Nationalism and private law in Europe
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Chapter IV

Euronationalism

Nationalism has thus far been described as a multi-faceted principle that can take on different forms according to the particular context and historical moment in which it arises. More specifically, the realisation of its programmatic aim – that is bringing the national and the political unit to overlap – can in the first place nourish ‘progressive’ movements aimed at the creation of nation-states as well as in a successive phase ‘conservative’ if not ‘reactionary’ movements aimed at preserving the national status quo once a nation-state has already been constructed. The indeterminacy of the concept of nation, together with the practical impossibility of ever achieving a national homogeneity, makes it very easy for nationalist forms of these two types to conflict with each other, each claiming to speak in the name of a particular national group. This is particularly evident even at the present day in the experience of certain countries in which regional groups claim a particular autonomy or even independence, so that, for instance, the dispute between Spain and Catalonia on the use of the terms ‘nation’ and ‘nationality’ to define a particular community is not only a quarrel about the most proper use of a word but reveals the presence of nationalist tensions. In this sense it becomes manifest that in the contemporary world order organised by states, the nationalist claims of a given ‘national unit’ are usually opposed to those, equal and contrary, of another ‘national unit’ which adopts a different understanding of nation. When dealing with nationalist manifestations it is then useful to take cognisance of the other group against whom nationalist claims are directed.

As we have previously drawn an analogy between nationalist arguments and the arguments employed in legal studies that object to Europeanisation, it is opportune to verify whether such ‘nationalism of resistance’ is opposed to an ‘analogous and contrary’ proactive nationalism based on a different understanding of the nation; in other words, the opposition occurs between a ‘state nationalism’ aimed at the maintenance of the political unit at the national level – within the state – and a kind of ‘European nationalism’ aimed at moving that political unit to a different supra-national level. According to a supra-nationalist model, indeed, the decision making power is transferred from the state level – where it has been traditionally exercised –
to a new higher governance level which does not coincide with the nation-state anymore. In other words, an influence of the nationalist ideology could be detected even behind the integration aims of the European institutions and the arguments employed by scholars who sustain Europeanisation. It has been suggested earlier that the European Union is a new framework for nationalism to operate in a broader context rather than the superseding of nationalist schemes, but it can now be asked whether the European integration process in itself can be considered a nationalist project.

In this chapter, therefore, some general considerations will be made with regard to the forms and characters of Euronationalism, subsequently showing the links of this political idea to the process of the Europeanisation of private law. Quite definitely, the complex question of Europeanism cannot be disentangled tout court considering it an expression of a (new?) kind of pan-nationalism; on the contrary the characteristic features of the processes of Europeanisation are so particular that the reductionist qualification of these dynamics as nationalism necessarily appears inadequate or provocative. Bearing this in mind, anyway, some links between opposite phenomena can be shown and looking – even if superficially – from this angle may highlight some important features even with regard to the approximation of national laws. The use of the term Euronationalism may indeed suggest the image of a movement for the creation of a European super-state which would act as a protagonist in a world scenario characterised by the disappearance of nations and the creation of other super-states. Sustaining the European project with the aim of establishing a super-state politically or economically opposed to other world powers would be indeed a plainly super-nationalist vision, as well as a very ambiguous one. However, coherently with the distinction between state and nation and the suggested idea that unification of law is a strategy for building the nation rather than the state, the question that has to be asked here is not whether Europeanisation projects are steps on the way to the creation of a European state – which would lead us to the eternal question of the federative or confederative nature of the union – but rather what their relevance is for the definition or the building of a European nation as the basis of a European political and legal system.

IV.1. The idea of Europe

At first glance, the expression European nationalism refers to the complex of particular nationalist manifestations in Europe. It is therefore a collective name given to a series of different and inhomogeneous phenomena, which nonetheless share the same basic nationalist assumption. A commonality of purpose between those manifestations is made possible by the fact that, according to the liberal nationalist principle, each nation should recognise the equal right to self-determination of all other national groups, which makes nationalism a possibly universal principle with necessarily local realisation. This aspect in particular marks the difference between liberal manifestations of nationalism and the aggressive movements that gained momentum at the beginning of the twentieth century which more or less explicitly

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rejected that principle in the name of the overriding national interest. While in reality the indeterminacy of the notion of nation and the focus on the national interest makes the pacific coexistence of different nationalist movements more complicated than nationalists like to suggest, the expression European nationalism can therefore be used to show a general unity of intentions among those groups and movements sharing the same idea that nations should coincide with states. Besides this understanding, one can also speak of Euronationalism in a very different sense, as an international movement that, given a broad interpretation of nation, aims at establishing a European state whose legitimacy is founded on a European nation. In this second sense, the political unit should come to coincide with a national one which is identified in a broader group of peoples, basically European populations, considered as a unique people on the basis of different criteria. Curiously, these two conceptions are not opposed and often even complementary to each other; indeed, they share the same roots, having developed in the same historical and cultural context, in which an ‘idea of Europe’ had been the inspiration for local nationalist manifestations.

While the cultural background of modern ethno-cultural nationalism in Europe is normally identified with German Romanticism, it should also be borne in mind that the exclusive focus on the nation as strongly opposed to other nations in Europe was a characteristic particularly associated with the second phase of Romanticism, the origins of which were actually more cosmopolitan. Considering cultural history, the second nationally-oriented phase of Romanticism developed slowly, also as a consequence of particular historical contingencies, from its first intellectual direction of a clearer European inspiration. One apparent example of these tendencies is Novalis’ work Die Christenheit oder Europa, in which the cultural unity of Europe was emphasised and based on mainly religious criteria. Such a trend characterised not only the arts: even in politics nationalism occasionally showed a clear European vocation. Firstly, the pursuit of national independence was seen as a principle valid for all European nations, so that revolutionaries of different origins could belong to the same network in order to better achieve their particularistic but common goals. Indeed, as Smith puts it ‘the basic goals of nationalists everywhere were identical: they sought to unify the nation, to endow it with a distinctive individuality, and to make it free and autonomous’. The political activity of Mazzini is a clear example thereof: after the disaggregation of the Giovine Italia, the new movement of the ideologue of the Italian Risorgimento was baptized Giovine Europa. In this regard, an author has highlighted an interesting feature of the dramatic relation between Europe and the nation:

'It is noteworthy that the two countries with the strongest traditions of Europeanism, Italy and Germany, were not unified. Both the Risorgimento and the drive for German unity exalted the idea of Europe. However, once these countries became unified, the earlier enthusiasm for Europe degenerated into national chauvinism and

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2 See supra, second chapter.
3 See supra, second chapter, where it has been pointed out that the legal thought of Savigny shows contiguity with both types of Romanticism.
irredentism. The universalist principles associated with Europe were overshadowed by the particularism of national cultures.\footnote{G Delanty, *Inventing Europe. Idea, Identity, Reality* (Basingstoke: Macmillan, 1995) at 79.}

Secondly, a movement for the creation of a European state – a goal for which the establishment of nation-states was considered a first necessary step – soon arose. Of course, plans for a politically united Europe (for certain hardly comparable to contemporary ones) have continued to exist after the fall of the Western Roman Empire,\footnote{H Mikkeli, *Europe as an Idea and an Identity* (Basingstoke: Palgrave Macmillan, 1998) at 35.} though great ambiguity existed as to the determination of the borders of Europe – a hotly debated question has always been whether England and Russia belonged to Europe. Limiting ourselves to more recent years, Victor Hugo, already a supporter of the independence claims of several nations in Europe, famously expressed the ideal of a United States of Europe, a new liberal and peaceful state in which European nations would have joined enthusiastically without renouncing their distinctive features.\footnote{In his speech at the International Peace Congress of Paris in 21 August 1849, Hugo said: ‘Un jour viendra où vous France, vous Russie, vous Italie, vous Angleterre, vous Allemagne, vous toutes, nations du continent, sans perdre vos qualités distinctes et votre glorieuse individualité, vous vous fondez étroitement dans une unité supérieure, et vous constituez la fraternité européenne, absolument comme la Normandie, la Bretagne, la Bourgogne, la Lorraine, l’Alsace, toutes nos provinces, se sont fondées dans la France. Un jour viendra où il n’y aura plus d’autres champs de bataille que les marchés s’ouvrant au commerce et les esprits s’ouvrant aux idées. Un jour viendra où les boulets et les bombes seront remplacés par les votes, par le suffrage universel des peuples, par le vénérable arbitrage d’un grand Sénat souverain qui sera à l’Europe ce que le parlement est à l’Angleterre, ce que la diète est à l’Allemagne, ce que l’Assemblée législative est à la France !’. On Hugo’s idea of Europe, also see E Ousselin, ‘Victor Hugo’s European Utopia’ (2006) 34 *Nineteenth-Century French Studies* 32-43.} In this sense, the European ideal smoothly coexisted with and completed the nationalist idea. Between the second half of the nineteenth and the beginning of the twentieth centuries, calls for a federal state, even representing a liberal and Christian nation called ‘Pan-Europa’,\footnote{This is the view of the movement ‘International Paneuropean Union’, the programmatic manifest of which was published in 1923 with the title ‘Pan-Europa’ by Richard Graf Coudenhove Kalergi.} proliferated. This particular form of European nationalism remained however minor and politically non-influential, so that Europe remained predominately a cultural idea, evidently overwhelmed by the success of that internally-oriented nationalism that soon took on a more ethnic and illiberal connotation. It was 1908 when Georges Sorel predicted that, since the idea of integrating different populations like the Europeans seemed still impracticable, in just ten years Europe would have sunk again into war.\footnote{‘En Amérique, on a fédéré des gens tous pareils les uns aux autres, vivant dans des Etats tous pareils... La belle affaire ! Mais comment ferez-vous pour fédérer des Slaves, ou religieux ou mystiques révolutionnaires ; des Scandinaves assaigis ; des Allemands ambitieux ; des Anglais jaloux d’autorité ; des Français aaves ; des Italiens souffrant d’une crise de croissance ; des Balkaniques braconniers ; des Hongrois guerriers ? Comment calmez-vous ce panier de crabes qui se pincent toute la sainte journée ? Malheureuse Europe ! Pourquoi lui chacher ce qui l’attend ? Avant dix ans, elle sombrera dans la guerre et l’anarchie, comme elle a toujours fait deux ou trois fois par siècle’, quoted in G Chabert, *L’idée européenne. Entre guerres et culture : de la confrontation à l’union* (Bruxelles: Peter Lang, 2007) at 198. See also H Mikkeli, *Europe as an Idea and an Identity*, at 89.} He had been too optimistic: the war broke out again already in 1914.

