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Articles

What do Nationalists Maximise? A Public Choice Perspective on the (Non-) Europeanization of Private Law

JAN M. SMITS*

Abstract: This contribution explores the relationship between (private) law and nationalism from a public choice perspective. Its main point is that the nationalist ideology in law is largely guided by the self-interest of citizens, legislatures, courts and academics. 'Nationalists' (those who favour the congruence of state and nation) maximise their chances in life by capitalising on homogeneity: by acting in accordance with the unified norms of the nation-state, they are able to put themselves in a better position. This framework is used to explain the importance of the nationalist view of law in the 19th century. In addition, it allows an analysis of both the question of how to organise private law today and the question of how to explain present resistance against Europeanization. At the normative level, the claim is made that citizens should be allowed to search for community elsewhere, e.g. by opting into European sets of norms (such as the proposed CESL). A possible explanation for resistance against Europeanization is found in the close relationship between engaging in things European and the economic or psychological advantages obtained from this. This is confirmed by a limited survey of the extent to which national academics are active in the debate on European private law, which can be explained by the different incentives universities provide to academics for obtaining tenure and prestige.

Résumé: Cette contribution explore les relations entre droit (privé) et nationalisme, en partant d'une perspective de théorie des "choix publics". Son argument principal est que l'idéologie nationaliste dans le droit est largement guidée par l'intérêt personnel des citoyens, des parlements, des tribunaux et des universitaires. Les "nationalistes" (ceux qui approuvent l'accord entre l'État et la Nation) maximisent leurs chances dans la vie en capitalisant sur l'homogénéité : en agissant en accord avec les normes unifiées de l'État-Nation, ils sont capables de se mettre eux-mêmes dans une meilleure position. Ce cadre est utilisé pour expliquer l'importance de la vision nationaliste du droit au 19ème siècle. En outre, cela permet l'analyse de deux questions : comment organiser le droit privé aujourd'hui et comment expliquer la résistance actuelle contre l'européanisation. Au niveau normatif, il est revendiqué que les citoyens devraient être autorisés à chercher des communautés ailleurs, c'est-à-dire en choisissant des ensembles européens de normes (comme le projet de règlement européen sur la vente). Une explication possible de la résistance contre l'européanisation est trouvée dans la relation étroite entre le fait de s'engager dans des choses européennes et les avantages écon-

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omiques et psychologiques qu'on peut en tirer. Ceci est confirmé par un bref survol de la façon dont les universitaires de chaque pays sont actifs dans le débat sur le droit privé européen, et qui peut s'expliquer par les différentes incitations que les universités fournissent aux universitaires dans l'obtention de postes et dans l'attribution de prestige.

Zusammenfassung: Dieser Beitrag untersucht die Beziehung zwischen Privatrecht und der nationalstaatlichen Perspektive aus der Perspektive der politischen Ökonomie (Public Choice). Ein nationalstaatlicher Zugang zu Rechtssetzung orientiert sich am Eigeninteresse der Staatsangehörigen, Gesetzgeber, Gerichte und Akademiker. Nationalstaatlich orientierte Ansätze (die das Zusammenfallen zwischen Staat und Nation befürworten) investieren vor allem in Homogenität: Daraus dass sie die vereinheitlichten Regeln des Nationalstaates zur Leitlinie nehmen, ziehen sie langfristig Vorteile. Dieser Rahmen wird zugrunde gelegt, um die Bedeutung eines nationalstaatlichen Verständnisses von Recht im 19. Jahrhundert zu erläutern. Dieser Rahen erlaubt es außerdem, die Frage danach zu analysieren, wie wir Privatrecht heute organisieren sollten, sowie die Frage, wie sich der starke Widerstand gegen eine Europäisierung erklären lässt. Normativ wird aus diesen Überlegungen abgeleitet, dass Bürger (oder auch Privatrechtssubjekte) das Recht haben sollten, andernorts "ihre" Gemeinschaft zu suchen, etwa indem sie für die Anwendung des (vorgeschlagenen) Gemeinsamen Europäischen Kaufrechts optieren. Eine mögliche Erklärung für den Widerstand gegen eine Europäisierung wird in dem Umstand gesehen, dass Europa sehr stark mit ökonomischen (oder auch psychologischen) Vorteilen hieraus assoziiert wird. Diese Sicht wird durch einen kleinen Überblick zu der Frage bestätigt, wie weit gehend sich welche Akademiker an europäischen Debatten beteiligen: Insbesondere differieren die Anreize erheblich, die Universitäten für eine Teilnahme an solchen Debatten setzen (hinsichtlich Berufungsfähigkeit und Prestige).

