do with the nation-building strategies adopted over time to create nations as ‘imagined communities’; while it is disputable whether before nationalism people actually regarded themselves as members of the same nation, confined as they were in narrow geo-political units that did not share much with other different entities from an economic, social and occasionally even linguistic point of view. Nowadays, it is surely prudent to affirm that national identities have been created de facto and they probably represent the primary allegiance for many people, but the very idea of the

311 J Leerssen, ‘Feminien en klagen, dat is twee keer hetzelfde zeggen’, at 9; B McSweeny, ‘Hofstede’s model of national cultural differences and their consequences’, at 99.
313 See B McSweeney, ‘Hofstede’s model of national cultural differences and their consequences’, at 102. At this point, an extract from the biography of the Nobel Prize winner Muhammad Yunus deserves to be quoted: “I first came face to face with racism in America in the house of an elite local family. The lady of the house said to me, ‘Researchers have found that the IQ of blacks is lower than that of whites.’ I stared at her and said, ‘What if I told you that the IQ of women is lower than that of men?’ ‘Do you mean that as an insult?’ she said. ‘No, but the problem with research is that the questions they are putting are in themselves stupid, or are loaded.’ ‘You think the researchers are racists?’ ‘Maybe, maybe not. But researchers might prove that the IQ of the north is lower than that of the south. Or that men over five-feet tall create more crime than men under five-feet tall’, M Yunus and A Jolis, Banker to the poor: the autobiography of Muhammad Yunus, founder of the Grameen Bank (London: Aurum, 1998) at 47.
314 G Hofstede, ‘Commentaar’, at 360.
315 G Hofstede, ‘Dimensions do not exist’, at 1356.
316 The availability argument is considered even ‘unreasonable’ by J Leerssen, ‘Culturele verschillen en nationale ideologien: een naschrift’ (1989) 16 Theoretische geschiedenis 361-365, at 362.
317 G Hofstede and GJ Hofstede, Cultures and Organizations, at 19.
318 In a contraposition between national and supranational identities, Eurobarometer surveys show that even European citizens who have connections with more countries than the one in which they live identify themselves
existence of ‘national software of the mind’ which has been handed down for centuries from generation to generation and undergoes little or no changes over time weakens. Timeless national cultural traits cannot exist as nations themselves are not timeless. A national allegiance exists nowadays and can become undeniably strong, but it is not the only conceivable allegiance as others can be imagined which according to the circumstances can even be more relevant than national identity. Nonetheless, the relevance of these other dimensions, though recognised in theory, is deemed irrelevant in the end.\(^{319}\) Of course, many distinctions and further elucidations can be made at least in theory, but in practice concepts tend to blur and become indistinguishable. For instance, nations – as artefacts – should be distinguished from societies (to which the concept of culture should apply in the first place)\(^{320}\), ‘[n]evertheless, many nations do form historically developed wholes even if they consist of clearly different groups’.\(^{321}\) These groups, in turn, challenge the cultural homogeneity of the nation only secondarily, and their ‘national culture’ in the end emerges:

‘The degree of national cultural homogeneity varies from one society to another, and may be especially low for some of the newer nations [...] Even if a society contains different cultural groups (such as blacks, Hispanics, Asians and Caucasians in the United States), these usually share certain cultural traits with one another that make their members recognizable to foreigners as belonging to that society.’\(^{322}\)

In other terms and regardless of its validity, the representation of cultural traits as distinguished among nations is a deliberate choice based on nationalist suppositions. Interestingly, Hofstede himself recognised that an equalisation of nation and culture amounts to a largely imprecise operation, as admittedly nations only occasionally perfectly coincide with cultures\(^{323}\) and culture is something different from identity.\(^{324}\) For this reason and in the presence of strong sub-national social (and mostly linguistic) differentiations, the author occasionally adopted a regional model, distinguishing for example the French-speaking from the Flemish communities within Belgium. This, however, does not always occur: Great Britain, with all of its strong differentiations, is for instance still treated as only one cultural unit, so that a strongly statist interpretation of the nation is given.\(^{325}\) On the other hand, Hofstede also speaks of cultural traits that can be found among more nations, and in this respect a particular

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\(^{319}\) The population of a nation can be differentiated on many grounds, but Hofstede claims that regardless of these divisions every national population somehow shares a unique culture’, B McSweeney, ‘Hofstede’s model of national cultural differences and their consequences’, at 92.

\(^{320}\) G Hofstede and GJ Hofstede, Cultures and Organizations, at 18. G Hofstede, Culture’s Consequences: Comparing Values, Behaviors, Institutions, and Organizations Across Nations (London: Sage, 2003) at 10, the author sustains that the word culture can nonetheless ‘be applied to any human collectivity or category: an organization, a profession, an age group, an entire gender, or a family’.

\(^{321}\) G Hofstede and GJ Hofstede, Cultures and Organizations, at 18.

\(^{322}\) G Hofstede, Culture’s Consequences, 2001, at 10.

\(^{323}\) G Hofstede, ‘Commentaar’, at 360: ‘ik ben me bewust van de beperkingen van het ‘land’ als eenheid van onderzoek’.

\(^{324}\) G Hofstede, Culture’s Consequences, 2001, at 10.

\(^{325}\) B McSweeney, ‘Hofstede’s model of national cultural differences and their consequences’, at 92.
Arguments against denationalisation

relevance concerns the distinction in Europe between Germanic and Latin countries. However, even the focus on such a juxtaposition – which could be linked to a distinction between Latin on the one side and Germanic and Common Law legal systems on the other side – is considered by critics as a deviation. More exactly, this appears to be the legacy of ethnic stereotypical distinctions which took root in Europe ever since *L'esprit des lois* of Montesquieu, so that the opposition of Romania and Germany appears ideological rather than cultural and therefore constructed rather than objective.326

However, the fact that Montesquieu (and actually many others before him)327 put emphasis on a distinction between Germanic and Latin countries proves that the distinction is quite old but definitely not that it is false. Apart from the consideration that distinguishing cultures on the basis of nations is a highly imprecise methodological operation which shows continuity with nationalist practices, these criticisms are still insufficient to reject the whole model – just like affirming that the methodology of a research is biased does not automatically imply that its outcomes are false – even more if one considers that Hofstede basically elaborated on the outcomes of a series of surveys together with an impressive quantity of other sources. In this sense, the author has rejected the criticisms on the basis of the fact that his study is an empirical research that aims to be scientific.328

III.3.4.3.2. Description as explanation

The aspect that raises more doubts is rather certain confusion between descriptions and explanations in dealing with cultural differentiations. The problem arises since the cultural characteristics of a given group can be described only by means of more or less precise generalisations, which lead to the extension of certain characteristics to all those who belong to the same group. In this sense, descriptive categories become somewhat ‘prescriptive’.