A few decades later, in the disarray of the Second World War, the project of a united Europe became even more unclear, and ended up being advocated by irreconcilably different political sides. On the one hand, the pan-nationalist idea of Europe survived among nationalists in the darkest days of the continent, but it now came to coincide with a brutal Nazi empire, so that even Hitler dared speak in the
name of the European culture and civilisation. The idea of European unity was furthermore essential to fascist ideology, and the plan of creating a federal and anti-Semitic organisation called European community, integrated under the flag of the Third Reich (and from which the United Kingdom had to be excluded) was even envisaged as a concrete political proposal in the manifesto of the Fascist Republican Party, as one of the last gasps of the fading Mussolinian era. On the other hand, a federative supranational organisation was seen as an ideal that could transform itself as a solution to the ills Europe was experiencing in that period: in 1941 Altieri Spinelli and Ernesto Rossi wrote the famous Ventotene Manifesto by which the European Federalist Movement was founded, giving new impulse to the vision of Aristide Briand – also honorary president of the aforementioned Paneuropean movement – who had advanced the progressive idea of a European Union already ten years earlier. The successive creation of the European Communities first and the European Union later, the historical background of which is widely known, revitalised the aspiration, together with a European state, to something similar to a European nation, based on a series of elements shared by all European populations.

In general and even in less extreme situations than those mentioned, it is therefore manifest that the idea of a European identity has always been generic enough to be compatible with – and censured by – both leftist and rightist political perspectives, as well as, paradoxically, an instrument for ‘state-nationalist’ aims. This latter point is what emerges not only after a consideration of the fascist imperialist views, but also visions expressed in a previous historical phase: the Napoleonic idea of Europe was almost the same as his idea of a French empire, while many French conveniently praised the idea of Europe exactly when European culture was most strongly inspired by French language and civilisation, and Hugo’s Europe had its capital in Paris. Conversely, German intellectuals often considered Europe as the quintessence of Christendom and, of course, Germanic culture. Considering the more or less explicit exploitations of the European idea at least the merit of frankness must be given to Peter the Great, who once clearly said: ‘We shall need Europe for a few decades, and then we can turn our backside to her’.

In conclusion, similarly to nationalism tout court, Euronationalism also appears to be a concept that can take several forms in different periods and contexts.

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11 G Delanty, Inventing Europe, at 111.
12 The point 8 of the Manifesto di Verona of 1944 stated: ‘Fine essenziale della politica estera della Repubblica dovrà essere l’unità, l’indipendenza, l’integrità territoriale della Patria nei termini marittimi ed alpini segnati dalla natura, dal sacrificio di sangue e dalla storia […] Altro fine essenziale consiste nel far riconoscere la necessità degli spazi vitali indispensabili ad un popolo di 45 milioni di abitanti sopra un’area insufficiente a nutrirli. Tale politica si adopererà inoltre per la realizzazione di una comunità europea, con la federazione di tutte le Nazioni che accettino i seguenti principi fondamentali: a) eliminazione dei secolari intrighi britannici dal nostro continente; b) abolizione del sistema capitalistic interno e lotta contro le plutocrazie mondiali; c) valorizzazione, a beneficio dei popoli europei e di quelli autoctoni, delle risorse naturali dell’Africa, nel rispetto assoluto di quei popoli, in ispecie musulmani, che, come l’Egitto, sono già civilmente e nazionalmente organizzati’, in R De Felice, Autobiografia del fascismo. Antologia di testi fascisti 1919-1945 (Torino: Einaudi, 2004) at 474.
13 H Mikkeli, Europe as an Idea and an Identity, at 62.
14 H Mikkeli, Europe as an Idea and an Identity, at 80.
15 G Delanty, Inventing Europe, at 71, 80 and 104-105.
Distinctions could be based on the criterion employed to define European identity – therefore distinguishing between civic, ethnic and cultural manifestations – and most importantly on the political agendas associated to it.

IV.2. Reasons for Europe-building

Imaging Europeanism as a form of pan-nationalism logically presupposes that the same political and economic reasons lying at the basis of the nationalist ideology also play a fundamental role in Euronationalism. In other words, the answers to the questions ‘why the nation?’ and ‘why Europe?’ should be connected.

In the first chapter, where the reasons for nation-building were discussed, we have referred to the Gellnerian idea that along with political reasons, economic circumstances were especially important in the process of formation of nation-states. According to this perspective – which is partially contested by ethno-symbolists who prefer to underline the ‘irrational’ character of the national sentiment that existed ab aeterno but arose at a random moment in history for unclear reasons – the process of nationalisation would have been more or less intentionally steered by economic, political and intellectual elites, occasionally with the support of parts of the populations. In this perspective, the national sentiments of all the artists and poets who spread the national idea were surely genuine rather than the result of an opportunistic calculation, but still it was only the new kind of modern society that determined the success of nationalism: this process took place only in a recent era for the reason that, according to Gellner, the political organisation of the nation-state was the most convenient one to fit the needs of industrialising societies. This new kind of society asked for worker mobility which, in turn, required some kind of egalitarianism: ‘Nationalism is rooted in a certain kind of division of labour, one which is complex and persistently, cumulatively changing’. In particular, only a unified space with no borders anymore would have consented the necessary circulation of workers, while the national ideal, instilling in people the idea of a common belonging which replaced the stricter ties of the community of origin, facilitating people’s mobility and representing – it is opportune to repeat these words – ‘substitute for factors of integration in a disintegrating society’.

If these reasons justified eighteenth and nineteenth century nationalism in the first place, it is easy to see that they also are of paramount importance to the European project. Such a shift from the nation-state to the supranational dimension is explainable since, while the framework of the nation-state represented an enlarged territorial and economic unit that could foster the economic development in the eighteenth and nineteenth century, in the twentieth century the process of economic globalisation made national borders often appear as a limitation or at least an alteration of the normal dynamics of the markets rather than that protected environment necessary to cultivate the economy and make transactions possible.

19 M Hroch, Nationale Bewegungen früher und heute. Ein europäischer Vergleich, at 14, quoted by EJ Hobsbawm, Nations and Nationalism since 1780, at 173.
20 ‘For example the German-French-Swiss valley of the upper Rhine is more likely to form a coherent market for many products than the national area of any one of the three States. It is due to the nationalization of economic
Marxist authors could expect that the normal outcome of this economic development would be colonialism – which was indeed hypocritically pursued by several European states exactly in the years in which the national principle affirmed itself in Europe – but after the horrific events of the world wars the road of colonialism was at least partially abandoned as history took a different course. In this context, the development of the European communities seems to respond at a higher level to the same needs to which nationalism could give an answer only some centuries ago: ‘Taking Gellner’s […] argument that nationalism came into being to serve society in the process of industrialisation with a culturally uniform mode of communication, it could be argued that the idea of Europe is today fulfilling this role’.

At any rate, the economic perspective cannot aim at explaining everything on its own. In the experience of post-war European integration there is also a fundamental quest for international peace that was more accentuated than in the nationalist movements of the eighteenth and nineteenth century; but the two dimensions – political and economic – have always been strongly intertwined. In this regard, it must be noticed that since its first conception while Europe was still facing self-destruction during the Second World War, the European integration project was already thought as a way to achieve a Kantian perpetual peace exactly by means of a limitation of national sovereignty and by combating economic protectionism. Some years later after the experiences of the European Coal and Steel Community and the EURATOM, the Treaty of Rome established the common market on the basis of the four fundamental economic freedoms, namely the free movement of goods, capital, services, and persons – mainly workers – within the whole European territory. The mobility of workers which in a modernist perspective is the reason behind the development of nationalism was elevated in the European context to a fundamental freedom. Following a similar line of reasoning, the pivotal argument employed today by the Commission and many advocates of legal harmonisation in Europe is that legal diversity represents a hindrance in the exercise of those fundamental freedoms of circulation. In other words, even the creation of a European system of private law would be necessary to enable the ‘mobility’ of businesses and consumers within the European territory. Considering these elements, if one accepts the modernist interpretation, it becomes apparent that the same reasons lie behind both nationalism and Europeanism.

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thought in the nineteenth century and to the intervention of the nation State by trade law and other regulations that economic data were distorted, that homogeneous transboundary markets were divided into their national components and that these components were apportioned to the respective national markets. As a result, products of the same kind whether toothpaste or mineral water, pocket knives or instant coffee, still differ considerably in Basle, Freiburg and Colmar’, in this context, private law rules represent the framework that allow the functioning of the market, and some of its basic principles are even the ‘prerequisite’ of it, so that it would be erroneous to think that the simple elimination of state interventions could open up the market enabling the circulation of goods among countries, J Basedow, ‘A Common Contract Law for the Common Market’ (1996) 33 Common Market Law Review 1169-1195, at 1179-1181.

G Delanty, Inventing Europe, at 8.

IV.3. The European identity

In the view of European nationalists and independently from the political consequences to be drawn, Europe is characterised by a set of common traits which make it something more than a mere – actually quite questionable – geographical concept. In other words there would be something which makes people in Europe if not identical to one another at least more similar to one another than to people in different parts of the world. These traits are what concur to define the so-called European identity. Despite the different traditions of the various nationalities in Europe, some philosophers and intellectuals have nonetheless argued that those differences seem secondary if compared with the deeper elements that keep Europeans together: ‘The souls of the French and English and Spanish are, and will be, as different as you like, but they possess the same psychological architecture’ and

‘[i]f we were to take an inventory of our mental stocks today – opinions, standards, desires, assumptions – we should discover that the greater part of it does not come to the Frenchman from France, nor to the Spaniard from Spain, but from the common European stock. Today, in fact, we are more influenced by what is European in us than by what is special to us as Frenchmen, Spaniards and so on’. 23

This view was indeed already represented by Rousseau, who affirmed

‘Il n’y a plus aujourd’hui de Français, d’Allemands, d’Espagnols, d’Anglois même quoi qu’on en dise; il n’y a que des Européens. Tous ont les mêmes goûts, les mêmes passions, les mêmes mœurs, parce qu’aucun n’a reçu de forme nationale par une institution particulière’. 24

But such Euro-friendly enthusiasms – which exist also at the present day – could easily become an instrument for concealed national egoism and interests25 or, in another sense, be a simple expression of the gusto of multilingual travelling elites, hardly representative of the experience of most people induced to migrate primarily for economic reasons.26 If what Herder thought of the nation cannot be taken as evidence for the thoughts of a Westphalian peasant,27 then it could also be said that neither can Rousseau’s idea of Europe be considered representative of the thoughts of the already legendary ‘Polish plumber’.

