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BRINGING THE HISTORY OF IDEAS TO SELF-DETERMINATION: UNDERSTANDING "NATION"

Abstract: *While international legal debates over self-determination have built on established "civic" and "cultural" ideas of a nation, a sustained engagement with the history of legal/philosophical ideas around the meanings of "nation" as an intellectual backdrop to the concept of self-determination has been frequently missing. The present analysis seeks to fill this gap by discussing the idea of a nation as a general conceptual category that, prompted by the tension between legal/philosophical historicism (broadly understood) and contractarian state theories, has influenced across time, not just political thought, but legal thought specifically international legal thought, at least within the European context. It argues that the main political and cultural meanings of "nation" are not exclusively modern creations but do have a long historical pedigree, one that manifests itself in different forms and degrees, from ancient and pre-modern times up until at least the interwar years. It also contends that, within this process, they rest on progressively broad(er) ideas of cultural distinctiveness and political agency, and that they ultimately reflect a plural concept which informs modern conceptions of peoples' self-determination, particularly in relation to free choice, the delimitation and character of the self-determining community, state unity, and a broader sense of humanity.*

Keywords: nation, nationality, self-determination, historicism, international law, interwar years, social pact theories, positivism, history of ideas

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INTRODUCTION: "NATION" – SOURCING THE CONCEPTUAL IMPACT ON SELF-DETERMINATION

It is almost commonplace to link national claims to the right of "peoples" to self-determination. Contemporary legal debates over self-determination have typically revolved around the territorial or "ethnic" dimensions of "peoplehood", that is, what it means to be a people.[1] A large part of those debates has been preoccupied with the question of whether a portion of a given state population (minority or majority alike) is entitled to self-determination as a distinctive national group or whether the focus needs to be exclusively on the population in its entirety. It is equally common knowledge that these variants of the concept of self-determination, though built around the interpretation of hard and soft law texts, reflect broader and modern, "civic" and "cultural" ideas of a "nation" – one built around the "political" state and its institutions, the other seeking to capture the substantive features of the community, within or without an existing state.

Theoretically, the political ideal of national unity has been associated with the spatial dimension of the community – the territory within which its members become conscious of, and wish to retain, their identity – and the utilitarian pursuit by the state (whose all-encompassing political unit is the "nation") of the maintenance of "law and order" and other broad institutional (and economic) ends. By contrast, the "cultural" approach to nationhood (or peoplehood) fundamentally appeals to a distinctive historical community bound together by certain traits across generations, and normally linked to a homeland, regardless of the way(s) in which that community manifests itself politically and/or institutionally. In the context of self-determination debates, institutional responses and scholarly analyses have generally sought to mitigate the potential or real excesses of nationalism, have considered and/or accommodated the position of specific groups and their members, or, at the other end of the spectrum, have dismissed such matters as "tribalism".[2]

What has been frequently missing in such analyses is a sustained engagement with the history of legal/philosophical ideas as an intellectual backdrop to the much later concept of self-determination, and most importantly, with the idea of a nation as a broad and underlying category that has influenced across time, not just political thought, but legal thought specifically international legal thought, at least within the European context. The analysis that follows seeks to fill this gap

[1] *See e.g.* T. Musgrave, *Self-Determination and National Minorities,* Oxford University Press, Oxford: 1997; L. Orgad, *The Cultural Defense of Nations – A Liberal Theory of Majority Rights*, Oxford University Press, Oxford: 2015.

[2] G. Pentassuglia, *Conceptualising National Identity in Self-Determination Practice: A Cross-Cutting International Law Analysis*, 11(1) Hungarian Yearbook of International Law and European Law 238 (2023), pp. 238–242.

by making essentially three, largely interrelated claims. First, it generally argues that the broad, inherited "political/territorial/institutional" and "cultural" meanings of a nation (and later people), far from being exclusively modern creations, do have a long historical pedigree, one that manifests itself in different forms and degrees, from ancient and pre-modern times up until at least the interwar years. More specifically, it contends that, within this process, legal/philosophical historicism (broadly understood), in its constant tension and interaction with contractarian state theories, plays an especially important role in articulating a normative core of national (social) individuality of which law and institutions are an integral part, eventually penetrating international legal scholarship (and practice). Second, it maintains that while pre-modern notions of *natio* (and people) are characteristically based on descent/ethnicity and ordinarily lack a legal/institutional dimension, later substantive articulations of "nation" or "nationality" (and thus people) prompted mainly by historicist thinking (between the sixteenth and nineteenth centuries) are informed by broader ideas of cultural/moral national distinctiveness and political/institutional agency. Third, it claims that the concept of nation – as historically discussed in legal thought and eventually inherited by the modern idea of "people" under international law – ultimately comes into view as a cluster (or plural) concept shaped (in theory or de facto) by the balance between political/territorial/institutional dimensions and substantive cultural/national elements.

Thus, the present discussion does not aim to offer a legal definition of "people" or "nation" or national identity in international law.[3] Rather, it seeks to demonstrate that "nation" operates historically as a general conceptual category whose main cultural and political meanings inevitably inform later and modern conceptions of peoples' self-determination, particularly in relation to free choice, the delimitation and character of the self-determining community, state unity, and a broader sense of humanity.

With this in mind, the inquiry is built around six steps: early semantics – mainly about *gens* and *natio* – the "social" (non-statist/people-driven) ideal of inter*nation*al law, and ideas of individuality (Section 1); the ground-breaking sixteenth-century post-Reformation historical school of law and the rise of national consciousness in that context (Section 2); the early modern period's contractarian (social pact) theories and the later substantive idea of a nation (Section 3); the re-emergence of historical thinking in eighteenth- and nineteenth-century thought (Section 4) and

[3] In 2006 the Council of Europe noted that "it was difficult, not to say impossible, to arrive at a common definition of the concept of "nation"", Recommendation 1735(2006), *The concept of "nation"*, 26 January 2006 (7th Sitting), para. 3, available at: https://www.aelpa.org/documentos/reformas/EACAT/ConsejoEuropaNacion.pdf (accessed 31 March 2026).

its impact on *fin de siècle*, interwar arrangements and scholarly critiques (Section 5); concluding thoughts on the political and cultural layers of "nation" and their reflection on the core and edges of the right to self-determination.

1. IDEAS OF INDIVIDUALITY: EARLY SEMANTICS AND THE NON-STATIST IDEAL OF INTERNATIONAL LAW

Although there was no *jus publicum civitatum* (inter-state law) that could approximate the current notion of international law and the built-in idea of state individuality, the Greek *polis* represented nevertheless one of the very first examples of legal, political and moral distinctiveness in pre-Christian history. By providing a comprehensive code across various domains of life, each *polis*'s political community pursued its own distinctive and self-sufficing (self-determining) sense of the common "good life".[4] The Greek "people" or "stock" in Aristotle's *Politics* (represented in all Greek cities) were thought to markedly differ from the people of other parts of Europe as well as the people of Asia. Aristotle blended predominantly political and moral considerations with matters of general common (Hellenic) descent and culture, in essence echoing political and cultural ideas of (national) individuality found in later centuries and radically different settings.[5]

Yet, it is essentially the Latin notion of *jus gentium* that offers the context for understanding the sort of social groupings that precede the state as we know it today and signal the early origins of international law as being informed by the idea of "peoples and nations, not institutions and organizations."[6] While *jus gentium* operated as natural law common to all *gentes*, the core meaning of *gens* referred to a community of common descent and customs. It differed from the *populus* of ancient Rome understood as a civic/pluralistic citizen body bound together by legislation and mutual advantages.[7] Giambattista Vico's *New Science*, for example, would view the Homeric poems as the prime repository of the laws and customs of the "Hellenic nation" understood in historical/cultural terms and underpinning his view of *jus (naturale) gentium*.[8] The much later translation of *gens* into *Volk* in Germanic languages indicates that the initial concept of *Völkerrecht* in German represents at least the ideal of articulating the law of peoples as social and cultural

[4] Aristotle, *Politics*, Oxford University Press, Oxford: 1995, p. 106.

[5] *Ibidem*, p. 266.

[6] J. Fisch, *Peoples and Nations,* in: B. Fassbender & A. Peters (eds.), *The Oxford Handbook of the History of International Law,* Oxford University Press, Oxford: 2012, p. 28.

[7] This classic concept of (Roman) *populus* can be found in Cicero, *De Re Publica*, I, 25 [39].

[8] G. Vico, *The New Science* (trans. T. G. Bergin and M.H. Fisch), Cornell University Press, Ithaca and London: 1948, Book 3. On Vico's thought and its influence, *see* later sections.

groups.[9] Emerged as an alternative to *gens* and *populus*,[10] the eventual semantic incorporation of *natio* into inter*nation*al law does hint at the term's original, narrow social (essentially ethno-cultural) meaning.