I Introduction

The relationship between private law and nationalism is underexplored. The traditional connection made between private law and the nationalist ideology is related to the unification and codification of private law in the 19th century: the emergence of national civil codes is then explained as an expression of, and a symbol for, the national unity of a people.[1] This contribution aims to explore the relationship between (private) law and nationalism in a more comprehensive way. It does so by applying a perspective from public choice, so starting from the assumption that the nationalist ideology in law is guided by the self-interest of actors, including the citizens themselves. The main questions are how we can explain the importance of the nationalist view of law in the 19th century and to what extent nationalism should still be a guiding principle in designing present-day (European) private law. An additional claim made in this contribution is that much the same reason why nationalism emerged as a driving force in shaping the law in the past can help to explain the resistance against Europeanization in the present time.

1 Cf M.F. John, 'The Politics of Legal Unity in Germany 1870–1896' *The Historical Journal* 28 (1985) 341–355.

This contribution starts off – after having given a definition of nationalism – with a sketch of the traditional account of the relationship between nationalism and private law, an account that despite its old roots is still influential today: prevailing theories of law emphasise the close link between the state, the nation and its law. This traditional account is subsequently analysed from a public choice perspective: what is it that actors supporting the nationalist ideology try to maximise (section II)? This opens the way (in section III) for a discussion of nationalism in the present time: is the aim that nationalists try to pursue still satisfied in the best possible way by national law? In other words: do people still need the nation to satisfy their needs? This leads to an exploration of the normative consequences that follow from this for the organisation of private law in the European Union and to a possible explanation of resistance against Europeanization.

II Law and the Nation: Looking behind the Volksgeist

1 Law and Nationalism: the Standard View

It is widely recognised that nationalism comes in many different forms of a religious, liberal, fascist, cultural, political, etc. nature and that it is virtually impossible to bring them all under one heading,[2] other than that all forms have 'an overriding concern with the nation.'[3] This makes it urgent to define carefully what is meant with nationalism in this paper. The key aspect of nationalism is well defined by Ernest Gellner who defines nationalism as the 'political principle that holds that the political and the national unit should be congruent.'[4] This means that one strives to have one nation per state and that, within this nation, there is to the greatest possible extent one national culture, language and law. The one and only homogenous cultural unit thus forms the foundation of political life, uniting the rulers and the ruled.[5] The essential aspect of the nation in this view is that it is a *felt* and *lived* community whose members share a homeland and a culture.[6] Nationalism thus requires some subjective element: members are to have a certain image of, and feelings about, the nation, usually made visible by way of symbols and stories.

2 J. Hutchinson and A.D. Smith (eds), *Nationalism* (Oxford: Oxford University Press, 1994) 3.

3 A.D. Smith, *Nationalism: Theory, Ideology, History* (2nd ed, Cambridge: Polity Press, 2010) 9.

4 E. Gellner, *Nations and Nationalism* (Ithaca: Cornell University Press, 1983) 1.

5 Gellner, n 4 above, 125.

6 Smith, n 3 above, 12 and 124. See also M. Moore, *The Ethics of Nationalism* (Oxford: Oxford University Press, 2001) 5: nationalism as 'a normative argument that confers moral value on national membership, and on the past and future existence of the nation, and identifies the nation with a particular homeland or part of the globe'.

It is clear how the law fits into this congruence of the political and the national unit. If the state and the nation are in harmony, the law can be easily legitimated: the state only needs to institutionalise what already follows from the preferences of the people. This adds a clear normative element to nationalism: actions of the state are seen as legitimate political action because they follow from what the people of the monolithic nation want anyway. Most definitions of the nation are therefore right to mention explicitly that next to a common history, language, myths and culture, a nation is to have common laws and customs for all of its members.[7]

It is against this background of the congruence of the political and the national unit that we are to understand the perhaps best-known expression of how the law and the nation relate: the idea that law, next to language, flows from the common consciousness of a people, the *Volksgeist*.[8] And from this, the logical consequence follows that the law of this people should be uniform. Johannes Miquel put this in clear wording in the German *Reichstag* in 1867: 'The demand for legal unity is a necessary precondition of a nation-state.'[9] If one is German, French or English, one must be governed by the same laws as one's fellow countrymen, just like one uses the same grammar and reads the same newspapers. In the standard account of unification of law through codification,[10] it was therefore the nationalist ideology that was the main driver behind enacting national codes. As long as fragmented territories looked at themselves as having separate cultural identities, it was difficult to come to any unification. This changed with the rise of the nation.

