Nationalism and private law in Europe
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Conclusions and Summary

This book has made the effort to highlight the conceptual and historical links between private law and the ideology of nationalism, to investigate the role of this latter as a significant factor in the evolution of contemporary jurisdictions and verify whether it still plays a role in the processes of Europeanisation of private law. It is now clear that the answer to the fundamental question as to whether nationalism has exercised and still exercises an influence on private law in Europe cannot be satisfactorily answered as a simple yes-no question. The subject is on the contrary much more multifaceted and it requires several remarks.

If one only considered theory, the direct impact of the nationalist political principle on private law should be excluded at first sight. Nationalism – as the ideology maintaining the coincidence of the national and the political unit – has indeed revealed to be a ‘poor’ philosophy, which prescribes a particular kind of state organisation but fails to suggest which ideals are appropriate to structure the reciprocal relations between citizens – something that makes it compatible with numerous and diverse ideologies but at the same time makes it seemingly neutral to private law, which is on the contrary concerned exactly with the regulation of those relations. However, it is not necessarily the most elaborated political doctrines that exercise the weightiest influence in historical development, and this holds particularly true for nationalism, which has become a fundamental conceptual category to read many of the historical and political events that took place in the last couple of centuries. Regardless of its theoretical foundations, nationalism’s practical significance in history has been such that soon after its emergence the traits of private law in Europe were completely altered. Still today, traditional private law basically maintains much of those traits while processes such as the one of Europeanisation appear as processes of ‘denationalisation’ in the first place. What is more, much of the rhetoric that was associated to private law in the period in which it became nationalised – and directly drew from the nationalist thought – still seems to survive in the legal studies and condition to different extents contemporary processes of
denationalisation. This state of affairs results nonetheless in a paradox, since while legal education and doctrine is still primarily focused on traditional and national private law, new regulations highly invasive to private relations are being created at the transnational and supranational level.

To take note of these aspects, it has been necessary to look back in history, most particularly to that specific era in which nationalism most clearly manifested itself and according to several historians modern nations started taking form. During a considerable part of European history, private law maintained a mixed universal-localist dimension – as a result of the intersection of local customs, jurisprudence based on Roman law, commercial practices and natural law – and started undergoing a process of national definition only after the emergence of national thought during the eighteenth and nineteenth century. Logically, before that moment, private law could not have been national for the very simple reason that nations did not exist. This is not to say that ‘states’ did not exist either: according to common convention, the modern idea of the state dates back to 1648, while some typically statist characteristics can be found even in previous historical experiences, first and foremost within the bosom of the Roman Church. Rather, it was the idea of a state that embraces a nation – as a community of people sharing some characteristics and conscious of their common identity and diversity from other groups – that was still lacking.

It is in particular a merit of the modern studies on nationalism – usually labelled as ‘modernist’ in opposition to the ‘primordialist’ approach – to have exposed much of the rhetorical character of the views of nineteenth century nationalists who adhered to an organicist vision of the nation considered as something natural with its own history and traits – a sort of ‘enlarged family’ – and that still seems to condition the popular understanding of nations. In this new analytical perspective, nations are rather ‘imagined’ communities that have often been conceived – building upon pre-existing group allegiances often of an ethnic, linguistic or religious nature – by political and cultural groups for specific reasons. According to a strongly materialistic but still quite widespread view, the success of nationalism in that period has to be linked to the needs of industrialisation, which asked for the establishment of a new territorial and political unit in which commerce could be protected and fostered and in which workers could move with more ease. In this light, nationalisation of law was an aspect of crucial importance.

But the possibility of speaking of a general theory of nationalism is made complicated by the diversity of particular expressions of that ideology. It is in particular the difficulty – or even impossibility – of defining the nation in clear and universal terms that let different nationalist manifestations arise. In particular in France, nationalism had the main function of challenging the king’s pretence to embody the state – l’État, c’est moi – and hand over that power to a new historical subject. Such a significant institutional change could be brought about only by means of a revolution and in that context nationalism – of an enlightened inspiration – took primarily a civic and egalitarian connotation: the nation coincided with the citizens in opposition to the king and the ancient regime. Following the momentous events that led to the rise of Napoleon, the French private law system finally became stable in the structure of the civil code, which still shows traces of that civic nationalist view, as
revealed by the establishment of a unified legal treatment for all legal subjects – which translated the revolutionary idea of equality. The very ‘ideology’ of the code, that repealed the existing *ius commune* and local customs managing to nationalise law in France and giving a new competence to the elected Parliament, is a manifestation of that understanding of the nationalistic principle.