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24 J-J Rousseau, Considérations sur le gouvernement de Pologne, et sur sa réformation projetée (Londres, 1782) at 17.
25 Inasmuch as private law is concerned, the impression is that a strategy of hegemonic domination employed by national actors ‘is to play up the idea of a European legal tradition in order to constitute a transnational space within which, working as cosmopolitans, they have a chance of exercising more influence than would be possible in a world of dispersed national systems with strong German and French blocs’, D Kennedy, ‘Thoughts on Coherence, Social Values and National Tradition in Private Law’, in MW Hesselink (ed), The Politics of a European Civil Code (The Hague: Kluwer, 2006) at 30.
These common aspects are, to be sure, still largely insufficient to make a ‘nation’ out of Europe, and the very idea of a nationalism which strives for the political recognition of an alleged ‘European nation’ sounds odd. Even acknowledging the elusiveness of the idea of nation, even the most audacious Europeanist in these days would still have many difficulties in defending the view that Europe is already a nation. In this sense, the European Union could at the most evolve into some kind of multi-national superstate, very different from the nineteenth century idea of state. In this light, the most fundamental claim of nationalism cannot be achieved, since even if a superstate were to be created, this political unit could never coincide with the national one. For those liberal nationalists who consider that the nation-state is still the only viable mechanism to implement democracy, this circumstance would make it impossible for the European Union to move towards a more federalist direction. Some remarks need to be made in this regard. The idea of something like a European nation that evolves in a supra-national state necessarily conflicts with the nationalist principle for those who adopt mainly primordialist positions or at least acknowledge ethnic factors a pivotal role in the process of creation of nations — which is what is claimed in particular by ethno-symbolists and somewhat assumed by liberal nationalists. To liberal nationalists, it is clear that the diversity existing on the continent cannot be reduced under the idea of a European nation:28 national identifications are vivid, popularised and established, unlike the European identity.29 In this sense, the decisive element is not much the fact that Europeans do not share the same blood, but rather that they very often do not even share the same historical memories and myths.30 In contrast, nationalists in past centuries could appeal to a very different set of common beliefs and traditional popular myths to highlight the particularity of specific national groups; these were myths punctually rediscovered31 or even plainly invented.32

While these differences are hardly deniable, for those who adopt a modernist view and accept the idea that nations can also be ‘created’, these divergences are still insufficient to think of Europe and nation as two irreconcilable concepts. In the modernist perspective, indeed, no actual nation really ‘existed’ before it was created at a certain moment in history, building upon a series of pre-national allegiances among people in certain geographical areas. In this sense, the idea of making Europe a nation is definitely not more foolish than was the idea to bring together Catalans and Basks under the Spanish Kingdom, Berliners and Bavarians under the German Empire or Sardinians and Neapolitans under the Italian state in the first place. In this sense, it is interesting to note that the same words used by Bismarck to express doubts concerning the political idea of Europe — ‘geographical expression’ — had been employed by Metternich with regard to the Italian peninsula, just before Italy was eventually unified in 1861. In conclusion, ‘Europe does not exist any more naturally

29 AD Smith, ‘National identity and the idea of European unity’, at 62.
30 A short overview of Smith’s argument can be found in H Mikkeli, Europe as an Idea and an Identity, at 217-219.
than do nations’. Even more stimulatingly, the idea of Europe historically precedes the idea of many European nations.

On the basis of the conviction that nations are purely imagined communities, a modernist point of view should not be interested in verifying whether something as a European nation exists and has good reasons to strive for political unity, but should rather verify whether strategies are in place to ‘build’ it. In other words, the European idea should be considered as a normative concept subject to critical reflection. In this light, one could think whether some of the nation-building strategies that have been more or less usefully employed some time ago for nation-states are being employed at the supranational level to lend a kind of ‘national’ legitimacy to the European political model, regardless of the tedious question as to whether Europe would be reduced to a unity called ‘nation’: the question whether Europe can be considered as some kind of very peculiar nation is redundant and would inevitably lead to the frustrating compromise-conclusion – typical of discussants tired of arguing and in search of an easy settlement – that basically any view is right as long as we recognise that we are presupposing different definitions. The main point that has to be addressed is therefore whether the process of Europeanisation presents similar characteristics to a process of nationalisation and whether – and which – ‘nation-building’ techniques are being used. These points lead us to face a tricky problem political scientists have been dealing with for years: the definition of a ‘European identity’.

IV.3.1. Does a European identity exist?

Despite the political importance it could have, European identity remains an extremely vague idea, and the problem of identifying what such an identity is concretely based on remains open. The definition of European identity is in the end analogous to the nationalist individuation of the criteria on which belonging to the nation could be based. Not by coincidence, a political scientist considered in the end the whole idea of a European identity as a pan-nationalist – that is to say Euro-nationalist – programme. The question as to what is European identity echoes undeniably the most fundamental dilemma of every nation, and could be rephrased in _qu’est-ce que l’Europe_ ? Similarly and even more than national identity, also the European identity appears to be an elusive and blurry concept which needs to be constructed rather than discovered.

According to one perspective, an authentic and comprehensive cultural unity in Europe has probably never existed, and has been invented only retrospectively. While an ‘idea of Europe’ has been somehow a constant in history – though filled with very different contents and used with diverse goals as it has already been shown – it is rather unclear what the criteria of identification are which define the ‘European’ enough to make him or her different enough from an American, an Egyptian or a

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33 G Delanty, _Inventing Europe_, at 3.
34 G Delanty, _Inventing Europe_, at 2.
36 G Delanty, _Inventing Europe_, at 80.
Chinese person. Given all the contradictory answers that can be given to this fundamental question, it is not strange but rather quite frank that someone threw in the towel admitting that a European identity simply does not exist or that this could at most be represented by its plurality and incoherence. The quest for a European identity would, therefore, be a merely rhetorical discourse brought about with the intention of culturally legitimising political constructions. In an analytical perspective, of course, plurality as the defining feature of identity is a contradiction in terms; identity is etymologically and by definition ‘one’ and can hardly accept plurality within itself. But politics is not the same as logic, and in political terms, such a new pluralist understanding of identity marks a considerable difference from the politics of identity traditionally promoted by nationalism.

However, as appealing as a radical conclusion can be, the fact that the discourse on a European identity appears as a rhetorical and instrumental exercise does not necessarily imply that, at least in the eyes of people, there is no common identity for Europe. Indeed, even empirical studies reveal that only a very small minority of Europeans do not think that such thing as a European identity exists, even if their opinions subsequently diverge as to ‘what’ this is. Thus, advocates for Europe have a case in sustaining that there is something which makes people in Europe somehow similar, even if Europeans are often not aware of it, embedded as they are in the banal nationalism of the countries in which they live, and that make them ‘subconsciously think and act much alike’, while ‘the coincidence of their opinions is not limited or restricted by national or state line’.

IV.3.2. Political meaning of a European identity

The expression ‘European identity’ has become common not only for popular use but in political discourse too. Indeed, the attempt to find out nature and contents of this concept appears particularly interesting from an institutional perspective too, since also ‘[t]he European Union as a political entity struggles to achieve a common identity for its citizens’. The reason is that the process of finding a European identity assumes a political importance within the legal architecture of the European Union, where it could serve as a form of civic legitimation for the whole supranational structure. If something like a European ‘people’ or ‘nation’ were to be ‘imagined’ on the basis of that shared identity, a new social subject would be created, which would reasonably demand representation in a European rather than in a national dimension. All in all, even the European citizenship that was brought about in 1992 ‘by a deep sense of malaise and public disaffection with the European construct which threatened to undermine its political legitimacy’.

This point is relevant also for the politics of private law: for instance, critics of Europeanisation point out that only national

38 See G Delanty, Inventing Europe, at 143.
39 M Barberis, Europa del diritto (Bologna: il Mulino, 2008), at 61.
40 More precisely, 3% of the respondents to Special Eurobarometer 346 Wave 73.3, April 2011, at 95.
legislators are in the ideal position to assess what the interests and preferences of their own co-nationals are\textsuperscript{44} but if one sees a unity of interests and preferences among the citizens of Europe, then the reason why the national legislator should be preferred in a multi-level governance system becomes theoretically questionable.

At the present day, however, the existence of such a European subject is dubious.\textsuperscript{45} Since the existence of a strong European identity has been denied by several commentators,\textsuperscript{46} the lack of a European dem\textit{os} would make the entire idea of a European democracy hardly imaginable within a supranational framework. This point has not remained solely within the realm of pure academic interest. In one of its most important judgments – the famous \textit{Maastricht-Urteil}\textsuperscript{47} of 1993 – the German \textit{Bundesverfassungsgericht} has basically denied that a European people actually exists. The legal consequences of this sociological premise, confirmed also in the later \textit{Lissabon-Urteil} of 2009,\textsuperscript{48} coherently follow: the democratic legitimacy of the European institutions necessarily passes through national institutions, in the first place the Parliaments, which remain the only bodies legitimated to represent national peoples, the only ones actually ‘existing’ and to which sovereignty belongs as expressly stated by national constitutions. On the contrary, the European Union must be defined as a mere ‘Staatenverbund zur Verwirklichung einer immer engeren Union der – staatlich organisierten – Völker Europas (Art. A EUV), keinen sich auf ein europäisches Staatsvolk stützenden Staat’.\textsuperscript{49} In this line of reasoning, the German Constitutional Court stated that the participation of national parliaments in the administration of the European Union is a condition of legitimacy for German participation in that supra-national organisation. The nation-state is indeed still the most important context in which democracy can be exercised and the political form of organisation for the national \textit{Volk}.

\textbf{IV.3.3. Constitutional Euro-patriotism}

If the post-modernist approach according to which a European identity is necessarily incoherent and in the end not a real ‘identity’ may appear unsatisfactory, it can be expected that more suitable results can be obtained by referring to a theory elaborated by one of the best-known opponents of post-modernity in defense of modernity. The European identity, therefore, could be acknowledged to build upon a theory of Constitutional patriotism. The idea, developed in particular by Habermas, seems to be particularly useful to develop criteria of identification within Europe which are ‘civic’ enough to make up on the one hand for the lack of any ‘ethnic’ or even apparent cultural similarity between the Europeans and on the other hand to avoid dangerous involutions in intolerance which characterised most nationalist projects in the past.