2 Beyond the Volksgeist

Until now, the standard view (at least among lawyers) of the relationship between nationalism and law was described thus: in a nationalist account of the law, law is seen as the unique expression of a people, thereby prompting the need for unification of laws on the territory of the nation-state. In the remainder of this contribution, I will look beyond this standard view and argue that it is rather the other way around: it is not nationalism that led to a uniform and homogeneous culture (and law), but the need for homogeneity, that was prompted by other reasons, which led to nationalism. This means we have to look beyond the *Volksgeist* and explain why a congruence of the state and

7 See eg Smith, n 3 above, 13 and 124. Cf 56: if there are different identities at the same time, there is no need for one national law to govern everything.

8 This idea was not only central to the German Historical School, but was also influential in England. See N. Jansen and R. Michaels, 'Private Law and the State' *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 71 (2007) 345–397, 378.

9 See John, n 1 above, 342.

10 See eg P.A.J. van den Berg, *The Politics of European Codification* (Groningen: Europa Law Publishing, 2007) 23 *et seq*.

the nation – not in any way the natural state of things[11] – came to play such a big role.

My account is inspired by public choice theory, thus by an approach that looks at the behaviour of actors as self-interested agents, maximising their own utility that may be at odds with the preferences of the general public.[12] It is surprising that nationalism was until now only very seldom studied from this public choice perspective.[13] While acts usually associated with nationalism (such as the willingness to fight, or even die, for one's country) seem irrational, it is worthwhile investigating if there are not any rational incentives in exposing such behaviour.

So why is it that actors have an interest in a congruence of the state and the nation? Ernest Gellner offers a convincing explanation.[14] He claims that the rise of the nation-state can be explained by the interest of rulers in cultural homogeneity. This interest was relatively new: for a very long time in history, rulers did not mind about cultural and legal diversity at all. It is remarkable that this was even the case when international commerce was highly developed, such as in the 17th and 18th century. It was only with the rise of a national *industrial* society that the need emerged to create nations, not so much for ideological reasons but simply because this greatly facilitated the rise of the economy. Nationalism was thus used as an *instrument* to reach another goal: the homogeneity of society, replacing dialects and legal diversity, creating a workforce that was educated, that could communicate with each other and that was therefore mobile and re-trainable.[15] Unlike the case in previous times, people no longer stayed in one profession (often that of their father) for their entire life. The whole point about having one national education and language

11 Cf J.H.H. Weiler, 'Does Europe Need a Constitution?' *European Law Journal* 1 (1995) 219–258; B.S. Frey, 'A Utopia? Government without Territorial Monopoly' *The Independent Review* 6 (2001) 99–112 goes further and shows how a state can even do without a territory.

12 Cf J.M. Buchanan and G. Tullock, *The Calculus of Consent* (Ann Arbor: University of Michigan Press, 1962).

13 See, however, F. Buckley and F. Parisi, 'Political and cultural nationalism', in C.K. Rowley and F. Schneider (eds), *Encyclopedia of Public Choice* (New York: Springer, 2003) 409–411 and U. Pagano, 'Can Economics Explain Nationalism?', in A. Breton, G. Galeotti, P. Salmon and R. Wintrobe (eds), *Nationalism and Rationality* (Cambridge: Cambridge University Press, 1995) 173–203.

14 Gellner, n 4 above. See also C. Taylor, 'Nationalism and Modernity', in R. Beiner (ed), *Theorizing Nationalism* (Albany: State University of New York Press, 1999) 219–246 and E. Hobsbawm, 'The Nation as Invented Tradition', in Hutchinson and Smith (eds), n 2 above, 76–83. For an account of criticism on Gellner (including that of Adrian Hastings): J. Leerssen, 'Nationalism and the cultivation of culture' *Nations and Nationalism* 12 (2006) 559–578.

15 Taylor, n 14 above, 221: 'To "do business" with each other, operate a system of courts, run a bureaucratic state apparatus, and the like, we need millions who can communicate without difficulty in a context-free fashion.'

was thus to make people no longer dependent on their local community, church or family, and to create a literate and skilled workforce, thereby permitting the division of labour. The only feasible way to realise this was through a centralised state that could provide education for the millions.