The development had been more multifaceted in Germany, where due to political fragmentation, civic forms of nationalism – represented in the legal discourse by advocates of codification such as Thibaut and von Feuerbach – did not meet with particular success and were soon overshadowed by ethno-cultural understandings of the nation. Nationalism studies have often pointed out the diversity between the French and the German nationalist experiences, and legal history can reveal how that opposition is also reflected in the legal development of those countries. A cultural understanding of the nation had been advocated in particular by the philosopher Herder, whose work had been highly influential in that period of patriotic fervour and also represented an important source of inspiration for lawyers, most notably the head of the Historical School of Law, Savigny.

It is thanks to Savigny that the conceptions of Herder and the Romantics were introduced in the legal discourse, mainly by means of the – in reality not entirely innovative – theory of the *Volksgeist*: every nation has a ‘spirit’ and law, similarly to language, is a natural expression of that spirit. A few years earlier, Montesquieu had already spoken of the spirit of the nation and its influence of the laws of a country, but that spirit was influenced in turn by several elements – first and foremost meteorological conditions – including law itself, which could still be modified by the legislator. Within the cultural context of German Romanticism, Savigny on the contrary put emphasis on the tie between law and the cultural roots of the nation, linked closely enough to make the idea of a legislator who intervenes on private law untenable. This view revealed to be a particularly valuable one for a country such as Germany that – unlike France – was not unified yet and in need to base the unity of its people on shared folkish elements. For the same reason, the ideas of the Historical School of Law met with success in other countries (some more than others) that were embracing ‘nation-building’ practices in that pivotal period of their history. But while Savigny’s conception was predominantly cultural – he even identified the traditional law of Germany with Roman law and constantly wavered between cultural regionalism and legal Europeanism – the cultural vision of the nation was soon overwhelmed by ethnic and later racist variations of nationalism. The common element that (at least allegedly) had to keep the nation together was now identified with race. In the twentieth century, the attempts of the Nazi and the Italian fascist regimes to intervene and ‘ethnicise’ private law were gloomy signs of this tendency. Historians still discuss whether these latter manifestations can be considered a direct and logical evolution from previous nationalist forms; the law scholar indeed detects a slow and increasingly worrying shift from cultural to ethnic understanding of the nation in the legal studies of that period, but at the same time recognises the evident contrasts concerning several other aspects between the legal thought of the nineteenth century legal scholars and the legal theory promoted by the fascist experiences.

Indeed, while nowadays it is usually associated with those dramatic historical events, nationalism in and of itself freed from fascist and racist connotations appears
to be as something quite different. In particular modern advocates of nationalism in political theory highlight with reason the fact that imperialistic fascist experiences even represented the contradiction of the nationalist principle aimed at giving each nation a state. In more recent years, a number of contemporary political theorists have therefore legitimised the idea of nationalism, making it acceptable by showing its compatibility with liberal principles as well as its persisting usefulness in the contemporary world. Nonetheless, while the idea that any nation should have the right to establish a state of its own became a guiding principle in the first decades of the twentieth century, the historical events of the Second World War led people to accept the view that nationalism was to be blamed for those tragedies and the only way to reduce the possibility of such conflicts in the future was to put constraints on national sovereignty. In this context, a fundamental paradox arose, resulting in an unending tension between opposite forces: on the one hand the world order is basically organised along national lines according to the nationalist principle, on the other hand nationalism in itself is looked down on as something dangerous. In the aftermath of the Second World War, the process of denationalisation – a consequence of rising globalisation of commerce – was accelerated by the creation of several international organisations, while the creation and later institutional evolution of the European Communities is a celebrated example thereof. The impact of these events on private law in Europe is self-evident and could be synthetised in one expression: European private law. In the perspective of the legal scholar, it is nonetheless clear that there is strong tension between the trends of denationalisation and the status quo dating back to the era of the nationalisation of law. Such tension gives rise to several episodes of resistance to Europeanisation that are detectable even inasmuch as private law is concerned.