Indeed, although the "law of nations" was first used in the sixteenth century to denote the beginning of the transformation of *jus gentium* into a framework designed to regulate the relationships between modern states, the idea of a nation (*natio*) remains fundamentally a cultural one for much of the Middle Ages and significant parts of the early modern period. In Roman times, *natio* and *gens* have similar meanings based on descent, kinship, and/or language.[11] In the early fifteenth-century Council of Costance held by the Catholic Church, the English clergy defends England's full national autonomy (as a "major", not "minor", nation) on account of descent, tradition, language and territorial connections (*Anglicae nationis vindicatio*, 1417). Importantly, they distinguish between national identity and political loyalty by conceding that broader national communities may be subject to different political rulers. Large dynastic monarchies (French, Spanish, English, etc.) would partially seek to align political institutions with linguistic and cultural values. Yet the idea of nation is largely articulated as a non-politically organised form of identity defined by objective factors, such as regional origin, ethnicity, customs and/or language. The "cultural" nation stood between merely local communities and the universal *res publica Christiana*.[12]

The terminology used in Machiavelli's early sixteenth-century major works, particularly *The Prince*, exemplifies not only the general distinction between cultural and political dimensions of the idea of a nation in the (political and legal) thought of the time, but also their fluid and uncertain interaction. Although Machiavelli uses a variety of terms, such as "state" (*stato*) or "dominion" (*dominio*), to indicate the institutional aspects of political power, he also references "nation", and far more frequently, "province" to convey multiple and overlapping meanings. Used throughout Machiavelli's body of work, "nation" can generally denote either an existing, or seemingly aspiring, state entity (i.e. the French nation, the German nation, etc.),[13] or more narrowly, individuals ("nationals") belonging to a "nation" defined by the city or region of origin (e.g. Florentine nation) and/or descent (e.g. university students

[9] Fisch, *supra* note 6, pp. 29–30.

[10] Unlike the high status of the Roman *populus*, the term "populus" was, not uncommonly, used in the modern age to reference the lower strata of society.

[11] *Natio* meant most frequently a distinct ethnic community. F. Chabod, *L'idea di nazione*, Laterza, Bari: 1961, pp. 19–21.

[12] *See e.g.* R. Romeo, *Idea e coscienza di nazione fino alla prima guerra mondiale. Appunti*, 14(1) Clio Rivista Trimestrale di Studi Storici 5 (1978).

[13] N. Machiavelli, *Discourses on Livy* (trans. H.C. Mansfield and N. Tarcov), The University of Chicago Press, Chicago and London: 1996, Book I, 55, p. 111; Book III, 43, p. 302.

or traders of a certain nationality living abroad). Despite his primary concern with political-institutional affairs and the individuality of existing or emerging states as distinct units, Machiavelli is not oblivious to the original concepts of *natio* and *gens* from which his even narrower idea of a nation derives. This is confirmed by his far wider and nuanced use of "province" compared to "nation". For him, "province" is not only a substitute for "nation" in the same generic (today's "civic") sense of all the inhabitants or citizens of a territory (usually an existing state or city), or less often, merely a territorial sub-unit within a wider dominion, but it can also indicate the equivalent of (ethno-cultural) *gens* in the sense of a commonality (or similarity) of customs, descent, language and institutions.[14] In Machiavelli's vision, ethnic or linguistic issues, or broader cultural (national) ways of life, are not irrelevant to political processes[15] yet remain essentially a free-floating (naturalistic) category in line with the spirit of the time. In fact, such factors feed, directly or indirectly, into a more general and somewhat constant and parallel literature – from Hippocrates and Aristotle to Voltaire, Montesquieu and beyond – around "national characters" and what influences the "nature" of a people, including elements such as geography, climate and the land itself.[16]

That said, the evolution of *natio* from *gens* does not automatically translate into mere Machiavellian statism (i.e. nations as merely institutional creatures). The ever-greater harmonisation of political and cultural values pursued by the early monarchies is increasingly paralleled by claims to live under the laws and customs of the historical community in question against all attempts at assimilation or subordination.

The so-called Declaration of Arbroath signed by the Scottish lords seeking papal recognition of Scottish independence from England in 1320 is a typical example of this. Linked to a series of battles against England between approximately 1296 and 1319 (so-called Scottish war of independence), the Declaration makes a case for the recognition of Robert the Bruce as King of Scots by the Pope. The claim is grounded primarily in the right of nations to be recognised as such and thus to govern themselves under their own laws and customs without external interference, let alone military attack. Indeed, Scottish immemorial "laws and customs" do not feature as exclusively cultural or institutional factors. They are at the heart of a claim

[14] N. Machiavelli, *The Prince* (trans. R. Goodwind), Dante University Press, Boston: 2003, Ch. 3, p. 34; *see* also *Discourses*, Book III, 43, p. 302.

[15] Tellingly, *The Prince*'s last chapter (XXVI) is an appeal to the House of Medici to achieve "Italy's redemption" by freeing it from "the barbarians" (foreign dominators); it ends with a quote from humanist Petrarca's verses of *Italia mia* (ca 1344–1345), which famously reflected a national sentiment built around common language/descent/culture and opposition to foreign rulers on Italian soil.

[16] For examples, *see* above, *Discourses* 1966.

to national distinctiveness (echoing today's "national" self-determination) advanced as a matter of right (though one rooted in political and moral legitimacy rather than international law).[17] "Freedom alone" – the Declaration states – would justify the King's replacement were he to betray the nation of Scotland (whose liberties he had been entrusted to defend) by making it subject to England.[18]

Over two centuries on, in 1581, the States General of the United Provinces of the Low Countries adopted the so-called Act of Abjuration to throw off the sovereignty of Philip II of Spain and replace him with another prince. They did so in the name of the (predominantly Calvinist) people's "ancient customs and privileges" claimed against tyrannical Spanish rule.[19] Although there is no explicit claim to nationhood in the Act, the link between the invoked defence of people's "liberty" in accordance with the "law of nature" and the patriotic meaning of the struggle against Catholic Spain is well-documented.[20] More significantly, the Act justifies the claim by appealing to previous practice "in several countries upon the like occasion, whereof there are notorious instances." The Act effectively builds on a wave of national/patriotic claims (articulated as much in literary efforts as in military ones) against the Holy Roman Empire and/or the authority of the Pope brought about by the Reformation in Germany and intellectually derived from a hybrid mix of the idea of *natio* as narrow common descent and customs (cultural meaning) and the wider view of a political struggle against external "oppression" (political/institutional meaning).[21]

This early focus on distinct groups of human beings, rather than abstract institutions, power or citizenship per se, would of course be hardly conclusive in matters of territorial sovereignty and political authority. Nevertheless, it offers an important glimpse into early ideas of "self-determination", both in terms of substantive communal identity (including the option of *jus emigrandi* for minority population groups living in territories lost to a foreign ruler)[22] and its progressively aligned

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[17] For commentary, *see e.g.* N. MacCormick, *Nation and Nationalism*, in: N. MacCormick (ed.), *Legal Right and Social Democracy: Essays in Legal and Political Philosophy*, Clarendon Press, Oxford: 1982, pp. 259–260. For an historical perspective, *see* among others, T. Sparks, *Self-Determination in the International Legal System, Whose Claim, to What Right?*, Hart Publishing, Oxford: 2023, pp. 41–50.

[18] Pope John XXII allowed the anointing of Robert the Bruce as King of an independent Scotland in 1329, following a peace treaty between England and Scotland in 1328 which had committed the English Crown to recognising Scotland's independence and Robert the Bruce as its lawful ruler.

[19] For the text, *see e.g.*, https://tinyurl.com/3hpwmjmk (accessed 31 March 2026).

[20] The Act of Abjuration eventually led to the international recognition of Dutch independence under the Treaty of Westphalia in 1648.

[21] *See e.g.* Chabod, *supra* note 11, pp. 120–121. For some examples, *see* R. Redslob, *Le principe des nationalités*, Collected Courses of the Hague Academy of International Law, Vol. 37 (1931), Sec. II, pp. 9–11.