A confusion between these descriptive and explicatory functions is deceptive, in particular considering that Hofstede’s indexes are associated with a long series of very diverse cultural features: peoples with an uncertainty avoiding culture – basically all the Mediterranean and Slavic countries – for example, besides tending to escape insecurity also suffer from high stress, anxiety, worries about health and money and in general feel less happy – but, notwithstanding, they suffer at least from fewer heart attacks.329 Following the success and on the basis of this model, diverse recent studies have attempted to show the national cultural dependence of a long series of radically different elements, mostly pertaining to marketing strategies.330 It is probably exaggerated to affirm that all of these characteristics derive from the ‘uncertainty avoidance’ level of culture, unless one considers ‘uncertainty avoidance’ as the generic descriptive label collectively given to a series of heterogeneous characteristics (stress, anxiety, level of precision of the laws, incidence of heart attacks and so on),

328 G Hofstede ‘Commentaar’.
329 G Hofstede and GJ Hofstede, *Cultures and Organizations*, at 194.
330 References are made by T Wilhelmsson, ‘The Average Consumer: a Legal Fiction?’ 243-268 at 256.
rather than their cause. People in Mediterranean countries are not more anxious because of their uncertainty avoidance, but rather, since people in those countries have shown higher levels of anxiety they can be described as uncertainty avoiding. In this light, however, the entire model disappointingly turns into a sophisticated truism: it would be in the end like affirming that being single is the reason why someone is not married.\textsuperscript{331} Otherwise, we would be just giving a definition of ‘single’.

But even the simpler descriptive function can conceal circularity. According to a critic, even behind the apparently innocuous question ‘what are the typical characteristics of the Dutch?’ lurks the self-referential question – ‘what are the typical characteristics of the typical Dutch?’ – which already presupposes some kind of choice,\textsuperscript{332} given that nations are so heterogeneous that it is necessary to single out the characteristics of a particular group out of all the possible identities that people in a country may have,\textsuperscript{333} and elevate those as ‘typical’\textsuperscript{334} features of the national group.\textsuperscript{335}

The two dimensions of description and explanation appear to be tightly connected: even if Hofstede’s aim is primarily to describe cultural differentiation simply reporting the findings of his study, the author abundantly gives in to the temptation of creating various examples to show how diverse behaviours and attitudes can be linked to – that means explained by – those findings concerning the cultural traits of the nation. Again, even if it is not necessarily false, this operation bears the risks of oversimplification, retrospection and biased selection: it is in other words easier to see only those individual examples that prove the point, more or less unwittingly overlooking all those others who do not fit or even contradict the assumption made.\textsuperscript{336} Outside of academia, nationalistically inspired populism is particularly familiar with such practices of biased selection. But this operation is even methodologically questionable, because since Hofstede affirms that cultural dimensions cannot be applied to individuals but only to populations, it is

\textsuperscript{331} J Leerssen, ‘Feminien en klagen, dat is twee keer hetzelfde zeggen’, at 9.

\textsuperscript{332} J Leerssen, ‘Over nationale identiteit’, at 424.

\textsuperscript{333} J Leerssen, ‘Over nationale identiteit’, at 423. The author browses a series of ‘multiple identities’ people can have: ‘de verschillen tussen buurvolkeren kunnen niet wezenlijk diepgaander worden genoemd dan de verschillen die er onvermijdelijk binnen een volk bestaan. Nederlanders zijn kleuters, ouden van dagen, genaturaliseerde gastarbeiders en rijksgenoten uit voormalige overzeese gebiedsdelen, Friese en Limburgers, edellieden en paupers, vrouwen en mannen, atleten en invaliden…’.

\textsuperscript{334} ‘In stereotyping, qualities or features that are ascribed to a given nationality are posited as typical of the nation in question, in a peculiarly double sense of the term. On the one hand, “typical” (as in “I saw a typically Spanish bullfight”) means that a certain type (Spanish) is marked and characterized and that the attribute or characteristic in question (bullfight) is representative of the type at large. On the other hand, typical means that the attribute in question is salient, nontrivial, remarkable, and noteworthy and that a bullfight is something that strikes the unwary observer as something out of the ordinary’, J Leerssen, ‘The Rhetoric of National Character: A Programmatic Survey’ (2000) 21 Poetics Today 267-292, at 284.

\textsuperscript{335} This leads to a mortification of plural identities: ‘If somehow the average tendency of IBM employee responses is assumed to be nationally representative then, with equal plausibility – or rather equal implausibility – it must also be assumed that this would be the same as the average tendency in every other company, tennis club, knitting club, political party, massage parlour, socialist party, and fascist party within the same country. The ‘average [national culture] tendency’ in New York City Young Marxist Club, for example, is […] the same as in the Keep America White Cheer-Leaders Club in Smoky Hill, Kansas, USA’, B McSweeney, ‘Hofstede’s model of national cultural differences and their consequences’, at 101.

\textsuperscript{336} In general, the use of the Hofstede categories implies the risk of a biased selection of the examples, see J Leerssen ‘Feminien en klagen’; B McSweeney, ‘The Essentials of Scholarship. A reply to Geert Hofstede’, at 48: ‘recognise everything supporting, ignore anything which contradicts’; J Leerssen, ‘Culturele verschillen en nationale ideologien: een naschrift’, at 362-363; also this author notices how in Culture’s Consequences, Hofstede adopts examples that prove its classification, minimizes those who contradicted it and at same point (at 120 of the first 1980 edition) explicitly affirms ‘I have completed the picture with elements based on intuition rather than on empirical evidence’.

188
contradictory to look for validation in specific cases and deny any value to those other cases that contradict the model. In other words, while it can even be agreed that in Spain people tend to avoid uncertainty more than in other countries, affirming that centuries ago the Spanish expelled the Moors and the Jews because of their uncertainty avoidance is retrospective and conceals all the historical explanations of those events, such as the tense relations between the different confessions or pure economic reasons. In this sense, Hofstede has been criticised for focusing on a cultural determinism that does not take into account the possibility of the influence of strictly non-cultural factors on society.337

### III.3.4.4. Cultural classifications in historical perspective

Are these ‘risks’ mere methodological errors due to an excessive faith in the explicatory value of a fundamentally valid model? From a broader perspective, scholars of comparative literature have pointed out that such an uncertain correlation of causes and effects is not fortuitous, but rather an authentic leitmotif in the history of the description and distinction of national groups. Hofstede’s study is in this sense merely one of the most influential and best structured examples of something that has been considered a renaissance338 of the old trend of using concepts such as culture, nation and nationality ‘as explanations rather than as descriptions or explicanda’, an operation which in the end gives new life to old ethnic categories.339 At any rate, this tendency is more widespread and often based on mere intuition rather than accurate studies. For instance, the ideologist of the ‘clash of civilizations’, with a quite arbitrary and undemonstrated simplification, affirmed that the reason why South Korea developed so rapidly since the 1960s while Ghana mired in the same poor economic conditions is mainly cultural, as the South Koreans would be hard workers while Ghanaians have other values: culture has ‘to be large part of the explanation’.340

Historically, the tendency to confuse description and explanation became particularly widespread in the nineteenth century under the influence of escalating nationalist thought: this was indeed the historical period in which ‘the various stereotypes and assumptions concerning national peculiarities never form[ed] the topic of investigation, but always part of the interpretative tool-kit; they [were] explanations rather than explicanda’,341 used as a criterion to systematise (often in a bi-polar way) the different nationalities similarly to what naturalists did to systematise animals and plants.342 Differences between nations had indeed to be scientifically demonstrable, as they were thought to be rooted in nature according to the primordialist and ethno-cultural vision of nations that was endorsed explicitly during

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342 See J Leerssen, National Thought in Europe. A Cultural History (Amsterdam: Amsterdam University Press, 2006), at 55-57.
that period and often implicitly assumed nowadays. An example of this kind of a biased activity concerns the nineteenth-century studies on human skulls which came from different parts of the world, that would have scientifically proved the existence of differences in races, on the basis of the systematisation of the results on a supposed ‘racial’ basis, a kind of ‘hardware of the mind’. Such a procedure is not only logically circular, but its findings are radically false, as modern researches on genetics have shown; the reader will recall how a scholar of nationalism has deemed those studies: ‘Measurements of skulls and classifications of blood types tell us little about men except about their skulls and blood types’.