The interesting thing about this account is that it was not nationalism that imposed homogeneity, but the other way around: the need for homogeneity surfaced in the form of nationalism: the modern industrial society needed uniformity and was dependent on the state to realise this.[16] In this respect, an interesting parallel can be drawn between the Industrial Revolution in Western Europe[17] and the desire to have uniform laws. Without claiming that there is a direct causal link between the two, it is likely that there is at least congruence between the sequence in which the Industrial Revolution took place in various European countries and unification of laws. England's early (from the 1850's onward) industrialisation can be related to the existence of the English common law. On the continent, early industrialisation in Belgium[18] seems congruent with the introduction of the Civil Code in 1804, while industrialisation in Prussia[19] coincided roughly with the introduction of the *Allgemeines Landrecht* in 1794. Industrialisation in the rest of Germany, in particular in the Ruhr Area, did not take place until the late 19th century, congruent with the late adoption of the German BGB in 1900. France seems to be the odd one out in this overview, but there may be valid reasons why the introduction of the Code in 1804 was not accompanied by industrialisation: Horn explains how late 18th century attempts in France to emulate the English model failed because of the emergence of revolutionary politics.[20]

It would in my view be a mistake to look at this socialisation process as something that only served the interests of the elite.[21] The change of peasants

16 Taylor, n 14 above, 221.

17 On which eg K.G. Persson, *An Economic History of Europe* (Cambridge: Cambridge University Press, 2010) and T.S. Ashton, *The Industrial Revolution 1760–1830* (Oxford: Oxford University Press, 1996).

18 Cf H. van der Wee, 'The Industrial Revolution in Belgium', in M. Teich and R. Porter (eds), *The Industrial Revolution in National Context: Europe and the USA* (Cambridge: Cambridge University Press, 1996) 64–77.

19 Cf E. Dorn Brose, 'The Political Economy of Early Industrialization in German Europe, 1800–1840', in J. Horn, L.N. Rosenband and M. Roe Smith (eds), *Reconceptualizing the Industrial Revolution* (Cambridge/Mass: MIT Press, 2010) 107–123.

20 See J. Horn, *The Path Not Taken: French Industrialization in the Age of Revolution 1750–1830* (Cambridge/Mass, MIT Press, 2006). The other obvious exception is the Netherlands that adopted a national codification in 1809, but did not industrialise until much later.

21 D. Levi-Faur, 'Friedrich List and the political economy of the nation-state' *Review of International Political Economy* 4 (1997) 154–178, 160. Critical about the idea of elites manipulating the masses for their self-interest: Moore, n 6 above, 12.

into Frenchmen, or of artisans into Germans, served just as much the interests of the newly created national citizens themselves. By acting in conformity with the norms of the nation, they were able to maximise their utility: their chances in life were increased by adhering to the dominant group norms that became rapidly national in the 18th and 19th centuries. In addition, this also increased solidarity vis-à-vis the group: if people feel kinship, they are more likely to contribute to the common good.[22] This is in line with evidence that the growth of institutions of national solidarity goes together with restrictions on immigration.[23] And – as Benedict Anderson makes clear – the community need not consist of a group of people that could look each other in the eye, but could also be *imagined*, creating a very effective comradeship by the joint feeling of belonging to one nation.[24]

All this means that – if the national economy is the main unit for economic development – 'nationalists' (those who favour the congruence of state and nation – and arguably the law) maximise their own chances in life by capitalising on homogeneity: if one wants to decrease the costs of doing business or of being employed, one needs to some extent also a homogeneous culture, language and law. This is beneficial to the state because it can profit from economic activities, but it is also beneficial to citizens because they are able to find jobs, to contract at low cost, in short to maximise their utility.[25]

It must be clear that in this account of nationalism the law plays a very important role. As the industrial society is in need of as much homogeneity as possible, this homogeneity must also extend to the law. It was in particular important to unify private law as the backbone of economic activity, but also as defining dominant group norms. These norms did not satisfy the needs of the outcasts (either rich or poor), but of *normal* people. Still today, private law is full of references to these norms, for example in emphasising reasonableness and reasonable expectations and in using standards such as the man on the Clapham omnibus, the *bon père de* famille, the *ordentlicher Kaufmann* and the reasonably well informed and ob-

22 Cf F.H. Buckley, 'Liberal Nationalism' *UCLA Law Review* 48 (2000) 221–264, 239 *et seq*, with reference to De Toqueville, John Stuart Mill and Simone Weil. G.L. Fontana, 'The economic development of Europe in the nineteenth century', in A. di Vittorio, *An economic history of Europe: from expansion to development* (London: Routledge, 2006) 176–207, 176 mentions that as a result of industrialisation the population in Europe doubled in 150 years.

23 Cf C. de Vreese and H. Boomgaarden, 'Projecting EU Referendums: Fear of Immigration and Support for European Integration' *European Union Politics* 6 (2005) 59–82, showing that fear for immigrants predicts Euro-scepticism.