[22] The option would see multiple iterations in history, including recent conflicts. For an early analysis, *see* J. Kunz, *L'option de nationalité*, Collected Courses of the Hague Academy of International Law, Vol. 31 (1930), pp. 107–176.

political/institutional manifestation, mainly in response to oppressive (external) authority. The gradual transition from the original *jus gentium* to the much later (positive) law of states reveals a loose set of ideas of *individuality*, one that broadly signals the cultural and increasingly political-institutional grounds of emerging national (people's) distinctiveness as the all-encompassing *res publica Christiana* begins to collapse and claims to past customs, liberties and modes of life (real or perceived) intensify. Early and later legal historicism, as well as social pact theories, discussed in Sections 2–4, largely define the intellectual pathways to such individuality, while the alliance of law and history, first articulated in the sixteenth century, is bound to have a deeper and longer-term impact on the national question and its international self-determination articulations (Section 5).

2. THE EMERGENCE OF HISTORY IN LEGAL THOUGHT: TOWARDS NATIONAL CONSCIOUSNESS (16TH CENTURY)

From a national (and self-determination) perspective, two points are key at this stage. On the one hand, the Reformation unleashes broader claims against the legacy of the Roman Empire and the authority of Roman law, in the name of local traditions and laws.[23] Luther's 1520 *An den Christlichen Adel Deutscher Nation* (To the Christian Nobility of the German Nation) is consistent with earlier German humanists' appeal to German customs and laws – "ancient Germanic liberties" – as distinctively indigenous creations.[24] The claim, in other words, is based on a kind of benign historical relativism against universal classical authority. It is the fifteenth-century Italian legal humanist Lorenza Valla who first promoted a philological understanding of (legal) language as particular, conventional, indeed historical, not the expression of natural truth. "[S]ignification [of terms]", he argued, "is derived from custom" – "*ab institutione*" or "*ab artifice*".[25]

It was the French legal humanists, though, who effectively inspired an increasingly systematic legal historicist approach to legislation and practice in the second half of the sixteenth century. Their *mos docendi Gallicus* involves the use of historical studies as a way of giving context to legal assessments (especially in public law) and

[23] For analyses, on which the current section heavily draws, *see e.g.* Redslob, *supra* note 21, pp. 8–9 (including bibliographic materials); D.R. Kelley, *Legal Humanism and the Sense of History*, 13 Studies in the Renaissance 184 (1966); D.R. Kelley, *Foundations of Modern Historical Scholarship*, Columbia University Press, New York: 1970; J.H. Franklin, *Jean Bodin and the Sixteenth-Century Revolution in the Methodology of Law and History*, Columbia University Press, New York and London: 1963; J.G.A. Pocock, *The Ancient Constitution and the Feudal Law*, Cambridge University Press, Cambridge: 1987, Ch. 1.

[24] Kelley, *supra* note 23, p. 190; Chabod, *supra* note 11, pp. 38–44.

[25] Quoted by Kelley, *supra* note 23, p. 185.

legal education more broadly. Crucially, they understood legal history as composed of distinctive streams of concepts and practices which reflect a plurality of legal and national experiences and need to be considered from an increasingly comparative perspective. In his 1561 *De institutione historiae universae et ejus cum jurisprudentia conjunctione prolegomenon*, François Baudouin, one of the movement's most prominent figures, dismissed the conventional distinction between Roman sources and others' legal "barbarism": "If we are Frenchmen, Britons, Germans, Spaniards, or Italians, and if we are able to speak of what is ours, it is necessary that we do not ignore the history of the Franks, Angles, Saxons, Goths, and Lombards; and since our affairs are often confluent with others, we may not remain ignorant of Saracen or Turkish history either."[26] As it widens the range of historical materials available for legal comparison and cross-analysis, the "historical school of law"[27] championed especially by Baudouin, Jean Bodin, and François Hotman, brought the difference between the Roman past and the French national experience into sharp relief.

The defence of the distinctiveness of the French experience against Roman universalism became an argument in public law. Both Hotman and Bodin, while pursuing different political-constitutional objectives (Hotman was a Huguenot prominent critic of the monarchy in defence of local and national/customary traditions, while Bodin supported the monarchy within a rule of law framework), grounded their "anti-Romanist" position firmly in the idea that the French experience was not dictated by Roman law (or indeed anything that sprang from it in the form of *jus gentium*) but was a "peculiar and indigenous" creation,[28] in the same way that German humanists defended Germanic indigenous culture against classical (Roman) authority.[29]

Other French legal humanists built their attack on the authority of Roman law primarily around specific conceptions of national linguistic usage and change. Charles Dumoulin appealed to linguistic usage to defend the French monarchy against Roman universalism. Ètienne Pasquier, while commenting on the political difference between the French monarchy and the Romans' *res publica*, wrote against Latinizing the French language in contrast with the "true and primitive laws of France", which he understood as a diverse body of customs and traditions derived from the diversity of French provinces. Informed by a deep sense of history, he distinguished the spontaneous, internal linguistic change originating in a people's "character" from the corruption of a language "when a nation is subjugated

[26] *De institutione historiae universae*, p. 59.
[27] Kelley, *supra* note 23, pp. 186, 189.
[28] Franklin, *supra* note 23, p. 42.
[29] *See supra* note 24.

by force of arms".[30] Pasquier's sense of linguistic and national difference thus informed and reinforced a dynamic view of natural language cycles prompted by his general historical method.

Despite its variations, the sixteenth-century historical school of law thus contributed to highlighting an altogether new perspective on nations and peoples in legal thought. Its common appeal to the man-made concrete and particular in time and space – "a sense of individuality"[31] as opposed to the unalterable and universal – exposed the unique connections between laws and institutions and entire societies with their cultures and traditions, as opposed to a single true *Zeitgeist* or *Volksgeist*.[32] Reconciled with the inevitable major influences from the classical past and minimal commonalities derived from comparative exercises,[33] this early historical method revealed an unmistakable blend of cultural and political-institutional meanings of national consciousness within legal frameworks (communal distinction and constitutional structures). Rather than grounding national distinctiveness in narrow ideas of descent or ethnicity from the original meaning of *natio*, it uncovered distinctive and not wholly translatable man-made national patterns of which law, institutions, and legal practice were very much an integral part. Three centuries on from Valla's philological studies, Giambattista Vico's *New Science* would systematically develop a wider and deeper notion of history and human institutions – even a new concept of *jus gentium* – steeped in the idea of organic and social patterns of nations.[34]

3. NATIONAL DISTINCTIVENESS AND SOVEREIGN AUTHORITY: FROM GROTIUS TO FICHTE (17TH-18TH CENTURIES)

3.1. History Denied: The Particularity of "People" (or "Nation") in Social Pact Theories

The other major conceptual pathway to peoplehood and nationhood is defined by the relationship between the "people" or "nation" and sovereign authority in the seventeenth and eighteenth centuries. Unlike the historicist approach discussed above, a large strand of this later pathway dispenses with cultural/institutional

[30] Kelley, *supra* note 23, pp. 192–193, 194–197.

[31] *Ibidem*, p. 185.

[32] G. Huppert, *The Idea of Perfect History*, University of Illinois Press, Urbana: 1970; Pocock, *supra* note 23, Ch.1.

[33] Franklin, *supra* note 23, p. 51, for example, notes that Hotman's intention is not to attack Roman influence in general, but rather the assumption that Roman law "must be studied in every jot and tittle as a universal code".

[34] *Supra* note 8, and below, Sections 3.2 and 4.

uniqueness, the particular in time and space, and seeks instead to mediate between the individuality of emerging (state) political communities – to be buttressed by the Peace of Westphalia of 1648[35] – and broader ethical/metaphysical values and imperatives or ideals.

On one basic level, social contract theories in the work of Hugo Grotius and Thomas Hobbes provided a basis for justifying the individual existence of the state, especially in terms of internal and external self-preservation and stability, beyond the prescriptions of natural law informed by universal Christian morality.[36] On Grotius's scheme, as famously articulated in his 1625 *De jure belli ac pacis*, the "people" is not the *natio* or *gens* of ancient, medieval or Renaissance times, but rather an original "multitude" emerging out of the "state of nature" through a postulated social pact. It is in practice only a territorially-defined segment, a sample as it were, of an imagined wider human community coming together to establish specific state institutions tasked to prevent chaos and anarchy.[37] In Hobbes' 1651 *Leviathan*, this approach amplifies since the "multitude" entering a social contract to purse concrete utilitarian (though morally justifiable) objectives, enables the sovereign to become and act as the "people", both internally and in international affairs, which remain in the "state of nature".[38]

John Locke developed this line of thinking by making peoples fuller political and legal/institutional agents. In his 1690 *Second Treatise of Government*, not only did he clearly distinguish the sovereign from the people by grounding the social contract stipulated by the latter exclusively in the moral (and then legal) requirement of the former to protect what he sees as the natural rights of individuals, but he also made the very legitimacy of government and the validity of laws dependent upon the people's and their representatives' consent. The right of the people to resist unjust laws and to remove or alter an unjust government is one of the key and long-standing implications of his thought.[39] Jean-Jacques Rousseau's later theory of popular sovereignty built on Locke's notion of self-government yet presented more radical institutional ramifications. Rousseau's *volonté générale* underpinning

[35] For context, *see* B. Fassbender & A. Peters (eds.), *supra* note 6, *passim*.