III.3.4.5. The use of cultural classifications in legal studies

The use of the Hofstedian model to link differences in national cultures to specific political and legal institutions is particularly problematic. The controversial aspects that have been previously highlighted – overlap of description and explanation, circularity, concealing of intra and supranational cultural variations, retrospection and so on – can materialise also in legal studies. Here the risk of confusion between descriptions and explanations is actually higher, since national legal systems already appear as different, so that there is no real need to ‘describe’ a difference which is clear after an even superficial comparative analysis. In this context, the role of the cultural dimensions would mainly be to explain those existing differences on the basis of different mentalities.

It has been underlined, for example, how the unsystematic nature of the British legal order and the absence of a written constitution in that country may be linked to the low uncertainty avoidance index scored by Great Britain: in other countries where on the contrary unforeseeable situations generate more angst, laws tend to become more and more precise in order to reduce that anxiety-provoking uncertainty, while legal reasoning becomes deductive. Just like most other examples, this explanation seems at first sight convincing, as it is reasonable to assume that subjects who prefer to avoid uncertainty tend to regulate in detail several aspects of their life, also by means of laws. However, the relation does not always work bi-univocally. So for instance, if one accepts that in the case of the United Kingdom there is a relation between a low uncertainty avoidance level and the absence of a written constitution, it is then very difficult to explain on the basis of the same argument why another country that scored quite low on the same index such as the United States has elaborated the oldest written constitution in force. The references to historical experiences to explain mental diversities often appear to be unjustified and not always fitting: a low uncertainty avoidance index is associated with nations that historically belonged to the former Roman Empire. Again, this association raises some doubts: one could already wonder how this empire could have not been able to eradicate local languages and traditions but at the same time manage to instil

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343 B McSweeney, ‘Hofstede’s model of national cultural differences and their consequences’, at 112.
345 C van Dam, ‘European Tort Law and the Many Cultures of Europe’, at 68, 73-74.
346 C van Dam, ‘European Tort Law and the Many Cultures of Europe’, at 68.
Arguments against denationalisation

in diverse populations a feeling of ‘uncertainty avoidance’; but even more decisively, how is then the high level of legal diversification within countries that once belonged to that empire explainable? Here, we are in the field of pure suppositions as to the social psychology of extinct civilisations, justified on the problematic assumption that culture generally does not change over generations.

In this sense, to affirm that Great Britain has no codification or written constitution because culturally it leans more towards ‘imprecise laws’ for its low ‘uncertainty avoidance’ appears retrospective, while a less fascinating but more genuine diachronic cultural-historical account would bring us to allege – in something which is obvious enough to resemble a truism – that Great Britain does not seem to have as many statutes as other countries because it has neither written constitution nor codification. A purely descriptive function, on the contrary, adds nothing to what every lawyer already knows: that Great Britain has no written constitution nor codification.

It is therefore evident that the tendency to select only examples that prove the point attributed to the Hofstede model is a tempting risk for legal scholars as well, who can look into cultural systematisations to find the categories needed to justify ‘some’ existing legal differences in hindsight. In this sense, basically any difference can be justified through cultural dimensions, with results that can even contradict more concrete historical explanations. This can lead to overemphasising the relevance of the cultural dimensions at the expense of other cultural as well as non-cultural factors that could contribute to explaining legal development. For example, legal scholars can relate masculinity and strong power distance with the inclination of countries to inexact implementation European directives, and use as an example the case of the French implementation of the liability directive.347 Such a correlation is statistically relevant, seems convincing and cannot be considered a priori wrong; however and again, this consideration alone could make the legal analyst forget other and more concrete reasons behind that case of resistance, reasons that in a broad sense could be considered ‘cultural’ as well.348 What is worse, the affirmation of the cultural necessity of those behaviours could even lead authors particularly respectful of cultural diversification to justify the persistence of those practices of bad government such as the systematic delay in the implementation of directives, something that even citizens of those countries would not be likely to deem appropriate.

To sum up, culture appears to be a valuable tool to understand and analyse contemporary societies and historical events – that cannot be fully understood without looking at the cultural scenario in which they developed – but it seems to lead to vague and contradictory results when, becoming a synonym of national mentality, it pretends to explain, let alone predict, legal developments alone.349

347 C van Dam, ‘European Tort Law and the Many Cultures of Europe’, at 77.
Nationalism and Private Law in Europe

III.3.4.6. Conclusion

The controversial aspects that have been exposed could lead some critics to object even to the existence of any kind of ‘national culture’ or ‘national characteristics’. This conclusion would nonetheless go too far. Otherwise, an obvious empirical statement such as ‘Frenchmen speak French’ should be considered as a stereotype, and we should close our eyes when confronted with the existence in the world of populations with very different traditions and customs. It is on the contrary hardly deniable that certain social or even national groups share certain traits and show a degree of homogeneity as to, for example, language, religion, eating habits, knowledge of particular facts concerning their own country etc. Only a certain level of ‘cultural homogeneity’ elucidates why most Germans speak German and most Spaniards speak Spanish, why most Portuguese citizens are Catholic while most Danes are not, as well as why most average Americans, confronted by the question as to who invented the telephone, would answer ‘Alexander Graham Bell’ while most average Italians would indicate their co-national Antonio Meucci. And of course, why English lawyers (and law students) primarily look into case-law while French lawyers (and law students) turn to statutory law to find an answer to legal questions. These circumstances are certainly not ignored by modernist scholars of nationalism, who rather investigate the origins of those habits and cultural traits highlighting their deliberately constructed nature.

However, admitting the existence of national culture is not the same as sustaining a national cultural determinism. Certainly there is also a difference in explaining a cultural aspect (different perceptions as to historical events, legal method) by means of a precise documentable fact (nation-building function of schools, organisation of the law schools) and explaining precise documentable facts (legal institutions) by means of culture. Explaining culture by means of culture is even more problematic. In this sense, as it cannot be said that national characters simply do not exist, even the data collected by Hofstede are not ipso facto false and any serious attempt to shed light on this highly nebulous field must be appreciated, keeping in mind that ‘[c]ulture is a construct, for which there can be no direct measure’. But exactly for these reasons, a critical analysis of those data as well as a clarification as to the functions and the utility of those distinctions becomes compulsory.