24 B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 1991) 36 *et seq*.

25 See on the 'holy trinity' of sovereignty, nationality and identity: V. Bader, 'Complex Citizenship and Legitimacy in Compound Polities: The EU as Example' *Eurosphere working papers series* 2008/05, 2.

servant consumer.[26] In this respect national civil codes are indeed the true constitutions of countries[27] because they define the prevalent norms in society. By creating a uniform conception of what is reasonable in the nation, people know what they have to do and acting in conformity with these norms will help them increase their chances of success in life.

III From Monoculture to Plural Culture (and Plural Laws)

In the preceding section nationalism and the rise of nation-states (and the rise of a monoculture following from this[28]) was explained as a way to make modern industrial society. Put in the terms of public choice analysis: people decided to organise themselves by way of nation-states (and adopt a uniform language, form of communication and law) because this maximised their utility. To belong to a national group suited people best in the 19th century. Turning from the descriptive to the normative, the question now is whether the nation is still the group to belong to in the present time or if perhaps belonging to some *other group* than the national one better enhances the chances of success in life.

We cannot answer this question without paying attention to how the world has changed in recent decades. In large parts of the Western world the traditional industrial society has made way for an economy in which provision of services takes centre stage. Globalisation has made the world much smaller. Communication often takes place in English and through the Internet. The groups that people identify with often no longer consist of fellow-nationals, but of likeminded people anywhere in the world.[29] While one once derived one's identity from being a farmer and later from being a Frenchman, one is now an adherent of the 'occupy'-movement[30] or a member of the class of travelling international scholars.[31] The point is that people in large parts of our interdependent world can now communicate without difficulty in a way that is largely context-free, making the role of the nation-state much less important as a way for people to identify with each other.

The gist of the analysis of nationalism in section II is that the nation-state growing old and tired does not mean that the underlying motives of why

26 Court of Justice EU, case 220/98, [2000] *ECR* I-117 (*Estée Lauder*).

27 J. Carbonnier, *Droit civil: Introduction* (20th ed, Paris: Presses Universitaires de France, 1991) 123.

28 Cf D. Tambini, 'Explaining monoculturalism: beyond Gellner's theory of nationalism' *Critical Review* 10 (1996) 251–270.

29 A. Sen, *Identity and Violence; the Illusion of Destiny* (New York: Norton, 2006) 4–5.

30 Cf <www.occupytogether.org>.

31 Cf D. Lodge, *Small World: An Academic Romance* (London: Secker & Warburg, 1984).

nationalism emerged in the first place are no longer important. The search for community as a way to maximise one's chances of success continues. This was even qualified as a quest for shelter to avoid 'identity panic' – the efforts of the European Union to convince its citizens of a tale of solidarity to a community (the 'ever closer Union') being a nice illustration of this.[32] In the remaining part of this article, this analysis is applied to two topics: the ideal organisation of European private law and the explanation of resistance against Europeanization.

1 The organisation of European private law

When it comes to the organisation ('architecture'[33]) of European private law, the question is whether the congruence of the state and the nation can still be the guiding principle in law making. As we saw above, this is dependent on the extent to which people can still maximise their needs by adhering to one national law. It is true in any case that 'we see ourselves as members of a variety of groups based on citizenship, residence, geographic origin, gender, class, politics, profession, employment, food habits, sport interests, taste in music, social commitments, and so on.'[34] This means that the role of the nation-state as the exclusive way for people to identify with each other has become less important.

The existence of these different identities does not necessarily mean something for the law. One could even reason that these non-national identities make the existence of one national law even *more important* because it is the only thing left to keep the citizens of the state together by way of *social cement* if a common language, morality, religion or culture cannot perform this role.[35] There is a long list of authors making this argument, ranging from Jean-Jacques Rousseau's *religion civile*[36] to Jürgen Habermas' *Verfassungspatriotismus*.[37] I do not disagree that there should be a minimum content of

32 See P. Schlesinger, 'Europeanness: a new cultural battlefield?' *Innovation* 5/1 (1992) 12–18. Ethnic and religious nationalism and fundamentalism also come up in turbulent times, when people are disoriented; cf de Vreese and Boomgaarden, n 23 above.

33 I am aware that the term 'architecture' (cf K. Purnhagen, 'The Architecture of Post-National European Contract Law from a Phenomenological Perspective – A Question of Institutions' *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 76 (2012) forthcoming) suggests design. However, I use the term in a neutral way, also allowing a more spontaneous order and in line with the idea that open space is also the result of a decision, namely *not* to build.