[36] H. Grotius, *De Jure Belli Ac Pacis Libri Tres*, in: J. Brown Scott (ed.), *The Classics of International Law*, Clarendon Press, Oxford: 1925, pp. 44, 253.

[37] *Ibidem*, Book I, Ch. III, Section IX, p. 111.

[38] T. Hobbes, *Leviathan*, in: R. Tuck (ed.), Cambridge University Press, Cambridge: 1996; T. Hobbes, *On the Citizen* (trans. M. Silverthorne), in R. Tuck (ed.), Cambridge University Press, Cambridge: 1988. Hobbes' sovereign did not recognise any constraints under international law – only external, legally unenforceable natural law, *Leviathan*, p. 244.

[39] J. Locke, *Second Treatise of Government*, 1690, paras. 149, 155, 168, 207–210, 220–231, 240–243. *See* P. Laslett (ed.), *Locke: Two Treatises of Government*, Cambridge University Press, Cambridge: 1988, pp. 265–428.

government and laws does not amount to majority rule tempered by the protection of key individual rights but is rather the expression of the sovereign will of the people taken as a whole, the very essence (for him) of the "ethical" and rational state.[40] The separation of people and state thus collapses by inverting Hobbes' terms of their (re-)unification – it is the people to become the sovereign, not the sovereign to act as the people. Locke's and Rousseau's theories, despite their, often remarkable, differences, would come to inspire the eighteenth-century self-determination emancipatory claims made in the name of "the people" – conceptualised as the entire (state) population – in North America and France.[41] Together with other proponents of social pact, the "nation" of their general theories pursued individual and collective freedom on broad political/territorial/institutional terms, not historical or cultural distinctiveness.

Kant arguably refined this movement further from within the tradition of German Enlightenment. Though influenced by Rousseau and broadly supportive of the French Revolution, Kant embraced the Hobbesian premise of a malign state of nature from which "individual human beings, peoples, and states" need to exit if they are to achieve any law and order, both internally (at the level of state formation) and within the international society (at the level of *jus publicum civitatum* – states in relation to one another).[42] The "people" that emerges from the state obeys the laws and subjects itself to a "public lawful external coercion", but equally, is represented in government within a republican (i.e. non-despotic) state that operates under a just civil constitution designed to protect individual freedoms.[43] Taken at its most abstract, Kant's moral and legal framework generally posits a "people" or "nation" as a whole (indivisible) entity *á la Rousseau*, yet gives it (as partly anticipated by Locke) a distinctive place within a constitutional structure governed by the separation of legislative and executive power (which makes the sovereign accountable to the people, including in matters of war) and informed by a much less radical concept of representation. In short, the "self-determining" people or nation is quintessentially legal and institutional in character.

Social pact theories would enormously contribute to a political/territorial/institutional understanding of a nation from a self-determination perspective. Locke's right to self-government, including the right to resist an unjust government, and

[40] J.J. Rousseau, *Of the Social Contract and Other Political Writings*, Penguin Books, London: 2012, *passim*, especially Book IV, Ch. 2, pp. 102–103.

[41] Redslob unsurprisingly grounded the "principle of nationalities" partly in the "liberté individuelle" and "la souveraineté du people", Redslob, *supra* note 21, pp. 6–8.

[42] I. Kant, *The Metaphysics of Morals* (trans. M. Gregor), in: L. Denis (ed.), Cambridge University Press, Cambridge: 2017, Part II, Chaps. I–III.

[43] *Ibidem*, *e.g.* paras. 43–49.

Rousseau's theory of popular sovereignty, would prove especially important as they come to encapsulate conceptually the right of a people to political self-determination, free of an oppressive ruler. By placing such whole complex of influential ideas in the wider context of earlier (post-Reformation and pre-revolutionary) forms of resistance to oppression and domination, the later opposition to Napoleonic aggressions and the rise of national independence movements against (foreign) monarchies, and even broader ideas of anti-imperial liberation and economic progress injected by Marxist thought in the late-nineteenth-century,[44] it is unsurprising that post-World War II international law would build its minimum self-determination standard around the *free choice of rulers*, particularly in the context of liberation from alien (colonial) rule. Much later in the century (following the end of the Cold War) the free choice paradigm would be essentially reproduced as part of the debate over internal self-determination, including a putative, emerging "right to democracy", i.e. the right to choose (and thus change) one's government through electoral processes, modelled on the Kantian ideal of *jus civitatis* as a basis of international law, and grounded in a republican (just) constitution.[45] Both such movements philosophically presuppose an exclusively universal parameter (free will, people's choice, or self-government) designed (conceptually) to reproduce a single idea of (moral/legal) freedom. A new nation can emerge from the ashes of previously common bonds (American Revolution), while the "nation" is thought of (or assumed) as being the result of a procedural mechanism, precisely a social pact with its various ramifications (nation-building linked to *uti possidetis*, and/or voting process).

3.2. History Affirmed: The Substantive Idea of a Nation

Whereas the main thrust of social pact theories presents an influential yet instrumental view of a people or nation, another and partly overlapping strand of the debate does *reclaim* its historicity, its substantive uniqueness *vis-à-vis* other peoples or nations, whatever their commonalities. By linking peoplehood or nationhood to a sense of distinct history, institutions, and/or communal traditions, these (broadly cultural) ideas build on the legal historicist turn of the sixteenth century (Section 2) and come to qualify the otherwise abstract universalism of Enlightenment

[44] Marx, for example, thought that Poland's struggle against the Austrians, Russians, and Prussians marked the beginning of a transnational class struggle in Europe against imperialism: e.g. V. Kattan, *To Consent or Revolt? European Public Law, the Three Partitions of Poland (1772, 1793, and 1795) and the Birth of National Self-Determination*, 17 Journal of the History of International Law 247 (2015), p. 279. *See below* Section 5.

[45] A classic piece inspired by Kantian thought is T. Franck, *The Emerging Right to Democratic Governance*, 86(1) The American Journal of International Law 46 (1992); more broadly on the right to self-determination, A. Cassese, *Self-determination of Peoples: A Legal Reappraisal*, Cambridge University Press, Cambridge: 1995.

thinking (below and Section 4). A clear indication of this is already visible in Vico's legal philosophy of history as he linked laws and institutions with the historical *sensus communis* (the collective social/cultural outlook) of entire nations in their distinctive (man-made) attempts to overcome human and natural obstacles. Against natural law (and contractarian) lawyers, Vico insists on the "Natural Law of the Nations" as successive stages of organisation and consciousness that whole societies (not merely individuals) – the *gentes* of his reconceptualised *jus gentium* – generate *for themselves* throughout history.[46] As Vico's "ideal eternal history" (*storia ideal eterna*) takes sixteenth-century nascent and scattered (legal) historicism into more ambitious territory, it also precedes the German Historical School (discussed in Section 4) in tracing law to a dynamic yet organic and cultural pattern unique to each society.

At the same time, the very work of some of the thinkers considered in Section 3.1 indicates a clear tension with their wholly rationalist doctrines. For example, in his 1610 *Liber de Antiquitate Republicae Batavicorum*, Grotius explained Dutch national identity, the provincial sovereignty of Holland and the 1581 independence of the United Provinces from Spain's Philip II by tracing them back to the ancient constitutional traditions, customs, and virtues of the Batavians (an ancient Germanic tribe) and Batavian "state" in Roman times. Grotius' thesis follows in the footsteps of the sixteenth-century historical jurists (whose work he openly recognised in his later *De jure belli ac pacis*[47]) by using a rigorous historiographic approach to uncover Holland's past liberties and identity vis-à-vis internal and external powers.[48]

Rousseau, for his part, broke with the mainstream Enlightenment tradition by believing that "popular sovereignty" requires, not good laws and institutions in the abstract, but laws and institutions that can adapt to the individuality of a people, of its national outlook, whatever commonalities may exist with other nations. "In a word" – he writes – "apart from the maxims common to all, every People contains within itself some cause that orders these in a particular way and makes its legislation suitable for it alone."[49] Rousseau's *volonté générale* is thus enlightened by reason but informed by the people's national character. He criticised Peter the Great of Russia for attempting to turn Russians into "Germans or Englishmen" instead

[46] Vico, *supra* note 8, e.g. paras. 142, 311.