\textsuperscript{44} See \textit{supra} third chapter.
\textsuperscript{47} German Constitutional Court, \textit{Maastricht} [1993] BVerfGE 89, 155.
\textsuperscript{48} German Constitutional Court, \textit{Lissabon} [2009] BVerfGE 123, 267.
\textsuperscript{49} German Constitutional Court, \textit{Maastricht} [1993] BVerfGE 89, 155.
According to this view, which has been already introduced in the first chapter, citizenship should be founded on a series of shared liberal values – often of a more procedural than substantive nature – while the respect for these values represents the only condition of ‘admission’ in the community. What keeps Europeans together is therefore the commitment to a set of shared values. In this sense, even the criticism that there is no such thing as a European *demos* can be dismissed inasmuch as it conceives of nations in purely ethnic terms as a community of descent, while a ‘civic’ understanding of nations would allow us to move from the plurality of national ethnic *demoi* to the unity of a European civic *demos*. In this sense, Europeans are not such because they share the same ethnic origin, religion or language, but rather because they all adhere to the same civic manifesto of liberal values. Adhering to a civic understanding of the nation, it becomes easier to imagine of a European unity in that sense: already Renan thought that ‘*Les nations ne sont pas quelque chose d’éternel. Elles ont commencé, elles finiront. La confédération européenne, probablement, les remplacera*’. In this understanding, the dimension of European political ideology becomes fundamental.

This interpretation also has its drawbacks and has been criticised in particular for assuming that abstract legal principles can be used to develop a strong collective identity. In this light, a European identity would be excessively ‘thin’. However, this criticism overlooks that ‘[a]bstract principles may be thin, but identities focused on them are not’, which is even more important considering that ‘the common core of a European identity is the character of the painful learning process it has gone through, as much as it results’. Furthermore, commentators have expressed the concern that it is unlikely that European citizens will develop a common identity given the actual institutional scenario (with regard in particular to electoral politics and accountability of the institutions) which does not favour the emergence of that ‘public sphere’ the existence of which is fundamental for the development of a common identity. If this is true, therefore, it can be concluded that citizens’ attitude towards the EU will ‘continue wavering between fickle support and a lack of interest in European political life, on the one hand, and a stubborn nationalism, on the other’.

Traces of attempts to base a European identity on Constitutional patriotism are evident within the European context. In this sense, if there is a Euronationalism this can be in the first place inspired by Constitutional patriotism and therefore qualifies as a manifestation of *civic* nationalism. In any case, if we imagine the European identity as a construction based on the civic and voluntaristic criteria of the acceptance of a set of constitutional values, the question crops up consequently as to what are those constitutional values that have to be agreed upon by all Europeans and that concur to forge a European identity.

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52 M Kumm, ‘Why Europeans will not embrace constitutional patriotism’, at 123.
IV.3.4. What are the European values?

In a way, the success of given political structures that have arisen in the ‘old world’ and later exported to the ‘new world’ is so remarkable that these elements alone have become insufficient to be considered the characteristically European features rather than those of some kind of ‘Western’ civilisation. So for example, while Bobbio could spot a European ‘ideology’ based on – or at least rhetorically self-represented as based on – the rule of freedom, it is self-evident that the concept of freedom in itself also represents a fundamental element of the American or Japanese form of government. Europe could then be at most considered to be the historical cradle of the liberal values of a general Western tradition, but still not the only representative of those values in the present. In this sense, that juxtaposition between the self and the other which makes possible the definition of identity becomes more complicated. On the other hand, the definition of European characteristic features presumes a logical operation against which the same criticisms that have been made to the systematisations of national cultures could be directed and that does not seem sufficient to embrace European diversity anyway.

The politically successful experiment of the European Union can offer some help identifying a set of common European values. In particular, the preambles of treaties and constitutions are always useful – though also easily misleading – documents to get a grasp of the political dimension of the legal rules contained there. In the case of the European treaties, these already entail a list of fundamental principles that are – and shall be – shared by all European states. The need for a strong collective identity supporting the European project became more considerable along with the expansion of the competences of the European communities themselves, as a sign of the necessary interrelation between political power and civic legitimacy based on identity. While the Treaty of Rome 1956 could only maintain a low profile, though already generically referring to values as solidarity between the peoples of Europe (and overseas) as well as peace and liberty, some decades later the Treaty of Maastricht 1992 that founded the political community of the European Union could go into more detail, disengaging from a purely economic perspective. In the first part of that treaty, the contracting parties confirmed ‘their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law’. These principles are not purely rhetoric formulae, but rather authentic conditions of adhesion to and permanence within the European Union: the lack of respect for one of these principles can even lead to the exclusion of a member state from the Union. Even the treaties, in other terms, focus on a commonality of political values as elements that bind together European states. At the latest stage in this evolution, the new article 2 of the Treaty on the European Union now reads that:

55 N Bobbio, ‘Grandezza e decadenza dell’ideologia europea’ (1986) 3 Lettera internazionale at 1-5.
56 This holds true for many constitutional provisions too and, in this sense, ‘Most constitutions guaranteeing free speech and elections are as informative about the societies they allegedly define as a man saying ‘Good morning’ is about the weather’, E Gellner, Nations and Nationalism, at 28.
The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

To some extent, these values are indeed laid down in the legal rules of several European states. Constitutionalists pointed out that there is a set of basic values that bind all member states and can lead to the notion of a European constitutional heritage, with the respect for human rights assuming importance in this context. If there is something that characterises a European political identity this seems to be its mixture of democracy and rights, liberalism and constitutionalism. In this light, a sensitivity for fundamental rights manifested by the European institutions – notably including the Court of Justice that tied the activities of the other Community institutions to the respect of those values considered as an integral part of the EU legal system even before this principle was explicitly laid down in the provisions of the treaties – also assumes the particular function of construction of its own identity.

These elements, nonetheless, only concur to define the political values that are shared by the national systems but do not offer any guarantee that these values will be shared by citizens as well. Political principles, in other words, could define the identity of Europe but not of the Europeans. Nonetheless, empirical research shows that respect for human rights, peace, democracy and rule of law are perceived of as the values that represent the European Union even by most European citizens. While it would admittedly be difficult to turn against these values, it is remarkable that people imagine the European identity as based exactly on those ideals.

While the treaties necessarily adopt quite generic terms, moreover, it seems possible to identify further characteristics typical of Europe. Habermas and Derrida in particular singled out six characteristics which would distinguish Europe from other world powers, writing during historical events that dramatically divided a considerable portion of European public opinion from the government of the United States in particular. The two philosophers identified several features of Europe’s political profile, among which the *privatisation of faith*, a particular conception of *politics and market* characterised by distrust in the market’s ability to correct its own failures, the struggle for *‘more social justice’*, sensitivity to injuries to personal and *bodily integrity* which translates into the rejection of capital punishment, and the idea

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57 A Pizzorusso, *Il patrimonio costituzionale europeo*.
60 *Eurobarometer 69*, November 2008, cited in J McCormick, *Europeanism* at 63. However, a more recent survey by the Eurobarometer (Special Eurobarometer 346, Wave 73.3, April 2011, at 95) asked this question ‘In your opinion, which of the following are the most important elements that go to make up a European identity?’; the answers were: The single currency, the Euro (36%), Democratic values (32%), Geography (22%), Common culture (22%), Common history (17%), A high level of social protection (13%), Symbols, flag, hymn and motto (11%), Common religious heritage (5%), Other (1%). There is no European identity (spontaneous, 3%), don’t know (6%). Furthermore, more than 53% declared to feel attached to the European Union. The leading position is taken by ‘the single currency’, which represents a new option if compared with previous analogous surveys. In this sense, the introduction of this new option sent ‘democratic values’ at the second place of the ranking. The highly educated respondents, however, still place democratic values at the first position (at 97).
of the mutual limitation of sovereignty.\textsuperscript{61} In the end, according to Habermas, the ‘common core’ of the European identity ‘is the lasting memory of a nationalist excess and moral abyss’.\textsuperscript{62} The predisposition towards a supra-nationality that goes beyond nationalism seems according to this view even inherent to the European identity, and also later commentators have highlighted that the ‘levels of nationalism’ in the European states are remarkably lower if compared to those of various non-European countries.\textsuperscript{63} Political scientists have built upon these foundations, more specifically identifying some characteristics that seem to be typical of the European societies in contrast to others even within the general category of the ‘West’.\textsuperscript{64}

In this sense, Habermas and Derrida put emphasis on aspects of the European identity as the focus on fundamental rights (like bodily integrity) as well as social rights. In this light, the promotion of citizens’ welfare is an expression of the ‘social’ nature of Europe, particularly developed in an era in which Europe had to define its identity as a ‘third way’ between the opposite economic and political models embodied by the United States and the Soviet Union. In this regard, a non-European observer can perceive that ‘in Europe today it seems as though every country except Britain claims that one of the things that is distinctive about its national tradition is its highly social character’.\textsuperscript{65}

\textbf{IV.4. Law as a Europe-building tool}

Even legal rules could be employed to promote the creation of a collective identity in Europe in the same way in which they can be (and have been) used as an instrument for nation building. While historically such a function of law has been undertaken for the consolidation of nations organised both on a civic and an ethno-cultural basis, if one accepts constitutional patriotism as the parameter for the construction of a collective identity, the function of legal rules becomes even more important: in this case, indeed, the object of identification of the citizens would plainly be law itself, as long as law is able to reflect faithfully the liberal values shared by citizens. In this light, the attempts that have been made in recent years to bring to fruition a Constitution for Europe assume a particular social importance and it is understandable why the idea of a European Constitution was sustained by Habermas in particular.\textsuperscript{66}

\textbf{IV.4.1. Public law}

As the events surrounding the ‘rise and fall’ of the European Constitution are well known, it suffices to say that the proposed treaty adopted the rhetoric and symbolic function of national constitutionalism even more than its substance: while the denomination ‘Constitution’ appeared to be quite improper for a treaty of that kind,

\begin{itemize}
  \item J McCormick, Europeanism, at 71 ff.
  \item See J McCormick, Europeanism.
\end{itemize}
Euronationalism

the classic symbolism which is usually associated with constitutional charters in member states was present in that project as well. The bashful use of the term ‘Constitution’ in the ambiguous official denomination of the Treaty establishing a Constitution for Europe, as well as the reference to concepts like a flag, a hymn and a day of celebration in the text, confirmed the undisguised intention to compete with the member states in nation-building practices, through the employment of classical instruments of – according to Billig’s terminology – ‘banal nationalism’. In other terms, ‘in attempting to move beyond nationalism, the European Community attempted to fashion a European identity using the very tools of nationalism’. This seems to confirm the idea that the European institutions embarked upon a Euronationalist project, the outcome of which has been quite unsuccessful thus far.