34 Sen, n 29 above, 4–5.

35 See, instead of many, and in the context of nationalism: B.R. Barber, 'Blood Brothers, Consumers, or Citizens? Three Models of Identity – Ethnic, Commercial, and Civic', in C.C. Gould and P. Pasquino (eds), *Cultural Identity and the Nation-State* (Lanham: Rowman & Littlefield, 2001) 57–65.

36 *Du Contrat Social* (1762), IV, 8.

37 See J. Habermas, *Faktizität und Geltung* (Frankfurt am Main: Suhrkamp, 1992) 632.

national law, but this does not mean that the state must provide one mono-cultural set of norms for everything that its citizens engage in. In my view, many people can today no longer maximise their chances of success in life by adhering to the norms of the nation-state. In so far as this is not contrary to the minimum content of national law (reflected in mandatory rules), they should be allowed to search for community elsewhere. Philip Schlesinger states this clearly: 'if we don't like the company, we can opt out.'[38] It is clear that this has far-reaching consequences for what it still means to be English, German, Dutch, etc. – the conception of which is then very different from what it was hundred years ago.

In this situation of 'neo-tribalism',[39] it is essential to identify for which parts of the law one is able to opt out because they do not belong to the minimum content of national law. In my view, large parts of private law – a field characterised by a large degree of autonomy – are not part of this national core. Habermas' *Verfassungspatriotismus* is not a *(Bürgerliches) Gesetzbuchspatriotismus*. This means in practical terms that states should allow their citizens to opt out of what these states do not consider to be an essential part of their state-being, thus permitting them to opt into other national laws or to European regimes.[40] The recently proposed Common European Sales Law[41] fits into this view: if people believe a choice for the CESL better reflects their commercial, consumer or European identity, they should be allowed to opt for it. Nation states often still regard themselves as being responsible for providing norms (as a monopolist) as if they need to provide a homogeneous culture for its citizens. This is wrong: present society is no longer an industrial one, but is characterised by a focus on services, innovation, finance, provision of information and worldwide communication networks.[42] This post-industrial society no longer requires one homogeneous culture at the state level in order to satisfy one's preferences. It changes the role of the nation from a community of fate into a community of choice, in line with the historical experience of before the national codifications, when law was more plural than uniform.[43]

38 Schlesinger, n 32 above, 12. Lawyers would phrase this in terms of diverging preferences, following C.M. Tiebout, 'A Pure Theory of Local Expenditures' *The Journal of Political Economy* 64 (1956) 416–424.

39 M. Maffesoli, *The Time of the Tribes* (London: Sage, 1996): a 'quest for shelter from the chill winds of ontological insecurity.'

40 See in more detail J.M. Smits, 'A Radical View of Legal Pluralism', in L. Niglia (ed), *Pluralism and European Private Law* (Oxford: Hart Publishing, 2012) forthcoming.

41 Proposal for a Regulation on a Common European Sales Law, COM(2011) 635 final.

42 Cf D. Bell, *The Coming of Post-Industrial Society* (New York: Harper, 1974).

43 See Smith, n 3 above, 139 and – for the law – N. Jansen, 'Legal Pluralism in Europe', in Niglia (ed), n 40 above.

2 Explaining resistance against Europeanization

Can the search for community as a way to maximise one's chances of success in life also explain the current resistance to the Europeanization of private law? It seems that Euro-scepticism exists to a greater extent in some countries and among some groups of people. If the framework provided in section II is to explain this, it would mean that identification with the nation-state is at the highest where actors would not profit from Europeanization. People would on the other hand identify with Europe if they gain, or expect to gain, from adhering to things European.

The available statistical evidence indeed suggests a close relationship between being pro-European and the economic or psychological advantages one obtains from this. This can be seen at both the state and the individual level. At the state level, previous research shows that there is a correlation between Europe-mindedness and the economic benefits one derives from membership of the European Union. The tendency of individuals identifying themselves purely with their nation-state is less strong in countries with high net receipts from the EU budget.[44] A rough comparison of the volume of intra-European trade per country and support for the European Union points in the same direction. Thus, the United Kingdom has the least amount of intra-EU trade as part of its total trade, and in most surveys its citizens support the EU the least. Luxembourg has the most intra-EU trade relatively-speaking and usually also scores highly on citizens' support for the EU.[45] In so far as the individual level is concerned, it seems that citizens engage in a cost-benefit calculation whereby citizens who profit the most from economic integration are more pro-EU than others.[46] Surveys show that enthusiasm for the European Union is much higher among well-educated and mobile citizens than among less-educated people in traditional professions: the latter expect to win less from Europe.[47]

Is it possible to relate these more general findings to resistance against Europeanization in the area of private law? This is impossible without distinguishing between the various actors involved in the fabric of law: national legislatures will maximise something else than courts or academics. The role of these legal actors in explaining positive or negative sentiments about harmonisation

44 J. Garry and J. Tilley, 'The Macroeconomic Factors Conditioning the Impact of Identity on Attitudes towards the EU' *European Union Politics* 10 (2009) 361–379, 373.