[47] On Grotius' "heavy dependence" upon history, as well as his substantial reliance upon scholars like Bodin and Hotman, *see* Franklin, *supra* note 23, pp. 73–74.

[48] For recent commentary, *see e.g.* H. Grotius, *The Antiquity of the Batavian Republic* (ed./trans. J. Wanzink), Van Gorcum, Assen: 2000, *passim*, especially pp.18–19.

[49] Rousseau, *supra* note 40, p. 54. In his *Considerations on the Government of Poland*, he reinforces the concept by praising the ancient legislators for infusing national values and culture into their institutions (e.g. Vico's Homeric poems, *supra* note 8, "recited to the Greeks in solemn assembly"), *ibidem*, Ch. II, p. 250.

of speaking to their national spirit, just as he famously urged the Poles to be who they are, not French or English, but Poles raised to love their country and ancient laws and customs in the name of the "will of the people" against foreign powers.[50] The ideal of people's internal freedom from kings and aristocrats thus combines with its *external* projection as a (peaceful) *national* state.

Despite his ambitious legal and moral framework, Kant's theory too reveals important internal tensions. For one thing, multitudes-turned-peoples eventually identified with their respective state, so that for Kant, an international state, a "World Republic" – as opposed to a federation of individual states – would contradict the premise of a state built around a single nation, not a nation of nations.[51] Despite this seemingly neutral (legal/institutional) understanding of a people or nation (and despite the term *Volk* used to denote it),[52] Kant explicitly states that "nature wisely separates the nations" along cultural (linguistic/religious) lines, effectively appealing to a more substantive idea of the nation. These national differences, while impeding (at least empirically) the fusion of states into a single superior global entity, are nevertheless said to represent important baselines from which a new equilibrium of forces can be pursued in the interest of peace.[53] The entire Kantian rational schema rests on the right of states, not the right of nations regardless of states,[54] including indigenous peoples recognised (only) as national groups (*Völkerschaften*).[55] Yet it is exceedingly unlikely that his republican state and patriotic government committed to civil liberties, though born of Kant's enlightened rationalism, does not in fact

[50] *Ibidem*, Book II, Ch. 8, p. 47; *Considerations* (*ibidem*, pp. 241-333, particularly p. 254). On Rousseau's influence on constitutional reform in Poland, *see* Kattan, *supra* note 44, pp. 266–267.

[51] I. Kant, *Perpetual Peace: a Philosophical Sketch*, in: Hans Reiss (ed.), *Kant's Political Writings*, Cambridge University Press, Cambridge: 1991, p. 102.

[52] Kant noted that while "every state involves a relationship between a superior (the legislator) and an inferior (the people obeying the laws) … a number of nations [*viele Völker*] forming one state [*einem Staate*] would constitute a single nation [*ein Volk*]", *ibidem*.

[53] *Ibidem*, pp. 113–114.

[54] Kant, *supra* note 42, p. 124. Kant distinguishes "the right of states" from the "right of nations" understood in connection with the ancient and medieval, descent-based meaning of *gens* and *natio* or otherwise outside of *jus publicum civitatum* (*inter-state* framework), which is Kant's view of *jus gentium*. He nevertheless seems to acknowledge that, at least for internal purposes, a nation can be looked upon as one family akin to *gens* or *natio* whose members exit the state of nature by becoming citizens of the state. For Kant's negative implications for sub-national groups, *see e.g.* V. Spencer, *Kant and Herder on colonialism, indigenous peoples, and minority nations*, 7 International Theory 360 (2015).

[55] Kant, *supra* note 42, pp. 124 (outside of the state framework, indigenous groups live in a "lawless" condition), 132 (Kant recognises that the traditional land of an indigenous nation cannot be acquired by another nation without the indigenous nation's consent or by using force against the latter). Spencer, *supra* note 54, pp. 379-381, argues, though, that this anti-colonial postulate is in practice limited by Kant's theory of property rights within a *state* framework.

coincide with the indivisible nation-state arising from the French Revolution and its related cultural overtones.

These conceptual tensions forerun open challenges to received ideas around peoples and nations. Johann Gottfried Herder, a former student of Kant, and Johann Gottlieb Fichte, a younger major contemporary of Kant, best illustrate the point. Whereas Grotius and Rousseau employ thin or weak, foundational social contract theories as they show sensitivity to, or recognise national individuality, Herder embraced historicist thinking by openly dismissing (like Vico) "state of nature" accounts and firmly shifting the focus towards national groups understood as the product of natural sentiments of positive sociability and social unity reflected in accumulated experiences through a common language and cultural/religious traditions.[56] Herder wanted to see the gradual dismantlement of "states-machines" (empires) and the "freeing" of nations trapped within them (thus endorsing Locke's natural right of a people to rebellion). At the same time, he was critical of Kant's quasi-Hobbesian account of sovereignty and legal cosmopolitan framework, which he regarded as having the potential for republican imperialism (despite his own republican preferences) at the expense of national cultures and characters. "[T]he so-called best form of government [cannot] suit all peoples, at once, in the same way"[57] – Herder argues – as he values various forms of indigenous governance otherwise dismissed by Kant as "lawless freedom", France's post-revolutionary attempt to uncover its "living constitution", or Germany's ancient constitutional tradition of self-government.[58] Herder ultimately expands on Kant's general moral concept of *selbstbestimmung* as individual emancipation, and Rousseau's radical view of popular sovereignty, to articulate an idea of "national" self-determination as a patriotic (non-Jacobin, non-imperialist) project of moral/psychological (sentimental) education, political participation and historical self-reflection, which may result in, but is not limited to, the creation of a nation-state.[59] For his part, Fichte absorbed elements of both Kant's and Herder's analyses yet transformed them in his own distinctive way. In Fichte's idealist thought, Kant's seemingly "unrooted" individual autonomy transformed into a universal scheme of mutual relationships, gradually including nationally conscious collective "selves" acting in the world to achieve

[56] On Herder's thought from the (often neglected) self-determination and political/legal angles, *see* E. Piirimäe, *Herder on the Self-Determination of Peoples*, 85 The Review of Politics 514 (2023); E. Piirimäe, *Herder and Enlightenment Politics*, Cambridge University Press, Cambridge: 2023.

[57] Piirimäe (*Herder*), *supra* note 56, p. 297.

[58] Tellingly, Herder supports the eclectic legal-historical analyses of writers such as Grotius, Montesquieu and Gaetano Filangieri (*La Scienza della Legislazione*, Firenze: 1782, Tome I, Book I, writing on the relationship between laws and "the genius and character of peoples", Ch. XIII, pp. 165–166).

[59] Piirimäe (*Herder*), *supra* note 56, Ch. 8.

emancipation from oppression and domination.[60] For Fichte, Kant's self-determining individual could ultimately have been so only in and through the nation. Fichte's acutely felt urgency for the German people to resist the Napoleonic occupation is consistent with his notion that each people has the right to develop in accordance with its own peculiar quality, free of foreign coercion or interference.[61] Although Fichte was deeply influenced by Herder's historicist ideas of human diversity and national cultures, he nevertheless conceptualised national self-determination primarily in the Enlightenment rationalist tradition of rights and freedoms.

Overall, these underlying historical/cultural ideas of a nation would essentially mean, directly or indirectly, the reaffirmation of the centrality of the man-made concrete and particular in time and space, of the "sense of individuality" first articulated by the legal humanists and Renaissance jurists of the past. In terms of the intellectual trajectory of self-determination, this would involve, not so much the free choice of rulers as the delimitation and character of the national community as a substantive, historically evolved group. Such an understanding would qualify, and even challenge, the Hobbesian/Kantian version of peoplehood or nationhood based on enlightened legal rationality – the ideal type of community, law and state – rather than national sentiment.

4. RECLAIMING HISTORY (AND LEGAL REASON): SAVIGNY, MANCINI, AND BEYOND (19TH CENTURY)

Two schools best capture the impact of the historical approach on nineteenth-century international legal thought. One is the German Historical School of Jurisprudence (otherwise known as the Historical School), led by Friedrich Carl von Savigny. The other is the group of Italian international legal scholars who embrace the concept and principle of nationality, first articulated and defended by Pasquale Stanislao Mancini. Savigny and the Historical School ground law in history, not (fictional) conventional mechanisms, let alone divine laws or enlightened ideas of *jus naturale*.[62] Savigny's law is not based on Rousseau's popular sovereignty or general will either, but rather a distinctive *Volksgeist* – a distinctive spirit of the people,

[60] *See e.g.* E. D. Weitz, *Self-Determination: How a German Enlightenment Idea Became the Slogan of National Liberation and a Human Right*, 120 American Historical Review 462 (2015), pp. 478–479.