This attempt, which may have been perceived as an undue interference in matters belonging to the historical consciousness of nation states, may contribute to explain part of the firm political resistance encountered by that Treaty and its definitive rejection following the famous French and Dutch referendums of 2005, furthermore preceded by inflamed debates in nationalist terms in those countries. No wonder, then, that in order to overcome such resistance, the treaty projects had to renounce eventually not only the denomination of Constitution and all references in the text of the treaty to flag and anthem – which will however continue to be employed as symbols of the Union by several member states – but even to a comprehensive form that included all different treaties – including notably the Charter of Nice – in a single text that could resemble a national constitutional charter. With a brilliant expression that alludes to the official denomination of the abandoned treaty, the new treaty has been defined by a commentator as the Treaty which does not establish a Constitution for Europe. The European institutions have therefore initially embraced nation-building techniques, abandoning them – to the regret in particular of the European Parliament – after the resistance of nations perceived as determined by nationalist concerns. Nonetheless, this is only part of the story, as the motivations that led to the rejection of the ‘constitutional’ Treaty appear to be more intricate and are still hotly debated.

68 G Delanty, Inventing Europe, at 128.
69 ‘Today such an ‘invented tradition’ is clearly in the process of invention with the proliferation of a paraphernalia of emblems and slogans of the new official culture’, G Delanty, Inventing Europe, at 128.
70 As to the Dutch experience, J Leerssen, National Thought in Europe. A Cultural History (Amsterdam: Amsterdam University Press, 2006) at 243, highlights the role played in the results of a Eurosceptic twist in the political campaigns of most political parties for the elections in 2004. See also LFM Besselink, ‘National and constitutional identity before and after Lisbon’ (2010) 6 Utrecht Law Review 36-49, at 43.
71 Declaration 52 annexed to the Treaty of Lisbon: ‘Belgium, Bulgaria, Germany, Greece, Spain, Italy, Cyprus, Lithuania, Luxembourg, Hungary, Malta, Austria, Portugal, Romania, Slovenia and the Slovak Republic declare that the flag with a circle of twelve golden stars on a blue background, the anthem based on the ‘Ode to Joy’ from the Ninth Symphony by Ludwig van Beethoven, the motto ‘United in diversity’, the euro as the currency of the European Union and Europe Day on 9 May will for them continue as symbols to express the sense of community of the people in the European Union and their allegiance to it’.
73 See J Ziller, Il nuovo Trattato europeo, at 25.
74 See for example, Eurobarometer, Flash EB172, June 2005 on The European Constitution: post-referendum survey in The Netherlands, at 28, from which it results that ‘Although citizens complain about the lack of information on the Constitution and the fact that debates started too late, the reasons for the overwhelming rejection of the Constitution (at 61.6%) are more complicated than a simple lack of information. Indeed in the
IV.4.2. Private law

While the notion of constitutional patriotism refers firstly to the acceptance by citizens of a series of fundamental rules of a public nature, it is definitely not only public law that has an importance in the process of building of a collective identity. As an instrument that governs the reciprocal relations between citizens, private law can also be used for constructivist purposes. Such a particular community-building aspect has been a constant factor in legal history since the emergence of the modern idea of a code, and it is likely to gain a new meaning in the era of the constitutionalisation of private law. In this sense, the creation of a European identity can benefit from the creation of a system of private law for all European states. Such a constructivist purpose is explicitly envisaged by a group of European private law scholars, who point out that:

'A common system of European contract law signifies an aspiration towards a shared European identity. It marks a commitment to an ever-closer union of peoples, of cultures, and of values. It is designed to bind citizens of Europe to a shared identity. The harmonisation of contract law represents a significant step towards the construction of such an identity'.

The view that the establishment of a common market with common rules may foster the natural development of a sentiment of belonging and identity is criticised nowadays by authors who study the dynamics leading to the construction of collective identities. Nonetheless, it has established itself as part of the argumentation (or rhetoric) of the European institutions; in one famous and divisive directive, it is stated that '[t]he elimination of barriers to the development of service activities between Member States is essential in order to strengthen the integration of the peoples of Europe'.

IV.4.2.1. Promoting unity through civil codifications

Ever since the Code Napoléon was enacted, civil codifications have been seen as the founding manifestos for a new society, and have represented important instruments of nation-building, unifying the legislation on the territory, promoting national cohesion by trying to instill the values considered significant for the definition of the national identity in the population. The role that the code has played in the construction of the

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Netherlands, the referendum has not only been used as a channel for criticising the Government (14%) but it has also shown that “no” voters are worried about a loss of sovereignty within a political union (19%) and also complain about the cost of Europe for tax-payers (13%).


77 Directive on services in the internal market, 2006/123/EC, (1).
nation-states in past centuries has therefore been pivotal. Legislators were well-aware of this particular political function, and sometimes explicitly presented their creation as one of the ‘supreme factors of unity’ for their own country. Accordingly, codifications prove to be instruments historically and conceptually linked to nationalism, through which rising nation-states have been able to destroy the legal particularism which threatened the unity of the nation, or, more recently, give a new ideological connotation to an already unified nation. Rather than merely technical tools, codifications have been political instruments of internal colonisation. In this sense, while it is common knowledge that a unique legislation presupposes the existence of a political institution, it should be clarified that a civil codification is – usually but not necessarily and particularly in a modernist perspective – a consequence of the unity of the state but it can precede and contribute to the unity of the nation; although this view is generally objected exactly by those who defend the code as a symbol of national unity.

Furthermore, legal scholars have been aware of this political function of the code. Firstly, it was already Thibaut’s conviction that a codification on the model of the French one would have contributed to the cause of German national unity bringing about a sentiment of brotherhood among the Germans, since the application of the same laws ‘hat immer zauberischen Einfluß auf Völkerliebe und Völkertreue gehabt’. In this sense a code does not require the actual existence of a community that recognises itself as a nation, but rather the ‘love for the fatherland’ would follow naturally as a consequence of the application of the same legal rules. Portalis adopted a similar perspective, sustaining that to maintain different laws for people living under the same government with a plethora of economic and personal relations with one another would have only led to confusion and trouble, thus jeopardising the national social unity that would have come into existence as a result of civil codification: once the code is in place, so Portalis, ‘[n]ous ne serons plus Provençaux, Bretons, Alsaciens, mais Français’.

**IV.4.2.1.1. European civil code?**

79 G Vacca, Relazione ministeriale al Re sul codice civile del Regno d’Italia (Torino: Stamperia Reale, 1866) at XIII.
80 F Wieacker, Industriegesellschaft und Privatrechtsordnung (Frankfurt am Main: Athenäum-Fischer-Taschenbuch-Verlag, 1974) at 89
83 Supra second chapter.
Can the ongoing discussion on the possibility of enacting a civil code for Europe be considered a part of that Euronationalist project which already manifested itself in the case of the European Constitution? Considering this perspective, the idea of a European civil code would perform the same function to build a collective identity as Thibaut already referred to. Traces of Thibaut’s line of reasoning can be found in the projects of European codifications and compilations of rules. For instance, the academic project of a European Code of Contracts, a spontaneous academic project that aims nonetheless at founding the basis for a future body of European rules on contracts known as the ‘Gandolfi code’, identifies its raison d’être in the need for ensuring the good functioning of the common market as well as in the necessity of establishing a common European consciousness. In 2004, the authors noticed that:

’si quinze pays ont d’ores et déjà décidé de confluer dans l’Union Européenne, le droit qui y est en vigueur deviendrait un fait anachronique et risquerait inefficacement fragmenté, continuant de cette manière à diviser, voire même à opposer, ces citoyens qui ont au contraire fermement choisi de vivre dans l’unité, de “parler davantage d’une seule voix et d’agir avec cohésion et solidarité afin de défendre plus efficacement leurs intérêts communs”’. 86

While the ‘Gandolfi code’ has remained a purely academic project – despite its declared intention to create the basis for a binding statute – the possibility of adopting a single civil codification for the continent has not remained a theoretical perspective or an academic exercise but had also become a concrete possibility after its appearance on the political agenda of the European Union. As it has already been mentioned,87 the European Parliament in particular has been the most outspoken advocate of a similar solution within the other Community institutions. In this regard, the resolutions of 1989 88 and later again of 1994 89 should be mentioned, in which the need for a sole civil codification for the European territory was considered to be a necessary step in the establishment of a well-functioning internal market. As the subject of a European codification became of particular interest in the academic world, the idea was once again proposed as a political option and presented as a possible means to improve the coherency of European private law by the European Commission in 2001.90 After the consultation started that year, the option gained little support from stakeholders,91 unlike the ideas of compilation of principles that may serve as a tool-box for legislators or even an optional instrument that could be chosen by private parties. The Commission therefore explicitly rejected the idea of a European code meant to replace national private law legislations, stating that this option was not on the agenda but efforts to improve the coherence of European

87 Supra ‘Introduction’.
89 A3-0329/94 (1994).
91 COM(2003) 68 final
private law should nonetheless be made. It is against this background, that the Draft Common Frame of Reference – ‘a European Civil Code in disguise’ – was created by a broad network of private lawyers representing the entire European area. More recently, the Commission has made it its explicit aim to create an optional instrument which private parties would be free to adopt. Regardless of official terminology, however, an optional instrument would not be much different from a European code in addition to the ones of the member states. In a later Green Paper, the Commission shyly reproposed the subject, suggesting the possible option of a recommendation to member state to adopt a ‘European instrument’ in addition or substitution of domestic laws, or plainly the elaboration of an imperative European instrument and finally presented in 2011 its proposal for a regulation on a Common European Sales Law.

IV.4.2.1.2. Nationalism and the idea of code today

Taking the historical link between code and nation-state into consideration, the employment at the supra-national level of such an instrument can be interpreted in two ways. Firstly, as an indirect confirmation of the suggestion that in modern (or rather post-modern) societies the idea of code has finally severed ties with nationalism and become a purely ‘technical’ category. The political value of the code would have disappeared, lost in a historical phase which is now gone forever, and the success of the code would reside in its purely technical characteristics such as its systematic coherence, already jeopardised by the arrival of the age of decodification and the increasingly regulatory function of private law. Nevertheless, in the new historical context characterised by a renewed nationalism it could be premature to diagnose the end of the political nature of the code, as the experience of recodification in Eastern European countries shows in particular. As a matter of fact, the prevision of the irreversibility of the decodification processes has been proven wrong by the increase in the number of codifications in the world that rather suggest the beginning of an era of re-codification, while the old motto that already accompanied the promulgation of the German BGB and asserts the necessity of one code for one nation still appears to be a guiding principle for several nation states.