45 See *Eurostat Pocketbooks External and intra-European Union trade, Data 2002-7, 2009 edition*, 44 and the table in Garry and Tilley, n 44 above, 370.

46 See eg R.C. Eichenberg and R.J. Dalton, 'Post-Maastricht Blues: The Transformation of Citizen Support for European Integration, 1973–2004' *Acta Politica* 42 (2007) 128–152.

47 Cf M. Gabel and H.D. Palmer, 'Understanding variation in public support for European integration' *European Journal of Political Research* 27 (1995) 3–19, who demonstrate that variables representing the personal potential to gain from trade were among the strongest correlates of individual-level support for European integration.

is much more important than the feelings of the population in general. In addition, an explanation of resistance must be preceded by some measurement of the extent to which it exists in the various member-states. The anecdotal evidence – usually assuming that actors in France and the United Kingdom resist Europeanization of private law more than actors in Germany or the Netherlands – is not particularly rigorous. One can of course point at vehement statements against Europeanization by French law professors[48] or in the French parliament,[49] or at pleas in favour of a European Civil Code by an influential German author,[50] but these are not representative for all legal actors in these two countries. It may be telling that the four reasoned opinions of parliaments objecting to the recently proposed CESL on the ground that it infringed the subsidiarity principle came not only from the UK House of Commons, but also from the German *Bundestag*, the Austrian Federal Council and the Belgian Senate.[51]

This is not the place to carry out an extensive statistical measurement of resistance to Europeanization in the various Member States. However, to show what such a quantitative exercise could look like, I propose a limited survey of the role of legal academics.[52] This also seems appropriate in view of the large role that they have in the process of Europeanisation of private law.[53]

48 See eg A. Ghozi and R. Vatinet in their reaction to the Green Paper on European Contract Law, COM(2010) 348 final, available at <http://ec.europa.eu/justice/news/consulting_public/0052/contributions/164_fr.pdf>: 'Le Code Civil participe de la culture du peuple français d'une manière essentielle (...). La France – Etat nation, dans sa définition socio-politique – trouve dans son code les signes et symboles de l'adhésion de la population aux valeurs qui la fédèrent (...). Le Code civil participe directement de l'identité de la nation française.'

49 On 7 December 2011, The European Affairs Committee of the French *Assemblée Nationale* (<www.assemblee-nationale.fr/13/dossiers/droit_commun_europeen_vente.asp>) unanimously rejected the Proposal for a Common European Sales Law. Reporter Marieta Karamanli noted: 'En aucun cas nous ne pouvons accepter d'avoir concomitamment deux corps de règles sur le même territoire.'

50 Cf eg C. von Bar and O. Lando, *Joint Response of the Commission on European Contract Law and the Study Group on a European Civil Code* (comment to Communication COM(2001) 398 final, 54: 'It is appropriate that the notion of a European Civil Code be taken seriously as one possible end goal (...).'

51 SEC/2011/1165, available through <www.ipex.eu>.

52 See on the role of courts A. Stone Sweet and T.L. Brunell, 'The European Court and the National Courts: a Statistical Analysis of Preliminary References 1961–95' *Journal of European Public Policy* 5 (1998) 66–97, arguing that member-states with more transnational activity produce more preliminary references. The role of national legislatures is scrutinised by A.E. Töller, 'Measuring and Comparing the Europeanization of National Legislation: A Research Note' *Journal of Common Market Studies* 48 (2010) 417–444. These two studies are not limited to private law.

53 Cf R. Zimmermann, 'The Present State of European Private Law' *American Journal of Comparative Law* 57 (2009) 479–512.