[61] On Fichte's impact on international legal thinking, *see* C. De Pascale, *Fichte and the Echo of his Internationalist Thinking in Romanticism*, in: S. Kadelbach et al. (eds.), *System, Order, and International Law: The Early History of International Legal Thought from Machiavelli to Hegel*, Oxford University Press, Oxford: 2017, pp. 329–351, especially Section II.

[62] *See e.g.* F. C. Beiser, *The German Historicist Tradition*, Oxford University Press, Oxford: 2011, Ch. 5.

its own national consciousness as reflected in customs and traditions.[63] Tracing the source of all law to local (national) conditions was not a new proposition. Vico and Montesquieu, to name a few, had already argued along similar lines. As discussed, Rousseau himself had increasingly emphasised the importance of retaining and nurturing national characters and the need to align legislation with such conditions. Yet Rousseau's *volonté générale* greatly differs from Savigny's *Volksgeist* in at least two key respects. For Savigny and the Historical School, it is not an abstractly construed transindividual will (let alone contingent majorities) that creates the law and the state but the people itself, understood as an objective (organic) social reality, a spiritual community defined by an historically determined common culture and language.[64] Secondly, this act of creation is what lies, invisible, in the spirit of the people; it is not an artificial act of will by any means, it is the people's spontaneous common consciousness that, in turn, translates into a permanent "living law" (customary law) to be captured by jurists and protected by the state.[65]

Intended to represent an alternative to Kant's abstract rationalism, Savigny's conception is, however, qualified by two crucial elements. For one thing, Savigny looks for a synthesis between crude history and abstract reason, between the raw material and social triggers of all law and the need to shape them through formal legal reasoning. At the same time, he does not reduce history to narrow empirical facts or findings. Instead, he places it within a wider idealistic schema. On the one hand, he posited the nation – like Herder and Vico had done before him – as an intergenerational cultural entity, as an organic and evolving historical stream,[66] much like the early sixteenth-century historical jurists had somehow implied. Simultaneously, he understood each national *Volksgeist* as the concrete manifestation of a "spirit of humanity" (*Menschheitsgeist*) that runs through all national communities, since it is only through them that any concrete law can in practice emerge.[67] Savigny's thought, in the end, is not merely an appeal to (real or perceived) "ancient freedoms" from pre-imperial or pre-revolutionary times; it is a systematic attempt

[63] *See e.g.* G. Balladori Pallieri, *Dottrina dello Stato*, 2nd ed., Cedam, Padova: 1964, pp. 40-49; R. Schütze, *German Idealism after Kant: Nineteenth-Century Foundations of International Law*, 25 Journal of the History of International Law 105 (2023), pp. 113–120; L. Nuzzo, *History, Science and Christianity. International Law and Savigny's Paradigm*, in: L. Nuzzo and M. Vec (eds.), *Constructing International Law – The Birth of a Discipline*, Vittorio Klostermann, Frankfurt am Main: 2012, pp. 25–50.

[64] Savigny builds on the concept first outlined by G. Puchta in *Das Gewohnheitsrecht* (Palmsche Verlagsbuchhandlung, Erlangen: 1828, p. 134). In his 1840 *System of Modern Roman Law*, Savigny articulates the concept of a nation as a spiritual community – and the state as its embodiment – informed by a common history and language rather than common descent per se: *System des heutigen Römischen Rechts*, Vol. 1, Veit, Berlin: 1840, pp. 13–21.

[65] On the role of jurists, *see* Nuzzo, *supra* note 63, pp. 42-44; Schütze, *supra* note 63, pp. 117–118.

[66] Savigny, *supra* note 64, pp. 13–21.

[67] *Ibidem*, pp. 18–21.

to reconstruct the parameters of legal theory and history away from the trappings of voluntarism, natural law, or sheer statism. Indeed, in contrast with the "unhistorical" school of jurisprudence, which the Historical School largely associates with state positivism/legislative power derived from contractarian schemes, Savingly firmly argues that "the material of law is given by the total past of the nation, but not by arbitrariness, so that it might happen to be this or another, but by the very essence of the nation itself and its history."[68]

It is important to note that, like Savigny but before him, Georg Wilhelm Friedrich Hegel had dismissed rationalist formalism, especially of the Kantian type, as lacking "some material, some determinacy (...) to supply [law's] content." He too had seen in a specific national *Volksgeist* the material and ethical basis of all law, the upshot of a concrete ethical community, of a concrete nation in its "geographical and anthropological existence", the best guarantee of individuality against what he thought was the shapelessness of cosmopolitanism.[69] Unlike the Historical School, though, Hegel did not give the national *Volksgeist* a customary norm-creating life of its own but equated it with the institutional primacy of the state and state law – the highest ethical expressions of the community. This also explains the differences between Savigny and Hegel in terms of how the national *Volksgeist* affects their conception of international law. Hegel came to emphasise exclusively state individuality by reducing international law to "external state law"– a negative relation of "another to another" which is entirely dependent upon individual state wills, even among civilised nations, because states (as Hobbes believed) remain in the state of nature.[70] By contrast, Savigny and the Historical School viewed each culturally conscious national spirit (the "nation") as contributing to an objective international law insofar as the universal *Menschheitsgeist* that such national spirits variably represent allowed for a broader common legal/cultural consciousness to exist, at least among Christian European states.[71]

Unlike the sixteenth-century broader debate around the historical method, this sense of national individuality propelled directly or indirectly by the Historical School, is bound to have a major impact on the nineteenth-century theoretical

[68] Quoted by Schütze, *supra* note 63, p. 115.

[69] G.W.F. Hegel, *On the Scientific Ways of Treating Natural Law*, in: L. Dickey (ed.), *Political Writings*, Cambridge University Press, Cambridge: 1999, pp. 124, 179. G.W.F. Hegel, *Outlines of the Philosophy of Right* (trans. T.M. Knox), Oxford University Press, Oxford: 2008, p. 317 (Hegel viewed each national *Volksgeist* as necessary individual contributions to the "world spirit" that governs history).

[70] Hegel, *supra* note 69, pp. 234, 304–315 (Hegel goes as far as to argue that there is one dominant national spirit in each epoch of world history which leaves the other national spirits without rights, pp. 317–318).

[71] Savigny, *supra* note 64, pp. 32–34.

framing of international law as a discipline, including private international law.[72] Leading international lawyers of the time, such as August Heffner, Kaltenborn von Stachau, and later, even Lassa Oppenheim, traced international law to a common legal, moral and cultural consciousness in Europe (i.e. amongst distinct European *peoples*) – with "custom" as the backdrop to "all law, whether written or unwritten" – without which, for them, no (international) law could exist.[73] It is clear, though, that each nation was understood in both cultural and political/institutional terms, with rather obvious implications for any sustained ideas of self-determination.

In Italy, Mancini followed Savigny's footsteps, positing a national (cultural) substratum underpinning all law and (ideally at least) the very existence of the state within the international system. Indeed, Mancini's principle of nationality in public and private international law does away with social contract theories or otherwise conceptions of the international legal order grounded in natural law, the balance of power/brute force or mere diplomatic practice. Conceptually, Mancini sought a fresh perspective on international law away from abstract individualism, pervasive religious authority, or crude state pragmatism or authoritarianism.[74] His idea of a nation and nationality as the real backbone of the internal and international legal orders provides a socially/historically conscious view of international law openly built around the principle of national self-determination rather than state power per se.[75] Mancini's concept of a nation heavily drew on Vico's philosophy of history, Savigny's idea of a living, intergenerational *Volksgeist*, as well as Hegel's national consciousness as expressed by the state.[76]

However, the Italian School led by Mancini does have features of its own. Despite Mancini's and his followers' insistence on external, historically grounded factors such as a common territory, descent, traditions and/or language, the principle of

[72] Schütze, *supra* note 63, pp. 120–133.

[73] The later emphasis on states and state-made international institutions does not keep Oppenheim from believing that "the development of mankind is inseparably bound up with the national development of the different peoples and states": L. Oppenheim, *The Future of International Law*, Clarendon Press, Oxford: 1921, p. 13.

[74] For excellent analyses of Mancini's work, *see* E. Catellani, *Les Maîtres de l'école italienne du droit international au XIXème siècle*, Collected Courses of the Hague Academy of International Law, Vol. 46 (1933), pp. 709-825; L. Nuzzo, *Da Mazzini a Mancini: il principio di nazionalitá tra politica e diritto*, 14 Giornale di Storia Costituzionale 161 (2007); L. Nuzzo, *Origini di una Scienza - Diritto internazionale e colonialismo nel XIX secolo*, Vittorio Klostermann, Frankfurt am Main: 2012, Ch. 2; F. Colao, *L' "idea di nazione" nei giuristi italiani tra Ottocento e Novecento*, 30 Quaderni Fiorentini 255 (2001); G. Grieco, *A legal theory for the nation state. Pasquale Stanislao Mancini, Hegelianism and Piedmontese liberalism after 1848*, 24 Journal of Modern Italian Studies 266 (2019).