In another sense, thus, the use of the category of code at a supra-national level could be on the other hand seen as evidence of the willingness to replicate typically nationalist categories. The fact that the legal instrument that put an end to the European legal cultural unity is now invoked to promote a European identity therefore appears as something more than just an irony of history. Already Koschaker, in the opening of his celebrated work on Europe and Roman law, indeed noted how ‘European’ the character of private law had been ever since the establishment of the University of Bologna, while it was only the emergence of the national thought and

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94 B Heiderhoff, Gemeinschaftsprivatrecht (München: Sellier, 2007) at 250.
95 COM(2011) 636 final
96 N Irti, Codice civile e società politica (Roma: Laterza, 2004) at 49; see also N Irti, L’età della decodificazione (Milano: Giuffrè, 1979)
97 P Koschaker, Europa und das römische Recht (München: Biederstein Verlag, 1947), at 1.
the civil codification on the continent that altered that unity. Nonetheless, since events cannot repeat themselves in the same way, a perfect imitation of nation-building strategies at the European level does not seem likely at the present day, so that the traditional idea of code assumes new nuances in the modern European context.

The creation of a code that replaces all national codifications is not on the political agenda anymore, probably reflecting a lesson learned from the history of the European constitution.

‘it is hardly the time to be seen to be moving towards anything that remotely resembles a European Civil Code; if the voters of Europe did not want a constitution it is hardly the moment to force a civil code, even just a contract code on them’.

Code and Constitution have shared the same failure, also due to insufficiently transparent drafting processes and in this sense to the lack of a European ‘public sphere’. But in this perspective, the preference for a form that clearly resembles – besides of the reticence of using this term and the intention to camouflage it with other words – a code appears as an expression of an unconscious methodological nationalism of those scholars called to draw projects of these instruments. Such a form could be better explained on the basis of symbolic arguments. On the other hand, even the criticisms mounted against the DCFR project seem to underline that this instrument has the nature of a ‘code’, for example attacking the excess of powers it acknowledges to judges, a criticism which is particularly robust if it pertains to a code that has indeed to be applied by judges, but which seems less persuasive if moved to a simple tool-box primarily thought for legislators.

In this sense, the impression that there is a political agenda to promote a European identity behind the intention to codify European private law is shared by several legal authors. More generally, the importance of the code would therefore mainly reside in its symbolic significance for the close connection between European states. Alpa notes that, besides all other advantages of a possible European codification:

100 H-W Micklitz, ‘Failure or Ideological Preconceptions’, at 3.
105 B Heiderhoff, Gemeinschaftsprivatrecht, at 248.
‘unitary codification re-enforces unity and is proactive for political unity. But if it is true that the legal component – that is the entire organisation of law in a community – constitutes an essential characteristic of that community the drafting of a unitary code at a European dimension will become one of the aggregate factors in cementing that same European Community, and a factor in defining the collective European identity’.

Although it is debatable whether a code could play a significant role as a symbol for all citizens, it could at least perform this function in the more restricted area of professional interest of legal scholars and practitioners that in this sense could develop the consciousness of belonging to the same pan-European category.

**IV.4.2.2. Promoting values through material private law**

Civil codifications can exert a particular symbolical importance on those who are used to working with them, but it is more debatable whether they will have the same effect on the general population, normally unaware of the characteristics of the legal system under which they live. If this is true, the symbolic value of the code is probably perceived by legal scholars to be more important than it actually is for society as a whole. In this sense, a European civil codification could still advance the cause of European identity at least among legal scholars, without jeopardising the cultural identities of the citizens of the member states.

However, the role of codifications within nation-building endeavours cannot be exclusively a symbolic one: codifications perform functions which make them something more significant than mere forms of ‘banal nationalism’ like hymns or flags. Unlike flags, legal rules steer people’s behaviour. The significance of this aspect in a nation-building perspective becomes clear looking, again, at legal history, since a direct link between the principles laid down in the code and the political values proposed by the state can be found in several past experiences. In this sense, the French codification embodies part of the revolutionary principles of equality (though weakened after the Napoleonic experience) which characterised the foundation of the French civic nation as opposed to the king who epitomised the very notion of state and nation; the draft of a Nazi *Volksgesetzbuch*, on the very other extreme, employed a racist criterion to attribute legal subjectivity and in several provisions aimed at instilling militaristic values in the citizens according to the predominant militaristic and racist connotation of the regime, which based itself on an ethnic conception of the nation. Rapidly setting aside the project of Franco-Italian codification, the Italian fascist experience gave birth to a code that through its clause of good faith interpreted in a cooperative manner aimed at leading subjects to act ‘as a

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people’ according to the corporativist organisation of the state, while provisions on corporate and labour law organised even private enterprises according to fascist principles of hierarchy. More recently, new civil codifications in post-socialist countries embraced marked liberalism with the intent of rapidly freeing themselves from their socialist past, looking at other Western codifications and aiming to promote a new open and cosmopolitan society. Many other examples could be cited. All these are cases in which law has been used to forge society which can over time lead to changes in people’s attitudes, but that can also be easily interpreted by sociologists interested in the systematisation of cultures as evidence of the ‘spirit’ of that nation glossing over the nation building function of law. In this sense, it is private law as such, rather than the mere form of the codification, which plays a role among the different nation-building strategies.

IV.4.2.2.1. Promoting European values

Is it then conceivable that private law can in the same way play a role in the construction of a European identity? This cannot be excluded; indeed, despite the oft-alleged technical nature of private law, ‘the construction of European contract law involves an identification process for the citizens of Europe’. But in order to foster such an identification process it is first necessary to individuate what the values to be fostered are, that is: what the European values are. This leads us back to the previous question as to the constitutive values of the European identity.

On the one hand, if one accepts the post-modernist view that a European identity does not exist and can only be represented by its incoherence and plurality, one should conclude that a Euronationalist private law representing that fragmented identity could only be a non-unified one in which nation-states remain completely free to regulate their own private law, since plurality and diversity are characteristic features of the European identity: to be European, one should be national. Peculiar as this might sound, this is indeed the mechanism at the basis of several legal concepts in Europe, with the most famous and revealing case being indeed ‘European citizenship’: this is automatically obtained by all those who are citizens of one of the member states and no-one else, while the EU explicitly renounces its interference on the considerations behind the citizenship policies of the member states. Such a postmodernist approach is compatible with ethno-cultural visions of the nation, but it can easily lead to nihilistic results, dooming Europe to remain a purely cultural notion rather than an authentic political category.

In a civic or constitutional-patriotic perspective, on the other hand, one can identify more concrete values that are interpreted as constitutive of the European

111 See the ‘Declaration of nationality of a Member State’ adopted with the Treaty of Maastricht: ‘The Conference declares that, wherever in the Treaty establishing the European Community reference is made to nationals of the Member States, the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned. Member States may declare, for information, who are to be considered their nationals for Community purposes by way of a declaration lodged with the Presidency and may amend any such declaration when necessary’.
identity and later promote them through private law instruments. In particular the academic project of Common Frame of Reference explicitly refers to the values that – as it has been clarified earlier – had already been individuated as characterising the political ideology of Europe. The first edition of the Draft Common Frame of Reference, in particular, individuated a set of eleven ‘core aims of European private law’ that immediately resemble the catalogue of values laid down in the treaties, on which the EU is based and that are said to be shared by all European countries. The first outline edition of the DCFR more specifically mentioned the values of justice, freedom, protection of human rights, economic welfare, solidarity and social responsibility, promotion of the internal market, preservation of cultural and linguistic plurality, rationality, legal certainty, predictability and efficiency in its introduction.

In other words, aside from typically private law principles such as efficiency and predictability, the list put particular emphasis on the subjects of fundamental rights, justice and welfare, interestingly enough resembling the ‘catalogue’ of Habermas and Derrida.

In this sense, there was something more than a mere allusion to the symbolism of national codification – furthermore already strongly challenged by terminological reticence and political uncertainties – but rather the intention to promote ‘European values’ in the relations between private citizens. Facing criticisms and counter-proposals from legal scholars in Germany and France, the drafters of the DCFR later reduced the list of such ‘core aims’, only speaking of four underlying principles: justice, freedom, security and efficiency. In this sense, the resistance coming from the member states may have limited the Euro-nationalist potential of the EU projects. The introduction to the latest published version of the DCFR clarifies the relationship between the different underlying principles, also including a short but telling reference to their political and historical background:

‘At one level, freedom, security, and justice are ends in themselves. People have fought and died for them. Efficiency is less dramatic. In the context of private law, however, these values are best regarded not as ends in themselves but as means to other ends – the promotion of welfare, the empowering of people to pursue their legitimate aims and fulfil their potential’.

IV.4.2.2.2. Fundamental rights and social justice

Regardless of the amendments to the introductions and the preambles of the European codification/compilation private law proposals, it is still evident, nonetheless, that the constitutive values of European identity as identified by political theorists are already present in European private law. In this context particular importance has been assumed by the respect for fundamental rights and justice.

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112 MW Hesselink, ‘If You Don’t Like Our Principles We Have Others’, at 70-71.
114 MW Hesselink, ‘If You Don’t Like Our Principles We Have Others’, at 70-71.
Fundamental rights are distinctively an important element in the legal architecture of Europe. The necessity for protection of these rights is sanctioned at several levels: in national constitutions, in the jurisprudence of the Court of Justice of the European Union but also in various international treaties that bind member states. The reference to the Charter of Nice in the Treaty of Lisbon is in this sense only the latest step in a process that started a longer time ago. It can also be noticed that the respect for fundamental rights is such a fundamental element of the legal architecture of Europe that it even allows the Union to derogate from the obligations stemming from the Charter of the United Nations. As decided in the famous Kadi case, indeed, not even respect for a resolution of the Security Council of the UN can deprive a citizen of fundamental rights recognised in Europe. In doing so, the European Court judged not dissimilarly to a national constitutional court, adhering to a ‘constitutionalist’ vision of public international law.