In light of the criticisms that have been made, the dimensions of national culture should be considered simple approximations that cannot pretend to explain every cultural manifestation as the ‘cause’ rather than the ‘consequence’. In particular, there are doubts as to their predictive value and even their capacity to

350 See B McSweeney, ‘Hofstede’s model of national cultural differences and their consequences’, at 92.
351 J Leerse, ‘Over nationale identiteit’, at 419, therefore considers Hofstede’s model an explanation obscurum per obscurius.
352 D Williamson, ‘Forward from a critique of Hofstede’s model of national culture’ (2002) 55 Human Relations 1373-1395, at 1380 and 1388. This author then warns that ‘not to confuse Hofstede’s scores with the cultural constructs for which they are only approximate measures. Hofstede’s scores can only be a very rough indication of tendencies in the rich variety of cultural values’, ‘But to reject Hofstede’s model because it does not provide a direct measure of national culture, is to reject all nomothetic research of culture’, at 1381 and 1388. This anyway surely contrasts with Hofstede’s claim that dimensions of culture can be measured.
353 Hofstede is ambiguous on the possibility of ‘predictions’: on the one hand, it seems that this is not possible when referred to the behaviour of individuals, on the other hand, ‘prediction’ would be on the contrary possible in
describe flawlessly the whole society.\textsuperscript{354} Such a predictive effect could be logically acknowledged only generalising the major premise of a hypothetical syllogism until the point of creating an average uniformity within a category – the nation – at the expenses of differences among that category; this operation would save the formal validity of the syllogism, but still say nothing about its actual truth, as the major premise remains unproven and even indemonstrable.\textsuperscript{355} But ‘[t]o assume national uniformity, as Hofstede does, is not appropriate for a study which purports to have found it’.\textsuperscript{356}

To cope with such a twist, Hofstede himself recognised that cultures should be considered as general tendencies in nations\textsuperscript{357} that cannot be applied to individuals.\textsuperscript{358} Indeed, this appropriate clarification basically means that within those national cultures that are considered more or less homogeneous, people can also manifest very different cultural values. National culture appears less and less a matter of mentality and increasingly more a matter of statistics. For these reasons, not dissimilarly from prophecies – inevitably vague till the day they eventually seem to have become fulfilled – predictions based on national culture could be realised only in hindsight when a particular circumstance confirms the general assumptions. But while we can generally accept this limitation and still make a reasonable guess that if we meet someone from England he or she will be very likely to speak English (we nonetheless have progressively less chances to guess correctly in regard to more specific cultural traits), the legal researcher is confronted with further difficulties: for his or her purposes, much of the practical utility of the whole model has by now faded out. Indeed, legal researchers also have to take into account a further hurdle, which is that to build a direct link between general culture and legal culture is not always possible, since often legal culture appears as a bearer of values that are different from those widespread among the population of a given community, neither is it necessarily homogeneous among different branches of the legal system.\textsuperscript{359}

On the one hand unable to exercise an unequivocal predictive function as to the behaviors of people or the developments of legal rules and institution and, on the other hand, imprecise in their descriptive function, cultural systematisations rather appear to perform a different function: a constructivist one. By elevating some characteristics to the range of national specificity of a given culture, they promote the definition of a cultural national model that can be opposed to others and becomes a
model of identification. As far as legal studies are concerned, the pessimistic conclusion is in the end corroborated:

‘the notion of the ‘spirit of the people’ is impossible to analyse empirically – a purely mystical idea on which nationalist or racist sentiment can easily be hung – glossing over the political struggles involved in legal development with a simple conception of unified culture as a given and as a causal factor’.

Such an operation of dissimulation of the ‘political struggles’ and the other dynamics of legal development appears clearly when one more specifically looks at the notion of ‘legal culture’ as it has been used in legal studies.

III.3.5. The argument in light of different political theories

The association of legal culture with the nation and the subsequent concealment of sub-national and inter-national cultural segments, leads to present national legal systems as culturally homogeneous, different from one another and not able to be harmonised in a supranational context. In this sense, this use of the cultural argument seems to be associable with nationalism not inasmuch as it functionally aims at impeding any transfer of competences from the national to the supranational level, but rather inasmuch as it bases its implications on an identification of culture and nation on the one hand and a presentation of national culture as basically homogeneous on the other hand.

These two aspects, which are the assumptions upon which theories on national characters exposed in the previous section are based, are indeed the political assumptions of the nationalist ideology, contested by opposed ideologies.

III.3.5.1. The nationalist perspective

Culture is the pivotal element around which modern theories of nations revolve, lying ‘at the heart of contemporary debates about identity’. As already shown in the first chapter, culture is the fundamental criterion employed in particular by liberal nationalists to construct collective identification. Such use was already observable in nineteenth century Germany, and it was more specifically the ‘[a]nti-Enlightenment cultural relativism, Herder-style’, that ‘created an ethnic taxonomy which saw ‘nation’ and ‘culture’ as the natural and fundamental, mutually interdependent units of humanity’. After the disastrous experience of nationalism represented in ethnic terms, the cultural criterion met with new favour and became the key to modern liberal nationalisms. The focus on culture does not therefore appear as the feature of a


Arguments against denationalisation

former historical phase but rather a still important element for liberal nationalist theories that re-emerge at the present day.

For sure, nobody ever claimed that people in a given nation perfectly share the same culture. This point, explicitly rejected also by Hofstede, is sustained not even by nationalists: culture is only basically homogeneous within nations, while it is undeniable that certain individuals will occasionally manifest cultural traits which are different from those of the majority of their fellow countrymen. Such homogeneity of tendency, nonetheless, is sufficient to make culture the fundamental form of identification for people. Miller is clear on this aspect:

‘if we think of national culture not as implying complete uniformity but as a set of overlapping cultural characteristics – beliefs, practices, sensibilities – which different members exhibit in different combinations and to different degrees, then […] it is reasonably clear that distinct national cultures do exist’. 363

In a later work, the political theorist did not deny the existence of cultural groups internal to the nation that make the idea of a ‘common nationality as implying cultural homogeneity’ appear as a ‘general fallacy’. 364 Indeed, the general nationalist ‘assumption of an equivalence between a common culture and a shared community which jointly underpin a nation-state’ has been increasingly criticised in political science 365 as excessively reductionist and for that reason not apt to represent the complexity of modern societies. Nevertheless and regardless of those criticisms Miller continues affirming that it is the presence of such ‘overlapping cultural characteristics’ that makes the nation somehow homogeneous. In this view, if the state were not sufficiently homogeneous, it would become difficult to be governed and eventually regress to a totalitarian form: the existence of ‘cultural homogeneity’ 366 as well as ‘even partially shared standards of justice’ 367 are the reasons why a state works more effectively when it ‘embraces just a single national community’. 368 This is basically the reason why, in the nationalist thought, national culture gives rise to political claims, legitimated also on the basis of ‘empirical reasons for thinking that national cultures will be protected most effectively when nurtured by states of their own’, 369 while communitarian politics of recognition, based on the argument of the existence of sub-national group identities, should be in general rejected. 370