[75] P.S. Mancini, *Della Nazionalita' come fondamento del diritto delle genti. Prelezione al corso di diritto internazionale e marittimo pronunziata nella Regia Universita' di Torino nel di' 22 gennaio, 1851*, Tipografia Eredi Botta, Torino: 1851.

[76] On Hegel's influence on Mancini's conception of the nation, *see* Greco, *supra* note 74, pp. 277–278.

nationality rests primarily on national consciousness understood as a forward-looking form of moral unity, without which all other factors, whatever their sociological combination, are bound to remain "inerte materia".[77] For Mancini and others, it is this crucial spiritual/psychological element, a collective sense of national belonging, that elevates what might be, at best, a series of external indicia, a "natural" society of some kind, into a political community – a nation in a narrow sense – one actively seeking emancipation from despotism and oppression.[78] In short, the Italian School's *coscienza della nazionalita*, linked to Vico's and subsequently Giancarlo Romagnosi's views of human sociability and progress in law and institutions (Vico's *nascimento* and Romagnosi's similar view of *incivilimento*),[79] comes to inform the "rights of nations" in the nineteenth-century as a collective amplification of the "rights of man" from the Age of Revolution. The "nation" dissolves neither into mere naturalism (however historically informed) nor mere statism in the sense of Hegel's institutional (and ethical) primacy of the state. The nation is neither the product of a spurious and unhistorical social contract nor the mere product of a sovereign decision or will.

Inspired by the political and moral republican teachings of Giuseppe Mazzini on the contribution of culturally and politically conscious nations to Europe and humankind, as well as echoing the national independence aspirations of the Italian *Risorgimento*,[80] the principle of nationality seeks to offer a distinctive legal basis for the self-determination of peoples, most notably those oppressed within empires (Herder's "states-machines"), by rethinking the social foundations of national (internal and external) sovereignty and international law itself. In this attempt to highlight the complementary of history and reason, nationality and humanity, moral unity and constitutional freedoms, Mancini and associates developed Savigny's and Hegel's legal historicism into a positive and ambitious project of renewal, indeed codification, of (public and private) international law consistent with the "rights of peoples", at least within the (Savignian) parameters of a (nineteenth-century) European common consciousness.[81]

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[77] Mancini, *supra* note 75, pp. 38-40.

[78] *Ibidem*, p. 40. *See also* Grieco, *supra* note 74, pp. 281–282. Guido Fusinato reinforces this concept by making the external manifestation of national consciousness, not any ethnic or linguistic necessity, the only key factor: *Il principio della scuola italiana nel diritto internazionale pubblico* (1885), in G. Fusinato, *Scritti giuridici*, Bocca, Torino: 1921, Vol. 1, pp. 213–249; G. Fusinato, *La teoria della nazionalità nel sistema del diritto pubblico internazionale*, Bocca, Torino: 1921, Vol. 2, pp. 333–340.

[79] Romagnosi is deeply influenced by Vico: *see* Grieco, *supra* note 74, pp. 270–271.

[80] *See e.g.* Nuzzo (*Da Mazzini*), *supra* note 74, pp. 161–164.

[81] Mancini would defend the inapplicability of the principle of nationality to overseas (non-European) indigenous populations on the basis that the latter were widely thought to lack the status of nations: Nuzzo, *supra* note 63, p. 129.

This approach, though very influential throughout the century and beyond, raised nevertheless problematic issues that would gradually limit its success in theoretical and practical terms. If it is the nation, not state institutions or power, the most veritable social trigger of sovereignty and international relations, how does national unity relate to state unity from the perspective of international legal personality? If the principle of nationality protects nations against existing states, does it follow that each nation is allowed to create a state of its own, or is an existing state allowed to seek territorial expansion on the grounds of national unity? And, finally, if the *coscienza della nazionalita'* operates, in Mancini's words, as a sentiment of moral unity "capace di costituirsi al di dentro e di manifestarsi al di fuori" (capable of constituting itself internally and manifesting itself externally),[82] to what extent does it affect the character of the state?

Despite Mancini's reference to the nation as a "national personality" in his famous 1851 *prelezione* at the University of Turin, he was adamant, especially in later writings and interventions, that nations did not have legal personality separate from states but rather justify and inform their sovereignty as distinctive subjects of international law. For one thing, as aptly noted by Enrico Catellani in the early 1930s, "[l]es publicistes italiens du XIX siècle font donc ressortir le culte du principe de nationalité comme l'élément génétique le plus parfait de l'Etat... En même temps ils persistent dans la reconnaissance des principes traditionnels quant á la personnalité de l'Etat."[83] At the same time, the principle of nationality does not provide only moral and political legitimacy but is also meant to operate as a constitutional principle capable of overring ordinary state law internally and enabling the external recognition of the rights of nations as part of a wider humanity. The latter dimension would need to involve the constraining of states' treaty-making power, the introduction of means for the peaceful settlement of disputes, the mutual internal recognition of "just" national (foreign) laws in private international law, as well as the making of plebiscite the main institutional translation of the principle of nationality from the point of view of self-determination.[84] However, such important qualifications do little to assuage the more basic concern that, as new states emerge, and as national autonomy is increasingly seen through the lens of national sovereignty (including Italy's independence), the principle of nationality could effectively prove a destabilising factor in the international system, allowing for secessionist and irredentist claims to arise in Europe and elsewhere.

[82] Mancini, *supra* note 75, p. 39.
[83] Catellani, *supra* note 74, p. 726.
[84] Nuzzo (*Da Mazzini*), *supra* note 74, p. 166; Grieco, *supra* note 74, p. 286.

Mancini responded to this criticism by firmly ruling out a legal right to secession or irredentism as a ramification of the principle of nationality, highlighting the latter's intended contribution to the peaceful resolution of conflicts, not the destabilisation of international relations. The notion that each nation was in principle entitled to purse a state of its own did not, in his view, legally imply the breaking up of existing states on that basis alone.[85] Yet the annexation of the Alsace-Lorraine by Germany later in the century, and the academic and political debate that surrounded this case, exposed the challenges of implementing the principle as a way of conclusively settling territorial disputes. The proponents of nationality in Europe did not concede a right of conquest yet admitted the legitimacy of the annexation on cultural and linguistic grounds in response to earlier French aggressive acquisitions and with a view to achieving peace and stability in the area. The critics of the principle noted not only the ambivalence of German identity under French territorial sovereignty but also the legal unreliability of plebiscites to implement self-determination as an alternative to *ipso facto* social determinism.[86]

Whatever its limitations – the lack of a separate legal personality, the inability to ground a legal right to secession or to overcome operational challenges – the inner core (*coscienza*) of the nation championed by the (Mancini-inspired) Italian School and widely endorsed explicitly or implicitly in nineteenth-century Europe[87] impacted the way of thinking about the nature of the state. Even though international law (from Bodin onwards) endows the state (and not the nation) with organic legal personality, is it not the case that any state can only be a national state, meaning that any form of state unity can only derive from some form of national unity? Conceptually, it would be a mistake to read the principle of nationality as a call for a chauvinist, ethnocentric state. Mancini's emphasis on national sentiment as a form of collective moral unity is defined by broader ideas of cultural distinctiveness, not merely ethnographic or racial or linguistic criteria. It is a call for the historicity of national communities in their multiple cultural variants, for the recognition of their being (out of a cultural substratum broadly understood) political

[85] As Italy's Minister of Foreign Affairs in 1883, Mancini dismissed the suggestion that the principle could justify the forcible return of Italian-speaking territories. For context, *see* Nuzzo, *supra* note 63, pp. 127–129; Catellani, *supra* note 74, p. 739.

[86] For diverging views, *see e.g.* G. Rolin-Jaequemyns, *Essai complémentaire sur la guerre franco-allemande dans ses rapports avec le droit international*, 3 Revue de droit international et de législation comparée 288 (1871); G. Padelletti, *L'Alsace et la Lorraine, et le droit des gens*, 3 Revue de droit international et de législation comparée 464 (1871). Padelletti insisted on the limitations of plebiscites, which he thought reflected "momentary passions" rather than authentic national sentiments, compared to territorial cessions approved by Parliament or the *jus emigrandi* to retain one's own nationality (*see supra*, note 22). For similar reservations, *see* Redslob, *supra* note 21, pp. 36–38.