The respect of fundamental rights as an aspect defining the European identity, however, also plays a primary role in private law. It is now commonly spoken of a constitutionalisation of private law, in the sense of a growing influence of constitutional provisions in the regulation of relationships between citizens, and judges throughout Europe show a tendency to employ categories such as fundamental rights in private law. In a nation-building perspective, the connection between private and constitutional law provisions allows for the distinctive values of a constitutional-patriotic legal order to find direct or indirect application in the private relations between citizens. What is more, if all European judges employ these categories, which are basically identical in all member states and are now part of the constitutional law of the Union, it is likely that a new ‘bottom-up’ convergence will occur, which will, in turn, help the development of a common private law for Europe.

Also, the definition of a scheme of social justice for private law becomes of pivotal importance for the definition of a common European identity in which justice is considered a fundamental value:

‘To say that a future European contract law […] needs a scheme of social justice with all its economic, political and cultural dimensions, is to say that we have to look for a common understanding between the Member States on what type of social justice best fits the perception of our identity as Europeans’.

116 ECJ, Kadi (joined cases C-402/05 and C-415/05).
It is already the Treaty on the European Union, at Art. 3, that states that the European Union ‘shall promote economic, social and territorial cohesion, and solidarity among Member States’. This intention represents, at least theoretically, the overcoming of the traditional nationalist view according to which, given that justice is a concept depending on national cultures, systems of justice can efficiently work only within nation-states. The nationalist interpretation of social justice lies, as already seen, at the basis of several objections to the possibility of developing uniform rules of contract law promoting solidarism; it is nonetheless not the only interpretation imaginable, and a ‘European Civil Code’ that ‘would help to establish solidarity without forcing societies and peoples of Europe to adopt uniform cultural practices’ – for example in the form of a code of principles – could also be conceived.\footnote{H Collins, \textit{The European Civil Code. The Way Forward} (Cambridge: Cambridge University Press, 2008) at 130.}

Quite interestingly, the possibility of elaborating a shared scheme of social justice for European contract law has not been excluded by the Court of Justice of the EU. While it has shown to be particularly deferential to the localist interpretation of clauses like public policy – as became clear particularly in the \textit{Omega} case – the Court has proved to be more ‘Europeanist’ – at least in theory – when confronted with issues of contract law in a strict sense. In this sense, mention has to be made of the \textit{Freiburger Kommunalbauten} case. In that case which concerned a preliminary ruling for interpretation of the unfair terms directive, the European Court stated that it is up to national judges to verify whether a given term can be considered as unfair under the provisions of the directive. Although not only the practical significance of the decision but also its reasoning could seem consistent with the approach in the \textit{Omega} decision, this is because the fairness of a given contractual term has to be assessed concretely by referring ‘to all the circumstances attending the conclusion of the contract’,\footnote{93/13/EEC, Art. 4(1).} so that, in the words of the European judges, the European Court should not rule on the application of ‘general criteria to a particular term, which must be considered in the light of the particular circumstances of the case in question’.\footnote{C-237/02, Para. 22.} However, ‘in the context of its jurisdiction under Article 234 EC to interpret Community law, the Court may interpret general criteria used by the Community legislature in order to define the concept of unfair terms.’\footnote{C-237/02, Para. 22.} In this sense, it would be technically possible to elaborate a European notion of (un)fairness that national judges then would have to apply, taking into account the specific circumstances of the case, so that the nationalist perspective which confines the notion of justice within the borders of the nation appears to have been superseded.\footnote{\textit{Contra} R Sefton-Green, ‘Multiculturalism, Europhilia and harmonization: harmony or disharmony?’ (2010) 6 \textit{Utrecht Law Review} 50-67, at 55, according to whom the decision of the Court ‘may have been due to the fact that it was aware that good faith is a culturally-sensitive concept’.} In that specific case, nevertheless, the European Court rejected its own competence on the basis of disputable arguments (not completely coherent with the previous case-law) that in the end appear to be detrimental to the coherence of the system of European private law.\footnote{MW Hesselink, ‘Case note to ECJ - Freiburger Kommunalbauten v Hofstetter’ (2006) 3 \textit{European Review of Contract Law} 366-375.}
Summing up, it can be noticed that if a European identity has to be based on the sharing of a set of common values of a political nature, including most notably the respect for fundamental rights and social justice, private law can play a pivotal role in the construction of such an identity. Actual trends both in the legal scholarship (including the academic plans for codification and restatements) and the activities of the courts show that those values are acquiring growing importance in European private law and their significance for the edification of a shared identity must therefore be acknowledged.

IV.5. European culture

In several places in this book, it has been pointed out that theories of nationalism acknowledge a particular importance to the notion of culture. Culture is more important according to some conceptions – ethno-cultural nationalism in particular – than to other views – civic nationalism – but it is still present in all of them. Culture is described as typical of a particular group – the nation – and justifies the need for an overlap of political and national unit. In this sense, also Euro-nationalism, similarly to other types of nationalism, cannot leave the cultural dimension aside. While opponents of Europeanisation like to put emphasis on the irreconcilable diversity of all the cultures and legal cultures that exist within Europe, advocates of Europeanisation tend to insist on the unity of the cultural dimension in Europe. This holds true for both general culture and legal culture.

As to the former, several political theorists point out an underlying cultural unity in Europe, which is strong enough to bridge political distinctions; so for example the existence of the Iron Curtain was considered not significant from a cultural perspective, since the inhabitants of cities such as Prague, Budapest or Warsaw thought of themselves as being Europeans, and the cultural belonging of Central and Eastern Europe to the rest of the continent has been famously highlighted among others by Kundera. In this perspective, all people belonging to the European cultural tradition share some cultural characteristics even if living in very different political systems, so that in the end it seems that ‘[e]conomics and politics may divide, but culture can unite’. Just like from a nationalist perspective, political and ideological distinctions are overshadowed by the fundamental unity of culture. What about the culture of law?

While opponents of Europeanisation can easily point at the diversity of the legal traditions of the countries that make up Europe, the unity of European legal culture may seem to be more difficult to state than the unity or at least similarity of general culture. The era of nationalism had indeed brought about a state of affairs in which each nation-state has developed a model of its own, occasionally ‘exporting’ it

129 On Kundera’s interpretation of Europe, see H Mikkeli, Europe as an Idea and an Identity, at 188-190.
130 ‘There is diversity: that of landscapes, languages, lifestyles, religions and nationalisms. There is also unity: that created by great rivers such as the Rhine and the Danube, the canals, railways, motor-ways and air services; that created by a shared work-ethic in industry, trade and finance; that created by a shared enthusiasm for science and technology; by the great forms of art, in painting, music and above all the novel’, R Hoggart and D Johnson, ‘Ideas about an ‘Idea of Europe’’ at 98-99.
to other countries. In this way, different legal families have been fashioned, the existence of which still seems to be perceivable in a set of elements that have garnered new interest in recent years, in particular after a few influential studies have – quite controversially – claimed to be able to link indexes of economic development to the ‘legal origin’ of a given system.\(^{132}\) Nonetheless, even if it is true that legal traditions practically diverge in different countries as a result of different historical developments and political choices, some scholars affirm that, again, all European countries share certain characteristic cultural traits which concur in defining a European legal culture. This proposition does not appear moreover as the mere propaganda of the institutions of the European Union, as opponents of harmonisation occasionally like to suggest, as it was already clear to those who, looking at the ‘inhaltlich-sachliche Bedeutung des Rechts’\(^{133}\) while the Second World War was still going on, noticed that ‘[n]ach ihrem Sinn und Inhalt stimmen wesentliche Begriffe und Institutionen der europäischen Völker in auffälliger Weise überein. Hier gibt es eine sehr starke Gemeinschaft europäischen Rechts’,\(^{134}\) while the law of such a ‘europäische Gemeinschaft’ still shows traces of ‘common law’ which remain manifest regardless of the differentiation of the various legal families.

In this sense, the element of culture becomes one of those aspects as to which a convergence of values already exists in Europe and on which Europeanisation can be based rather than a hindrance to Europeanisation.\(^{135}\) It is unclear how much uniformity exists within such a cultural category but it remains nonetheless hardly deniable that a certain uniformity of the European legal systems already exists, not inasmuch as rules are sometimes apparently identical but rather because these are ‘embedded in an already partly common legal culture’.\(^{136}\) By categorising culture as European rather than national as it is often done, the cultural argument moves in favour of Europeanisation, rather than standing against it.\(^{137}\) Once again, thus, the notion of culture – the pivotal element around which modern theories of nationalism revolve – can be employed to legitimise political projects, emphasising the ‘homogeneity’ of given groups in opposition to others. Nonetheless, the definition of a set of cultural traits of the European legal experience is particularly complicated, since on the one hand laws are already sufficiently differentiated within Europe and, on the other hand, the legal institutes that were elaborated in that region later developed and were somehow ‘exported’ to other countries, so that it is now challenging to identify the peculiarity of a European legal culture within a broader category such as what is commonly defined as the Western legal tradition.


\(^{133}\) C Schmitt, Die Lage der europäischen Rechtswissenschaft (Tübingen: Internationaler Universitäts-Verlag, 1950) at 8.

\(^{134}\) C Schmitt, Die Lage der europäischen Rechtswissenschaft, at 9.


According to Berman’s classic study, the macro legal tradition that started developing from Roman and Canon law and spread from the lecture rooms of the University of Bologna to the rest of the continent is characterised by certain elements: a ‘relatively sharp’ distinction between legal and other types of institutions, the fact that legal institutions are administrated by ‘a special corps of people’, the fact that lawyers and jurists are specially trained for their profession, the pivotal role of legal scholarship for the legal system itself, the fact that law is intended as a coherent and integrated system, the capacity of this system of growing over centuries and organically change with an internal logic, and the fact that the ‘historicity of law is linked with the concept of its supremacy over the political authorities’. This new category was capable of superseding the traditional distinction made by comparative lawyers between common and civil law systems and oppose them to, among others, socialist systems. But in a period in which the socialist legal family dissolved and most countries that were previously expressions of it have become part of a Europe that strives for developing an identity of its own, new systematisations are needed to go beyond Berman’s position and single out characteristics that outline the European legal culture only. A European legal culture, in other words, should be able to collocate itself in a middle position between the Western legal tradition and the classic legal families including, of course, the divide between civil and common law.