The refusal of non-national identities is common among most nationalists: another theorist of liberal nationalism clearly closer to ‘civic’ understandings of the nation, Tamir, has highlighted in this regard:

363 D Miller, On Nationality, at 85.
364 D Miller, Citizenship and National Identity, at 77.
366 D Miller, On Nationality, at 90.
367 D Miller, Citizenship and National Identity, at 78.
368 D Miller, On Nationality, at 90.
369 D Miller, On Nationality, at 88.
Nationalism and Private Law in Europe

‘Nationalists reject the proliferation of cultural options for two reasons. First it challenges the aspect of continuity […], opens the way for the disintegration of national identities based on cultural similarities, and brings about a proliferation of “private” cultures. Second, it is feared that new, modified traditions might be so thin as to lack all meaning’. 371

These concerns are rejected by this author on the basis of the assumption that ‘national culture is not a prison and cultural ties are not shackles’, so that even a right to ‘choose’ their own national group should be acknowledged to individuals. 372 This hypothetical right would have to be counter-balanced by the ‘right to preserve cultural homogeneity’ which has to be acknowledged to states. However, this latter right is clearly a particularly controversial one, so that in order not to legitimise chauvinistic degenerations and bring about the coveted pacification of nationalism and liberalism, the author suggests that ‘it is justified for a nation to seek homogeneity by restricting immigration only if it has fulfilled its global obligation to assure equality among all nations’, 373 while on the internal side, ‘[n]ational cultures should […] be protected if, and only if, their members express a reflective interest in adhering to them’. 374

Such an opening to cultural voluntarism, however, remains generally criticised by nationalists: provided that the pursuit of cultural homogeneity – the objective of what has been defined ‘statist nationalism’ 375 – should never degenerate into chauvinistic practices, ‘the idea that I choose my culture is deeply problematic. I have cultural affinities with others whether I wish it or not’. 376 Miller in fact rejects the idea that belonging to a nation could be made object of subjective ‘will’ rather than objective ‘identity’. 377 According to this line of reasoning, cultural determinism also becomes primarily national cultural determinism: national culture can explain individual choices, as the ‘background’ against which these can be tested and made. 378 In conclusion, only ‘a national culture gives the society its distinct identity’. 379

III.3.5.1.1. Legal culture as national legal culture

Parallel to the nationalist approach that mainly equates cultures with national cultures, legal studies also show a strong tendency to consider legal culture in mainly national terms. This tendency has already been denounced by various scholars, by Smits among others, who blamed legal sociologists like Friedman, Marryman & Clark as well as Legrand for adopting a predominantly static understanding of legal culture, pretty much resembling Savigny’s Volksgeist idea, which conceives the existence of different ‘cultural segments’ within and across nations. 380

372 Y Tamir, Liberal Nationalism, at 57.
373 Y Tamir, Liberal Nationalism, at 161.
374 Y Tamir, Liberal Nationalism, at 37.
375 P Gilbert, The Philosophy of Nationalism, at 31.
376 P Gilbert, The Philosophy of Nationalism, at 123.
377 D Miller, On Nationality, at 37.
378 D Miller, On Nationality, at 86.
379 D Miller, On Nationality, at 95.
380 JM Smits, ‘Legal Culture as Mental Software’, at 142.
Arguments against denationalisation

Not even the more circumscribed debate on Europeanisation is immune from such reductionism with regard to the national dimension. So for example, referring to the authors that have already been cited, Van Dam had analysed the tort law systems of France, Germany and England referring to the nationally organised categories of Hofstede; Sefton-Green initially recognised the fact that even within nation-states there are differences. However, since allegedly these differences are even larger in the context of the EU as a whole, her analysis ended up once again opposing a French idea of social justice, an English idea and so on, so that in conclusion we do not manage to get away from the nationalist perspective even if we are conscious of its insufficiency. What is more, the image of legal cultures as something homogeneous and basically stable is increased by the fact that very little attention is given to the possibility of cultural changes, which is anyway subordinated to the idea of path dependence: even if it is possible to change cultural values, ‘this requires a reinterpretation and development; the slate cannot be wiped clean’.  

The very idea Hofstede described of culture as a ‘mental software’ that has been handed down from father to son for centuries and will influence any future choice the sons will make is widespread in legal studies as well; as already mentioned, Legrand has emphasised this point excluding even the possibility of a change, famously arguing that the national legal culture is a ‘destiny’ to which lawyers were doomed long before they set foot in a law faculty and that culture is something that has to be therefore investigated in the longue durée.  

Since the national unit is, as in Hofstede’s words, methodologically ‘better than nothing’ to understand cultural pluralism, the reductionist approach does not appear to be necessarily erroneous. However, admitting that nations can be culturally heterogeneous even on the inside, it is then artificial to draw a coherent conclusion against legal denationalisation based on the cultural argument: even a national legal order disrespects sub-national cultural diversity, but this – except for a few particular contexts – has not led to the conclusion that regional private laws should be enacted.

In this way, the argument of culture becomes quite conservative as it gives a cultural legitimacy to the legal status quo and paradoxically even appears as the new instrument to defend legal positivism: the distinctions between legal cultures basically follow the ones between positive legal systems (French or English legal culture) or at most legal families (civil law or common law culture), hallowing them on anthropological grounds.

III.3.5.1.2. Cultural homogeneity and the legal order

In the debate on law and culture there is a strong tendency to neglect cultural variety at a regional or sub-national level. This may be due to several factors that entirely coincide with the methodological justifications given by Hofstede. In the first place, especially for those who intend to make an empirical analysis on the basis of existing data, information concerning nations is more easily available than data concerning nations.

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382 P Legrand, ‘European Legal Systems are not Converging’, at 63.
local cultures; in the second place, it is generally thought that people tend to define themselves primarily in terms of nationalities. If the choice for the nation is an appealing methodological option for sociologists, it becomes almost a forced choice for legal scholars, for the reason that – ever since the nationalisation of private law – legal systems have been built on a national basis. If you investigate a legal order, you often necessarily investigate a national one. But in a legally centralised state where the same rules are meant to be applied in the same way to the whole territory, it would be impossible to remain faithful to the Volksgeist idea without somehow admitting that the Volk of a given legal system is essentially homogeneous. Consequently, the weight of sub-national cultural segments is played down and in the legal studies legal culture is constructed in national terms only furtively admitting that not even national systems are culturally homogeneous.

But is it not too simplistic to imagine legal cultures as homogeneous within nations and not considering internal divergences and external convergences? In this regard, it is important to note that the existence of cultural differences within nation states is not radically denied by authors who insist on the argument of national legal culture. The importance of those segments rather is minimised. In particular Legrand has addressed this issue. The author explicitly recognised that differences in legal cultures can be found even within the same jurisdiction, accepting at least in theory sub-national regionalism, but then again his analysis mainly opposed broader legal traditions (as a civil law culture vs. a common law culture) as they are mainly expressed in the opposition between the national legal cultures of France and Britain, while his focus has progressively shifted towards the national dimension over the years. The presumption seems to be that nations may be heterogeneous inasmuch as regional groups exist within them. But what about groups that are organised on a non-geographical basis? Again, Legrand makes an interesting concession, acknowledging that ‘sub-mentalités’ or ‘para-mentalités’ can exist even within nation-states, nevertheless, the relevance of these minor mentalities too is immediately put aside in the name of a necessarily ‘imperfect approximation’ which once again coincides with the nation.