In the first place, the elaboration of European private law rules can be jeopardised by the attempts of the member states to steer the drafting process in a direction that serves best the interests – material or symbolic – of the nation-state. In the second place, since European private law is usually issued in the form of directives in need of implementation by the member states, national resistance can also emerge at another level, inspired by the need for member states to safeguard particularly relevant national interests or the systematic coherence of their private law system. While these practices do not necessarily stand in contrast with the purposes of European integration – that in the area of private law has implied a mere harmonisation by means of directives rather than unification – they can occasionally lead to a contrast between European and national interests – especially when it comes to particularly important areas or even symbols of the nation-state – that frustrate the aims of integration and ultimately reveal the continuing importance of the order attained in the era of the nationalisation of law. In this sense European private law becomes ‘renationalised’ even if such renationalisation is often brought about at the expense of the uniformity of European law and thus creates new divergences. Even the judiciary, structurally thought to give application to national law, can easily contribute to this process of renationalisation of law, which in the end does not appear as a deliberate nationalist agenda but rather as the coherent continuation of practices that preserve a nationalistic state of affairs.
To grasp more clearly the importance of the national dimension in the private law discourse and its theoretical implications it is particularly helpful to turn our attention to the reflections of the legal scholars who since years – also explicitly stirred by the European institutions – engage in an extensive, multi-disciplinary, as well as highly normatively oriented debate on the advantages and disadvantages of a European private law. In this debate not only the legal but also the economic, political and in a broader sense cultural implications of the process of Europeanisation have been analysed and the reasons justifying such a ‘resistance’ as well as the defence of the national state of affairs of private law are systematically presented and discussed. According to some of the arguments employed in that context and taken in consideration in this book, most notably the economic, the social justice and the cultural argument, Europeanisation would be unfeasible or undesirable for several reasons: it would lead to results that are economically inefficient or even unjust, and would in any case disrespect cultural diversities whose safeguard should fall within the scope of the European treaties. Indeed, if people in different nation states have different cultures, ideas of justice, needs and economic preferences, any private law regulations taken at a European level would necessarily end up disregarding the views and values of at least one nation-state. These arguments are based on the underlying assumption that different member states have different understandings as to particular policy choices, social values or cultures, so that in the end the idea of unification or harmonisation extended to particularly sensitive issues – which would signify the substitution of the policy choice made by a supranational institution to the one expressed by a nation-state – appears as unattainable. The cultural argument assumes a particular importance in this sense. In other words, cultural pluralism would require legal pluralism since law and culture are tied to one another and cannot be dissociated.

On a closer look, nonetheless, the assumption upon which those arguments rest appears to be inherently nationally biased: cultures are considered different among nations and not also across or within nations. Actually, the existence of different levels of culture is not denied in theory by advocates of national cultural pluralism, but coherent policy implications do not follow from the recognition of the existence of supra or sub-national cultural segments. Such idea that culture basically corresponds to the nation is widespread in legal discourse, where in order to prove the necessary link between law and culture scholars resort to studies that claim to have discovered and systematised cultural variations among nations. Nevertheless, on closer analysis, these studies appear to be based on nationalist methodologies and assumptions themselves. Critics testify that distinctions of cultures based on national categories are still questionable instruments to be employed to investigate the specificities of legal institutions. In fact, while it cannot be proved that ‘dimensions of national culture’, as they are called, are false \textit{per se}, these can at most describe – accepting the necessary imprecision of a generalisation and the restriction to the nation – but hardly explain or even less \textit{predict} variations in legal rules and institutions, so that also their employment in comparative law with the aim to \textit{explain} differences in law and institutions or \textit{predict} how legal transplants would be accepted in culturally different contexts – normally coinciding with the jurisdiction of the nation-state – should be reconsidered.
In a broader perspective, while the existence of a blurry concept such as
national culture – which can manifest itself in a series of easily detectable behavioural
habits – can hardly be empirically disproved (the very observation of the existence of
cultural pluralism would otherwise be a mere hallucination) the suggestion that the
criterion to identify nationality is exactly national culture remains a fundamental
assumption that nationalists have proposed several times in the past, occasionally
linking culture with race. The link between culture and nation was indeed highlighted
in clear terms during the period of German cultural nationalism in particular by
Herder – whose view spread as already said into the legal studies thanks to the idea of
*Volksgeist* that in more or less clear terms still emerges in the contemporary debate –
while more recently political theorists adhering to the idea of ‘liberal nationalism’
have deepened and strengthened the relation between culture and nationality. Starting
from the idea that nationality and culture are basically synonyms, liberal nationalist
authors have drawn normative implications, explaining why the political and the
national unit should coincide: only this condition would guarantee democracy,
efficiency, justice and respect for culture within the state. Besides a functional
similarity, certain arguments widespread in the European private law discourse
therefore show even a structural resemblance to liberal nationalist views.