To this end, I analysed the 82 main articles published in the volumes 3–7 (2007–2011) of the *European Review of Contract Law* on the basis of the country of origin of the university with which the author is associated. In absolute numbers, most articles (25) were written by authors at German universities, followed by the United Kingdom (14) and the Netherlands (11). In order to calculate the relative rank, the amount of papers per country was divided by the size of population of that country. This provides interesting numbers. It shows that the Netherlands has the highest amount of articles in this journal per capita (ie 1 article per 1,55 million inhabitants), followed by Germany (1/3,28 m), the United Kingdom (1/4,4 m), Italy (1/6,6 m), France (1/10,5 m) and Spain (1/23,5 m). This exercise was repeated for the 138 main articles of the volumes 15–19 (2007–2011) of the *European Review of Private Law*. This confirms the high rank of authors at Dutch (1 article per 425.000 inhabitants) and German (1/4,5 m) universities. Spain (1/4,3 m) and Italy (1/5 m) also rank in the top 5 for *ERPL*, with the United Kingdom (1/6,5 m) and France (1/9 m) at positions 6 and 7. The most striking difference between both journals concerns the position of authors at Belgian (mostly Flemish) universities, who are almost absent in *ERCL*, but take the second place in *ERPL* with 1 article per 526.000 inhabitants. Another interesting finding concerns the low position of Poland, with only one main article for 39 million inhabitants in *ERCL*.[54]

I do realise that ranking journal contributions on basis of the origin of the author is not the only possible way to measure academics' resistance against (or enthusiasm for) Europeanization. However, the findings can be explained within the framework provided above, so from the view that actors deal the most with things European if they expect to gain from this.[55] One can say in general that legal academics have an interest in the harmonisation process as it generates a demand for their skills and they can derive non-financial benefits from being involved in the process (such as the chance to travel and obtain international prestige).[56] But this does not explain differences among academics working in different countries. In the last ten years or so, legal academics in the Netherlands (who, as we saw in the survey, are relatively the most active participants in the debate) could greatly increase their chances of obtaining tenure and prestige by publishing internationally. This was forcefully supported by university policies and by the funding mechanisms of the Dutch government and the Netherlands Organisation for Scientific Research

54 The position of Poland is slightly better in *ERPL*, with three articles and a rating of 1/13 m.

55 I do acknowledge, of course, that this is not a monolithic explanation: other factors may be important as well, including the composition of the journal's editorial board and publication cultures in general.

56 A. Ogus, 'Competition Between National Legal Systems: A Contribution of Economic Analysis to Comparative Law' *International and Comparative Law Quarterly* 48 (1999) 405–418, 416.

(NWO).[57] France (whose academics rank low in the survey) represents in many respects the opposite position. Partly because of an emphasis on national doctrine as the core of academic activity,[58] and partly because of the mode of recruitment through the *concours d'agrégation*,[59] the incentive of French academics is to publish as much as possible about French law within the confines of their own long-existing sub-discipline. Budding legal scholars cannot derive prestige from publishing in English or engaging in the often theoretical and interdisciplinary debate on the course of European private law. To the contrary: in French academia this is more likely to damage their career.

This example shows that a perspective of legal academics satisfying their own preferences may (at least partly) explain a positive or negative attitude towards dealing with Europe. This implies that the same reason why nationalism emerged as a driving force in shaping the law in the past can help to explain the resistance against Europeanization in the present time: the stable factor is formed by actors maximising their utility.

IV Conclusions

The main point made in this contribution is that the nationalist ideology in law is largely guided by the self-interest of actors involved in the fabric of law. These actors include citizens, legislatures, courts and academics. 'Nationalists' (those who favour the congruence of state and nation) maximise their chances in life by capitalising on homogeneity: by acting in accordance with the unified norms of the nation-state, they are able to put themselves in a better position. While this can explain the importance of the nationalist view of law in the 19th century, it does not say much about the extent to which adherence to national law is still the best way to maximise one's utility in the present time.

This framework allows an analysis of both the normative question of how to organise European private law and the explanatory question of how to account for resistance against Europeanization. At the normative level, the claim is made that, in so far as this is not contrary to national mandatory law, citizens should be allowed to search for community elsewhere, e.g. by opting into European sets of norms (such as the proposed CESL) or by choosing for other national laws. Actors maximising their utility also offers a possible explanation for resistance against Europeanization. Political scientists demonstrate that there is a close relationship between engaging in things European and the

57 See in more detail J.M. Smits, *The Mind and Method of the Legal Academic* (Cheltenham: Edward Elgar, 2012) forthcoming.

58 See P. Jestaz and C. Jamin, *La doctrine* (Paris: Dalloz, 2004).

59 Cf H. Muir-Watt, 'The Epistemological Function of "la Doctrine"', in M. van Hoecke (ed), *Methodologies of Legal Research* (Oxford: Hart Publishing, 2011) 123–131.

economic or psychological advantages obtained from this. This is confirmed by a limited survey of the extent to which national academics are active in the debate on European private law. The greatest contrast is that between Dutch and French scholars, which can be explained by the different incentives in obtaining tenure and prestige in the Netherlands and France.