In other words, the most attentive advocates of the national cultural argument are well aware of the existence of different ‘cultural segments’ of geographical, religious or ideological nature, as well as the idea that ‘our identities are multiple’, but given the practical impossibility of taking all of them into account, they resort to an

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384 JM Smits, ‘Legal Culture as Mental Software’: ‘Traditionally, the analysis of legal culture has been on this national level: the existence of legal cultures is usually assigned to countries or groups of countries (like the civil law and common law tradition or Nordic legal culture). Good reasons exist for this emphasis on countries. One is that it is practical: it is relatively easy to establish a person’s nationality. Another is that statistics are often only available for countries and not for other segments of society. But a substantive reason also exists for this emphasis on national culture: the age-old presumption that people are indeed shaped the most by their country of origin. Although this probably was true in the past, increasing Europeanization and globalization may have made the situation different’, at 144.

385 Since ‘there are clearly differences at the level of legal cultures within the same jurisdiction: Holland is not Limburg and the Trentino is not Sicily’, P Legrand, ‘European legal systems are not converging’, at 63.

386 P Legrand, ‘European legal systems are not converging’, at 63.

387 P Legrand, ‘European Legal Systems are not Converging’, at 63-64.

Arguments against denationalisation

approximation which makes cultures appear at least mostly homogeneous within the nation. In other terms, they do not manage to escape methodological nationalism.

All in all, not even nineteenth century patriots denied the existence of sub-national identities, but rather minimised their relevance considering them to be mere expressions of ‘regionalism’.

III.3.5.1.3. Concealing ideological distinctions

The price to be paid for representing the legal systems in homogeneous terms is the concealment of the distinctions within those systems. Such distinctions can be understood not only as referring to the diverging cultures of particular minorities of ethnic, linguistic, religious natures and so on, as it normally comes to mind when one thinks of the lack of national homogeneity. An emphasis on such contrasts between a majority and other minority groups in the country would ultimately even strengthen the nationalist conviction that nations are homogeneous while problems crop up only when a state is not organised on a national basis. Rather and more radically, homogeneity does not exist even within the ‘majority’, and cultural differences can in fact be linked to different social, economic or ideological categories too. Such aspects had been initially highlighted in particular by Marxist theorists, concerned with the peril that the emerging idea of ‘national identity’ might have been an instrument to prevent the workers from developing a class consciousness.

The way in which the emphasis on national cultures represses infra-national political dynamics is discernible even in the realm of private law. Some examples may help clarifying this point. As long as one looks at legal systems from a classical positivist perspective, it is justified to affirm that national jurisdictions are (more or less) homogeneous: in particular in civil law systems, codifications provide for only one answer to a question of law, while the highest court provides the correct interpretation of the rule for the whole country. From this point of view, there is little or no room for pluralism. Adopting a cultural perspective, however, such coherence of the legal order cannot be imputed to the homogeneity of the national ‘culture’ anymore. This would fit an organicist Volksgeist idea, but contradicts the cultural complexity of modern societies. So, to take a clear example concerning family law, the fact that some jurisdictions have come to acknowledge same-sex marriages does not indicate that a particular idea of the marriage belongs to the culture of the nation, but rather that because of political circumstances that particular ‘liberal’ cultural segment has arisen until it was eventually sanctioned in law. Democratic procedures allow forging law according to the wish of the majority, but democratic majority is not the same as cultural homogeneity.

As in Smits’ words,

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391 See supra first chapter on ‘Nationalism’: ‘National vs. social identities: some notes on the case of socialism’.

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‘Even if Parliament, after long deliberation, comes up with a ‘best’ national solution (often in the form of a compromise), many people will still disagree with that solution. The truth is that there is no longer one ideal social arrangement; in its place, we only have competing views of what is right’.³⁹³

Law can unquestionably be one of those social factors that influence culture – as affirmed by Rousseau and Montesquieu long ago³⁹⁴ – so that it is likely that over time and under certain circumstances a particular value entailed in law will rise to the status of social cultural value, but these dynamics cannot be grasped if culture is seen as something steady. Given the impossibility of distinguishing cultural from technical aspects of law, the same holds true for contract law: the allegedly more economically ‘liberal’ character of the English law of contracts seems to derive from the fact that in that procedural system almost only corporations can afford the economic effort of legal procedures that reach the Supreme Court, so that the case-law of that country is mainly based on business transactions.³⁹⁵ This can explain distinctive ‘business-friendly’ features of that jurisdiction such as notably the refusal of a general clause of good faith, as well as the frequent choice for that legal regime in international transactions, considered with some reason by many English commentators as a good reason to object to Europeanisation.

Researching the historical and societal background of a legal system, a cultural analysis allows us to shed light on these and many other aspects, highlighting the cultural complexity of societies and rules behind the simplifications of positivism. Quite on the contrary, insisting on the notion of national legal culture overlooks this aspect extending the cultural segment entailed in legal rules for the whole nation: ‘national legal culture’ then becomes just a misleading formula with the aim or result of concealing the domination of a particular cultural segment on the others, which hides and mortifies the existence of cultural pluralism – where of course, different cultural segments could also be analysed in terms of the Hofstedian dimensions. Furthermore, if the national legal culture argument gains normative force the result will necessarily be the maintenance of the status quo and therefore an advantage for the cultural segment that had already established itself to the detriment of the others. It also amounts to a strategy of nation-building – which is indeed an ongoing process rather than the heritage of another historical period³⁹⁶ – as it ‘invents’ a national culture drawing from a specific one, regardless of the political and economic reasons behind it. In this sense, national culture is often just the culture of those who have more power in the nation.

³⁹² Admittedly, national culture does not demand unanimity as to its contents, but statistics are at least a useful tool to get a more comprehensive view: according to a Spanish study of 2004, 26.5% of the population was against same-sex marriages, while 30% admitted they would have considered it a ‘serious problem’ if their sons had a homosexual relation; Centro de Investigaciones Sociológicas, Estudio n. 2568, June 2004, questions 14, 8 and 9.
³⁹⁴ See supra, first chapter on ‘Nationalism’: ‘The Volksgeist theory’.
III.3.5.2. Non-nationalist perspectives

The equalisation of culture and nation proposed by nationalism is rejected by several authors. Already the model elaborated by Hofstede has been criticised for the reason that it would emphasise homogeneity within the nation playing down important differences within it and similarities across nations. It has been for example noticed that two small border-towns, one in Germany and the other one in the Netherlands, will be culturally much more similar to one another than each would be to the capital to the capital of the country they belong to.397

In legal studies, Watson has made similar points in direct confrontation with the reductionism of Legrand basically challenging the idea of a national cultural homogeneity. If the word which translates ‘bread’ in French means something slightly different than an analogous word in German, it must be said that even the same word in the same language can sound very differently to two people even within the same country.398 By the same token, ‘[a] small farmer in the Belgian Ardennes will be closer in his legal conceptions to a small farmer in neighboring Germany than to a businessman from Brussels’.399 What is implied by Watson is that there are some identities, in this case the ‘professional’ identity of ‘small farmer’ that can occasionally be much more important than national identities. This point introduces a new dimension into the debate: the relevance of non-geographical identities rather based on economic or sociological categories. If Legrand’s thesis shares with nationalism a focus on the national dimension, Watson’s positions clearly transposes within legal studies the criticism to nationalism carried out by the multiple identities theory, of cosmopolitan inspiration, that has been addressed several times in this book. It is time to address it more specifically.