The legal culture of Europe has in this perspective to be compared and opposed to legal culture in other Western countries, more specifically, the United States. In this sense, European legal culture has already been compared and contrasted to American common law, from which it seems distinguishable in particular because of its more evident positivistic character that, even if in slightly different terms, seems to be present even in the common law of England. In this light, English law appears to belong to the European family more than to the common law tradition, and historical analysis underlying the basic unity of the medieval *ius commune* experience and the influence of Roman law in Britain offer support to the theory of the explicitly European character of that legal system too. In this sense, a link is created between the historical *ius commune* and the idea of a modern *ius commune* of Europe, even if in this way the *ius commune* loses its ‘historical’ dimension becoming mere legitimation for modern political constructions, at the risk of backing retrospective interpretations of history. Political scientists have already warned that ‘we should not overstate the political or cultural unity of the Middle Ages’, for such unity of is mostly a ‘myth’.

Abandoning a purely historical perspective fixated on the unity of the *ius commune*, the characteristics of what could be called a new European legal culture have been also sketched out. The main aspect of this new culture seems to be a shift from formalism to pragmatism and interdisciplinary approaches. To a certain extent, this development brings Europe closer to the American legal experience which has

141 G Delanty, *Inventing Europe*, at 41.
142 MW Hesselink, *The New European Legal Culture*. 

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been strongly marked by legal realism (paradoxically imported into the new world by European jurists),\textsuperscript{143} pointing again in the direction of a Western legal tradition which is notwithstanding less and less similar to the one initially described by Berman. More generally, it has been concluded that there is a set of values which are common to the Western legal orders aimed at bringing together private subjects’ interest to each other and to the interests of the community and that among others include the principle of protection of individuals and their fundamental freedoms, equality in difference, the importance of private property with its contextual limitation in the general interest, the protection of the worker, the economic freedoms and so on.\textsuperscript{144}

Considering these elements, legal culture is not necessarily the great opponent of forms of forced harmonisation or unification of European contract law, as this is not exclusively national but possibly even European. In this sense, the fundamental nationalist claim that cultural similarity underlying the members of a nation requires a political organisation in the form of the nation-state can be employed to affirm, beyond nationalism, the desirability of supra-national and multi-level political organisations which are representative of that cultural homogeneity; this operation, however, can only be made at the cost of putting emphasis on unity and playing down diversity, through ideological readings of history, which always bear a concrete risk of falsification.

**IV.6. Nation and Europe-building today**

In conclusion, even the project of Europeanisation of private law advocated by several European(ist) scholars and proposed intermittently by the European institutions can be interpreted as the repetition of older mechanisms of nation-building at a new supranational governance level, aimed at the creation of a European identity which can provide the political construction with civic legitimacy, even if this does not imply institutional unification as has been the case with modern nation-states. The recognition of the conceptual link between Europeanisation and nation-building processes forces us to consider also the possible risks connected to a Euronationalist endeavour, keeping in mind the too often forgotten high costs that even unification of nation-states demanded in certain countries. On the other hand it goes without saying that this operation, like potentially any nation-building process, is not something negative \textit{per se} that has to be rejected because of its artificiality – in particular if one considers that the form of identification proposed by this Euronationalism seems mainly based on the acceptance of a set of liberal and social values, as advocated in particular by the idea of constitutional patriotism.

Constitutional patriotism offers indeed a chance, that is to confer the European construction – both in its current \textit{sui generis} structure and in future possible evolutions in a more federative direction – a liberal, democratic and modern rather than post-modern character, in which diversity is acknowledged but not sanctified, without giving in to relativism and nihilism and in which identity is intended as an overarching category that allows the coexistence of different national and local characters. In this light, a European identity would not be imposed as a substitute to

\textsuperscript{143} MW Heselink, \textit{The New European Legal Culture}, at 72-74.

\textsuperscript{144} G Alpa and M Andenas, \textit{Fondamenti del diritto privato europeo} (Milano: Giuffrè, 2005) at 44 ff.
traditional national cultures and therefore would not easily lead to, as it has been feared in the opposite case, \textsuperscript{145} ‘alienation and rejection’ from the nation-states. One could question that, beyond the beautiful declarations of intents, European and national identities can coexist. In any case, such a concern seems to take for granted a mutual exclusivity of identities which is hardly justifiable if one adheres to the view that identities are plural (though occasionally conflicting). Moreover, as one author has suggested, the European identity emerges from national allegiances just like the national identities emerged from older ethnic ones, so that it would be a mistake to consider a new European identity as a radical break from national identities.\textsuperscript{146} This holds particularly true if such an identity is based on constitutional patriotism, for this does not require the suppression of local identities but rather enables the institutional framework through which these can coexist.\textsuperscript{147} In this light, national concerns about the preservation of cultures within a supranational context should be dismissed.

The historical experience may offer further indications as to the way in which such an ambitious process could take place, with particular regard to the role of private law as a tool for building collective identities. Undeniably, law is already a fundamental factor in this sense, since it has been the main instrument through which the European Union itself has been constructed.\textsuperscript{148} What is more, law can translate the fundamental values that lie at the basis of a constitutional-patriotic society in the reality of daily relations between citizens. If one accepts this point, it will be easy to conclude that the elaboration of a private law which is more focused on the respect of those collective values, first and foremost fundamental rights and justice, will be one of the elements that can promote a European identity that does not necessarily contradict national allegiances. Indeed, the importance of private law in this light consists in its ability to give a concrete and tangible shape to abstract values and fundamental rights, whose constructivist function would otherwise remain in a naïve rhetorical dimension.\textsuperscript{149} A possible way forward for European legal integration which seems inspired by constitutional patriotism inasmuch as it envisages a transnational civil society kept together by the respect for certain principles also of private law\textsuperscript{150} has indeed been proposed in the form of a code or a statute that, ‘unlike the nationalist civil codes of the nineteenth century’, is structured as ‘a code of principles’ representing ‘an agreement on principles as a symbol of solidarity between the peoples of Europe, as a shared commitment to shared values, much like the European Convention for the Protection of Human Rights and Fundamental Freedoms’.\textsuperscript{151}

Does this mean that the elaboration of a European civil code is required for the promotion of a collective identity in Europe? Again, a distinction should be made between private law as such and civil codification. To speak of the symbolic function of a European civil code can be quite misleading, and produce new unnecessary tensions between the two sides of the ‘Legal’ English Channel. It is in fact very

\begin{footnotesize}
\textsuperscript{147} J Habermas, Die postnationale Konstellation. Politische Essays (Berlin: Suhrkamp, 1998) at 150.
\textsuperscript{148} G Alpa and M Andenas, Fondamenti del diritto privato europeo, at 31.
\textsuperscript{149} Giving human rights an horizontal effect was already suggested as a means to enhancing transnational democracy by JHH Weiler, ‘To Be a European citizen’, at 355-356.
\textsuperscript{150} H Collins, The European Civil Code, at 22.
\textsuperscript{151} H Collins, The European Civil Code, at 136.
\end{footnotesize}
questionable that people will identify with a civil code and feel part of a community only because a unitary code is in place. More likely, the codification is perceived as an important part of national identity only by jurists themselves, while ‘realistically speaking’, it is not seen as an important identifying characteristic by ordinary citizens. Was Thibaut thus wrong, when he affirmed that a civil code would have led to a spirit of brotherhood? Simply, the historical context has dramatically changed since the time in which Thibaut proposed a codification for a united Germany. It is more uncertain nowadays that a European codification can have the same political meaning that it had in the past for nation-states. In the period in which the nation-state arose overshadowing legal particularism, the code represented the best employable instrument to promote a shared national identity, inasmuch as it could also perform a ‘constitutional function’: codifications represented the civic manifest of the new bourgeois societies of the eighteenth and nineteenth century and often included constitutional as well as criminal and procedural provisions, as notably in the case of the ALR. In performing a constitutional function, codifications were often more capable than the constitutions of the nineteenth century. However, the constitutional function of the code which accompanied the rise of the nation-state faded away when new national constitutions appeared after the Second World War. Provisions of a constitutional nature can be still found in codifications immediately preceding the end of the war, exemplified by the 1942 Italian Codice civile, but already after the end of that military event, it is the constitution that has started playing the most important function in the dynamics of construction of collective identities. This particular meaning of the constitution becomes clear if one looks beyond Europe and considers the political experience of the United States. In that context, ‘without a common ethnic, racial, or religious heritage, American identity is peculiarly dependent on the idea of law’ and of the Constitution more in particular. In particular the idea that the Constitution is ‘a product of reason, deliberation, and political science remains a vital part of [the American] political self-understanding’.

Considering these important changes in the political scenario of Europe, it is judicious to affirm that civil codifications may still play a role in the construction of a European legal culture of the lawyers, which interests legal scholars and practitioners but leave citizens relatively uninterested. Unlike civil codes, constitutions and the declarations of rights post Second World War period were capable of appealing to the deepest sentiments of the nation’s citizenry. If this is true, insisting on the function of construction of the collective identity of the codification appears anachronistic. As a form, it is unable to work properly as a ‘banally nationalist’ symbol and could even be counterproductive, particularly in a context characterised by rising nationalism in the member states. The symbolic added value of the code should be reconsidered, but

152 G Alpa and M Andenas, Fondamenti del diritto privato europeo, at 31.
154 A Pizzorusso, Il patrimonio costituzionale europeo, at 38.
155 L Mengoni, L’Europa dei codici o un codice per l’Europa? (Roma: Centro di studi e ricerche di diritto comparato e straniero: saggi, conferenze e seminari, 1992) at 1-2
this holds true for both European project and established national codifications. As it has been underlined before, it is true that codifications are still very popular political instruments and even within Europe there are cases in which new codes have entered into force following important political and social transformations. However in those cases it was rather the content of private law that was completely changed and new values – corresponding to those laid down also in the new constitutions – introduced to organise the economic and social relations between citizens. In this sense, it is not the form of the code that is important as such, while it is the role of private law that has to be acknowledged as a persisting element in nation-building.

Taking all these reasons into consideration in the perspective of the process of Europeanisation, it does not seem plausible that a European civil code would play any significant role in the construction of a European identity *per se* outside the limited circle of legal scholars, and, as an instrument which is historically linked to the nationalist experience, the political advisability of transferring it at the European level seems highly debatable. Nevertheless a substantive European private law that regardless of its form promotes constitutional-patriotic values, bringing about that adaptation of the black letter rule of the codes to the new constitutional values which is still asked for by certain authors,\(^{159}\) may advance even the cause of European identity.

\(^{159}\) S Rodotà, *Il codice civile e il processo costituente europeo*, at 25.