Interestingly enough, nonetheless, underlying nationalist assumptions can
inspire not only the opposition to denationalisation of law, but even the process of
Europeanisation itself. Since several centuries ‘nation-building’ strategies have been
employed to spread national consciousness and establish the nation-state; civil
codifications in continental Europe can be seen as one of those instruments too, whose
political rather than just legal function is widely recognised by historians. Those same
nation-building strategies could now likely be repeated at the European level to foster
the development of a shared collective identity for the European citizens, that is the
famous and highly discussed idea of a ‘European identity’. Not only the instruments
of ‘banal nationalism’ on which much of the discussion in the political debate and
media has been (sometimes naively) focussing – flags, hymns and so on – can serve
the cause of the European identity, but more substantially and importantly, law itself
can be a factor in this Europe-building project. In this light, the attempts to elaborate
not only something similar to a constitutional charter but also a civil codification – in
the form of a mandatory code or even a less pretentious optional instrument – can be
seen as an attempt to define the values that should be accepted and represent the
object of identification for people according to a model of ‘constitutional patriotism’,
which appears as the most viable solution to foster social and political integration in a
context, such as the European, which is characterised by an apparent lack of
homogeneity between citizens, may it be of an ethnic, linguistic or cultural nature.
Much of the discussion as to European plans for instruments that resemble the form
and contents of a codification is conditioned by the awareness of such a nationalist
added value of the code. Nevertheless, while that added value has reasonably faded
away over the years, not resisting to tendencies of decodification and more
importantly the emergence of modern constitutions with an important nation-building
function after the Second World War, private law as such and independently of its
form can still play a sociologically important role in the creation of collective
identities.
The concept of European identity has been extensively discussed in political science, but any attempt to define it unambiguously, singling out the element that makes a person ‘European’ regardless of national identity, has admittedly not led to appreciable results as of yet. Even the legal concept of European citizenship is a derivative one and follows from traditional national citizenship. Ultimately, to analyse it from the perspective of the nationalism studies, the question of European identity does not seem much dissimilar from the one ‘*qu’est-ce qu’une nation*’. From this perspective, the main difference between the traditional construction of national identity and the attempt to establish a European identity – even one which is respectful of other identities and cultures – seems rather and simply that national identities have already been constructed. In this sense, even the opposition between primordialist and modernist conceptions of nationalism loses importance outside of a purely historical perspective: one may consider national identities as natural facts or imagined artefacts but it is hardly deniable that, like self-fulfilling prophecies, they already somehow ‘exist’ in the acceptance of people. Already the fact that nations are *imagined* communities – and not *imaginary*, as it is often said misquoting a famous expression – gives a hint in this sense. On the contrary, European identity remains in a less developed phase, which makes it easy to become distrustful and return to the safe haven of our national identities and concepts, admitting that the only thing that Europeans share, beside a rather limited geographical area on the world map, is the fact of having been fighting each other for the past few thousands years. This conclusion, nonetheless, would be hardly justifiable. Exactly for that reason, and mindful of the fact that historically most collective identities – including those that we take for granted and at times mythicise nowadays – have been built by means of homogenisation and repression of differences, the construction of a shared identity for Europe while respecting diversity and avoiding the economic and social injustices that even the creation of nation-states has often produced in the past, appears as a tempting challenge from a theoretical, an historical and even a legal point of view. Private law could be, again, an important factor in this challenge.