This view has gained momentum in the latest years, as it has been expressed in particular by the Nobel prize winner Amartya Sen, to challenge any form of ‘reductionism’ of the person on the basis of which the world order is presented as an inhomogeneous jumble of ethnic, cultural and national groups possibly in conflict with one another. The strongest criticism that derives for nationalism is therefore that nation and culture do not necessarily coincide, as liberal nationalists more or less openly claim.400 While nationalists make ‘a fetish of culture’,401 cosmopolitans try to desecrate that fetish pointing at how multi-faceted its figure is. At the basis of this argument lies the conviction that ‘[t]he political conception of a person as a citizen of a nation – important as it is – cannot override all other conceptions and the behavioral consequences of other forms of group association’.402

Despite for its association with the name of Sen, the idea is actually older. Hayek, another Nobel Prize for economics winner, expressed a similar point, without

397 J Leerssen, ‘femininen en klagen, dat is twee keer hetzelfde zeggen’at 9.
400 See supra, first chapter on ‘Nationalism’: ‘The fundamental criticism: do nation and culture really coincide?’
the uttered intention to challenge nationalist assumptions – to which he was extremely critical\textsuperscript{403} – but rather draws attention to the distinction between state and society:

‘It is in fact very misleading to single out the inhabitants or citizens of a particular political unit as the prototype of the society. There exists, under modern conditions, no single society to which an individual normally belongs, and it is highly desirable that this should not be so. Each of us is fortunately a member of many different overlapping and interlacing societies to which he may belong more or less strongly or lastingly. Society is a network of voluntary relationships between individuals and organized groups, and strictly speaking there is hardly ever merely one society to which any person exclusively belongs. For practical purposes it may be innocuous to single out, in a particular context, some part of the complex order of often hierarchically related networks as specially relevant for the topic discussed, and to assume that it will be understood to which part of this complex the speaker or writer refers as ‘the society’. But it should never be forgotten that today many persons and organizations belong to networks which extend over national boundaries as well as that within any nation any one may be an element in many different structures of this kind.’\textsuperscript{404}

The focus on the plurality of ‘societies’ or ‘identities’ permits to clarify, at least theoretically, a controversial aspect. One could indeed wonder whether it is really wise and convenient to blame the nationalist tendency to make cultural generalisations for presenting ‘astonishingly limited and bleak understandings of the characteristics of the human beings involved’.\textsuperscript{405} Looking for alternatives to that approach, the risk would be once again to create a new terrible ‘cultural destiny’ from which it is impossible to escape: a businessperson will always be a businessperson, a farmer will always remain a farmer and so on, so that in the end we would recreate a class-based legal system which distinguishes people according to their social class, their profession or their education. Civic nationalism may be disqualified as ‘reductionist’, but its ‘anti-hierarchical’\textsuperscript{406} function cannot be ignored: the French revolution and later the \textit{Code civil} had at least the merit of overcoming such a class-based system. Abandoning this assumption would mean moving away from the foundations of the legal system of modern Europe and pave the way to new sweetened forms of apartheid. Is this really the direction contemporary societies are taking?

This concern might go too far. The argument of plural allegiances does not imply that non-national identities such as farmer or consumer will always be more important than the national identity: if it is true that our identity is a jigsaw of multiple identities then ‘[n]one of them can be taken to be the person’s only identity or singular

\textsuperscript{403} ‘[M]y personal position makes me unable to sympathize with any form of nationalism’, wrote quite clearly Hayek in his \textit{The Constitution of Liberty} (London and New York: Routledge, 2009) at 350.
\textsuperscript{404} FA von Hayek, \textit{The Political Order of a Free People}, at 140-141.
\textsuperscript{405} A Sen, \textit{Identity and Violence}, at 103.
arguments against denationalisation membership category'. As Sen alleged, these are rather multiple, occasionally conflictual and their weight changes according to the circumstances, ‘[f]or example, when going to a dinner, one’s identity as a vegetarian may be rather more crucial than one’s identity as a linguist, whereas the latter may be particularly important if one considers going to a lecture on linguistic studies’. Saying something that could please in particular communitarians, the context is fundamental in the choice for a given identity. In the same line of reasoning and with regard to the relevance of these identities for law, Smits remarks that national culture may determine people’s behaviour ‘when they support their national football team, but does not bind them when they conclude a commercial contract’.

III.3.5.2.1. Legal significance of multiple identities

What are then the practical consequences of all these theoretical premises? Is it seriously conceivable to conjure the image of some kind of private inter-cultural law on the model of the classical private international law, which is precise enough to determine what affiliation will be more relevant for people in a particular circumstance and consequently establish which specific legal regime will be applicable? In the first place, it should be noticed that in fact this example is not completely frivolous, as modern private international law already provides for rules that perform a similar function: so for example, the provisions of the Rome I Regulation that limit the freedom of choice as to the applicable law in contracts with consumers and workers can be seen as the recognition of the prevalence in certain circumstances of those ‘identities’ of consumer or worker over identities based on nationality or geographical criteria – such as the place of habitual residence, that already undermines the criterion of nationality. Taking the aforementioned into consideration, the recognition of multiple identities does not do away with the anti-hierarchical function of nationalism determining a comeback to the ‘status’: differently from the identities based on ‘status’ civil codifications got rid of, the ‘identity’ of consumer is not a fixed but rather a dynamic one: depending on the circumstances, everyone is also a consumer.

In the second place, there are other relevant theoretical implications. As Watson makes clear, the fact that there is no higher cultural similarity between a small farmer and a businessperson in the same country than between two farmers in different nations proves that there is no reason why private law rules should be necessarily national rather than, say, included in some common legal code (which holds particularly true if one considers that, pursuant to the regulation that has been just mentioned, parties are generally free to determine the contract law that should bind them). In the context of the on-going debate on European private law, such a view lends legitimacy to the idea of an optional supra-national code that parties may be free to adopt as a legal regime additional to those of the nation-states.

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407 A Sen, Identity and Violence, at 5.
408 A Sen, Identity and Violence, at 25.
409 JM Smits, ‘Legal Culture as Mental Software’, at 147.
The same conclusion that plural identities in Europe demand more freedom of choice and optional instruments is drawn by Smits. According to this author, one should already start asking ‘if the fact that people are English or live in the United Kingdom automatically implies that national English law has to apply to everything they do’.\textsuperscript{411} In this sense, the strategy that is more attentive to the theme of the plurality of identity is \textit{differentiation}, which allows people to opt out of their national legal system and opt for a legal regime which is more adequate to their culture,\textsuperscript{412} something which could be moreover particularly important in an era of accentuated multiculturalism and social pluralism. The choice as to applicable legal regime, in other words, would be up to people.\textsuperscript{413}

While the idea of people as completely free agents who choose for the legal regime that best suits their interests still provokes some doubts to say the least – unless of course one affirms that the establishment of some kind of free-market anarchism is one of the values a legal system should strive for – the theory of multiple identities still has important implications for the debate on Europeanisation of private law. The most important lesson that could be learnt is that there is no theoretical justification to affirm that only a national system of law can reflect the culture of citizens, as such culture is in reality a set of different beliefs, notions and allegiances which are often independent from nationality and not always significant in a contract law perspective. If this is true, even sub-national or supra-national regulations can be suitable to mirror that culture, in particular if allegiances transcend the borders of the nation-state, then one is legitimised to speak of forms of legal unification.\textsuperscript{414} The supranational institutional context of the European Union already offers several examples of the ways in which different identities can manifest themselves and challenge nationalistic assumptions. As far as the institutional organisation is concerned, the European Parliament represents an attempt to supersede national distinctions and allow a political confrontation between subjects that are gathered and interact with each other on the basis of ideological rather than geographical distinctions. This does not impede that political distinctions could occasionally give way to ‘classical’ national differentiations, which reveal themselves in cross-cutting majorities. This is normal, as identities – including the national one – gain prevalence ‘according to the circumstances’. Besides, there are examples that directly concern the process of the Europeanisation of private law.

\textbf{III.3.5.2.2. Multiple identities and the process of Europeanisation}

In the field of contract law, some evidence of the relevance of non-national allegiances can be found in the responses which have been given from national governments, consumer organisations, businesses and lawyers to the European Commission after the publication of the ‘communication on European contract law’

\begin{itemize}
  \item \textsuperscript{411}JM Smits, ‘Legal Culture as Mental Software’, at 146.
  \item \textsuperscript{412}JM Smits, ‘Legal Culture as Mental Software’, at 147.
  \item \textsuperscript{413}JM Smits, ‘Beyond Euro scepticism’, at 70 ff.
  \item \textsuperscript{414}Already in the 1970s Wieacker affirmed: ‘Einmail ist heute der Nationalstaatsgedanke selbst geschwächt. Gewiß kann uns auch heute niemand sonst abnehmen, Recht und Freiheit im eigenen Hause zu bestellen; aber starke Interessen und Loyalitäten richten sich heute auch auf über nationale Gemeinschaften und damit auch auf eine Rechtsvereinheitlichung in größerem Maßstab’, F. Wieacker, \textit{Industriegesellschaft und Privatrechtsordnung} (Frankfurt am Main: Athenäum-Fischer-Taschenbuch-Verlag, 1974) at 92.
\end{itemize}
of July 2001. In the ‘communication on a more coherent European contract law – An action plan’, those responses that came from various parts of Europe have been grouped together according to the social or economic function (governments, consumer, business, lawyers and so on) of the respondents instead of their nationality. Mutatis mutandis, this represents the opposite choice to that made by Hofstede in his study which on the contrary distinguished the respondents to questionnaires on the basis of their nationality. Distinguished on the basis of the function of the respondents, the reactions to the Commission even show a reasonable homogeneity within those categories. There is for instance a higher propensity for academic lawyers and legal practitioners to favour the famous proposed ‘option IV’ – that is a new comprehensive European legislation – which plainly contrasts with the general disfavor of the business for that hypothesis. On the contrary, it is among businesses that the idea of a minimalistic approach by the European communities seems to be favoured, while particular emphasis is put on the necessity to acknowledge freedom of contract and reduce mandatory interventions. If the results had been grouped together keeping in consideration the nationality of the respondents instead of their socio-economic function, the results obtained would have appeared to be less homogeneous. Even in that case, by the way, the results could have been different enough to allow us to speak of different ‘average’ cultures in different countries with regard to the perception of Europeanisation, provided of course with the usual disclaimer as to the imprecision of ‘cultural homogeneity’.

While these circumstances do not necessarily lead to the eccentric (and in reality likely dangerous) idea that instead of national legal regimes Europe should have ‘economic’ or ‘sociological’ codifications, they highlight the methodological reductionism that, although it originated in the era of nationalism, still affects aspects of the legal debate. The discussion on the Europeanisation of private law indeed continues to take the nation as a starting point, implying that there is some kind of homogeneity between the members of a nation while it adopts national understanding of the concept of culture – whose functional equivalent in the legal debate became legal culture, the main argument of critics of Europeanisation. Such an approach is coherent with a nationalist Weltanschauung: if one assumes that a French consumer is primarily a Frenchman, and only secondly a consumer, then the preference for the national level within the European multi-level private law system is consistent with the premise. Nonetheless, if one wants to underline the ‘identity’ of consumer, the conclusion would not necessarily lead in the direction of the national level and the option of a supra-national regulation – may it be in the form of a contract code, a so-called optional instrument, a comprehensive directive on consumer rights, a uniform legal method and so on – would appear more attractive and not in contradiction with the valuable respect for cultural diversity.

415 COM/2001/398
416 COM/2003/68
417 More precisely, respondents have been distinguished in governments (and these further distinguished in national governments), business (further distinguished in manufacturing industry, retail trade and so on), consumer organisations, legal practitioners, academic lawyers.
418 COM/2003/68, 4.4.4, 4.4.5 and 4.4.2.
III.3.6. Concluding remarks

While in a purely Kelsenian perspective every legal rule finds its justification and reason for validity in a hierarchically superior rule – up until the Grundnorm – in an ‘external’ perspective every rule finds a justification which resides in non-legal elements: politics, economy and, in a broader sense, culture. The analysis of legal culture is for this reason fundamental for a comparative analysis of law. In particular in the European context, fascinating attempts have been made to link legal culture with the more general societal culture, which in a way, appear as the attempt to prove scientifically the Volksgeist theory. However, the analysis of the broad concept of culture has mainly remained limited to the national dimension, coming to coincide with ‘national culture’, a still unclear concept mainly employed by nationalists to found the political claim to organise states on a national basis. Such a limitation – which shows the greatest trouble of concealing cultural variety within and beyond the borders of the nation – is not necessarily false but inaccurate and almost unavoidably leads to the conclusion of the cultural undesirability or even impossibility of denationalisation of private law.

Even despite all the methodological reservations about those studies that tried to scientifically prove the existence of national characters, the importance of national identities cannot be plainly confuted just like one cannot seriously claim that personal identity develops independently from the context in which a person lives or has lived. Quite on the contrary, everything depends on its context. It is anyway opportune that the importance of other identities is also recognised: limiting the analysis of culture to the sole national dimension is an arbitrary choice that can easily misrepresent reality and that cannot be seriously justified if not on the basis of the unspoken nationalist assumption that the nation is our most important, if not sole, allegiance.