[87] Redslob, *supra* note 21.

communities characterized by "l'assimilation psychologique", and almost invariably, "la superposition et la fusion de plusieurs races."[88] The nation so conceived shifts the focus from narrower data rooted in a common past, arguably preeminent in Savigny's (cultural) conception, to a pro-active political (future-looking) will which expresses the moral unity underlying national unity as an overarching framework where cultural identity and political agency meet. That the "nation-state" – where nationality (national homogeneity) and statehood (ideally) coincide – is increasingly thought to be on this schema the best institutional form of political community in nineteenth-century Europe is beyond dispute. Nevertheless, Mancini himself noted that national unity did not automatically involve state unity, and that in fact states were full subjects of international law regardless of their internal composition or structure.[89] The focus on issues of legal personality left the ramifications of this thinking partly unexplored. If the nation's *coscienza* is *au fond* the expression of a synthetic moral unity rather than ethnic purity/common descent, can the principle of nationality still apply where moral unity does not reflect national unity on purely objective grounds?

While firmly endorsing Mancini's core doctrine of nationality, leading Italian international law scholars such as Terenzio Mamiani and Pasquale Fiore came close to qualifying the idea of a nation in ways that allow for a more pluralistic understanding of it. Both of them confirmed the key cultural/historical and moral elements of Mancini's conception of a nation (separate from the state) defining it as a "certo novero di genti per comunanza di sangue, conformità di genio, medesimezza di linguaggio atte e preordinate alla massima unione sociale."[90] Yet by juxtaposing the nation and the state in their later-century work, and by linking national individuality to the idea of the state as a free political association, they both effectively developed the Mancinian parameters of national unity as moral unity. Like all his contemporaries and predecessors, Mamiani distinguished the state as an institutional fact (and legal subject) from the nation as a more substantive and complex idea of moral unity.[91] Similarly, he distinguished (quite emphatically) the nation from race, highlighting the variable and multiple constellations of factors and sources of national identity with an inner core to be found in common culture

[88] Catellani, *supra* note 74, pp. 713–714.

[89] Mancini, *supra* note 75, p. 44.

[90] Mamiani's definition appears in his *Dell'ottima congregazione umana e del principio di nazionalità* (1856), id., *D'un nuovo diritto europeo*, 3rd ed., De Angelis, Napoli: 1860, p. 263 (a human community which, through common blood, shared character and a common language, is capable of and prepared for the most complete social union).

[91] *Ibidem*, pp. 32–33.

and laws.[92] Mamiani did nevertheless argue that the principle of nationality applied, more broadly, where human communities ("congregazioni di uomini") achieve moral unity by establishing a fatherland (*patria*) by an act of free will, even though this may require the disruption of violent political unions comprising of several states and fatherlands ("piu' Stati e patrie").[93] Fiore fully endorsed Mamiani's definition of a nation and observed that the moral unity underpinning the nation, its *coscienza* beyond random political and territorial circumstances, can *also* emerge in conditions like those of Switzerland, characterised by strong internal linguistic, ethnic, or religious diversity.[94] While Fiore reinforced the generally accepted idea that the nation as a "free and spontaneous aggregation" was more than a collection of natural or merely institutional factors underpinning the national state, he also tentatively unpacked the Mancinian idea of national consciousness to account for scenarios in which national cultural distinctiveness (the cultural nation) can transcend the factual existence of several nationalities or ethnicities.[95] Despite its various scholarly iterations, the principle of nationality was to retain its direct or indirect significance for years to come.[96]

5. THE LEGACY OF THE HISTORICIST TURN: NATION AND NATIONALITIES THROUGH TO THE INTERWAR YEARS

This attempt to reconcile a substantive idea of the nation with formal legal reasoning (with the latter being mainly inherited from Enlightenment thinking and German historical idealism), and even to model the early efforts to codify the fundamentals of international law on such an attempt,[97] arguably sow the seeds (partly at least) of wider debates over national identity that informed the *fin de siècle* and interwar arrangements and scholarly critiques.

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[92] *Ibidem*, p. 254.

[93] *Ibidem*, pp. 31–32. *See also supra* note 86.

[94] P. Fiore, *Nuovo diritto internazionale pubblico secondo i bisogni della civiltà moderna*, Presso la Casa Editrice e Tipog. degli Autori-Editori, Milano: 1865, p. 51.

[95] In fact, the tradition of thought represented by Mancini, and even more so, Fusinato, Mamiani and Fiore, though prioritising the nation/state connection (Colao, *supra* note 74), arguably lent itself to a substantive idea of a nation (or nationality) capacious enough to encompass what we, *in modern times*, identify as diverse societies in merely sociological terms.

[96] Despite his various caveats, Catellani, *supra* note 74, p. 739, tellingly ends his analysis by still presenting the principle as the best guarantee of "un équilibre juridique stable", and the best safeguard against war and conquest.

[97] Schütze, *supra* note 63, p. 135.

For one thing, Woodrow Wilson's post-World War I idea of nationality,[98] owes much to the core notion that *within* the "political" state lie certain social groups (nations or peoples or nationalities) whose historically formed sense of belonging and individuality continually tests the adequacy of legal arrangements. Marxist thought undoubtedly preceded Wilson's at the turn of the century in appealing to the "self-determination of peoples" in its international political programme, and later, for post-Zarist Russia itself, while Otto Bauer (unsuccessfully) offered a view of cultural autonomy designed to keep the Austro-Hungarian Empire intact, though decentralised.[99] But for Marx and Lenin, the national question was, at best, a welcome movement towards dismantling empires and achieving broader emancipation and economic progress.[100] Otto Bauer strictly distinguished cultural autonomy for specific groups from the overarching political self-determination of the working class of all nations, while Stalin's substantive idea of a nation, the closest to its earlier nineteenth-century articulations,[101] hardly translates internationally into anything other than Soviet support for the post-1945 overseas anti-colonial position within the (legally pre-set) territorial framework of *uti possidetis*.

By contrast, the "nation" discussed at Versailles, for all its complexities, ambivalences and/or variety of layers,[102] presented itself as a value of its own, regardless of the creation or recognition of new states or (from a Marxist perspective) wider revolutionary programmes of social liberation. Similarly to Mancini's national self-determination conception, it was deliberately meant to superimpose itself on the formal (positivist/conventional) category of the state and state sovereignty and, to that extent, sought to "transfor[m] the very relationship of international law to its «foundations»".[103] As noted by Nathaniel Berman, many interwar international

[98] US President Wilson's Fourteen Points Address to Congress, 8 January 1918. Wilson famously referenced an "evident principle… of justice to all peoples and nationalities" running through the "whole program" as the foundational principle of "international justice". This was consistent with his (eventually rejected) proposal to recognise national minority/majority equality in the preamble to the League of Nations Covenant. D.M. Hunter, *The Drafting of the Covenant*, G.P. Putnam's Sons, New York: 1928, Vol. II, p. 91.

[99] Weitz, *supra* note 60, pp. 482–485.

[100] V. Lenin, *The Right of Nations to Self-determination*, 1914 (English trans. Foreign Language Publishing House), Moscow: 1946. For the mainly tactical use of Bolshevik "national" self-determination, *see* also L. Mälksoo, *The Soviet Approach to the Right of Peoples to Self-determination: Russia's Farewell to jus publicum europaeum*, 19 Journal of the History of International Law 200 (2017).

[101] J. Stalin, *Marxism and the National and Colonial Question*, Lawrence and Wishart, London: 1936, pp. 5, 8 (he defined a nation as "a historically evolved, stable community of people, formed on the basis of a common language, territory, economic life, and psychological make-up, manifested in a community of culture").

[102] Pentassuglia, *supra* note 2.

[103] N. Berman, "*But the Alternative is Despair*": *European Nationalism and the Modernist Renewal of International Law*, 106 Harvard Law Review 1800 (1993).

lawyers became acutely aware of the need to take "the principle of nationalities" seriously in the new world order, and to even treat "nationalism [as] the key to any international legal order."[104] Mancini, for his part, sought to transpose his own version of the national *Volksgeist*, the forward-looking national consciousness at the heart of his doctrine of nationality, into the *Institut de Droit International*'s ambitious programme of favouring "the progress" of international law by acting, in a Savignian way, as the "organ of the legal conscience of the civilised world."[105] In a different context and from a different perspective, Albert de Lapradelle would even propose the recognition of "the separatist will of a people" as one exception to the illegality of war in the *Institut's* subsequently abandoned "Declaration of the Rights and Duties of Nations" in the mid-1920s.[106] The ideas behind these moves never succeed in displacing the mainstream assumptions of state positivism, even though Mancini's work would prove more successful in embedding the principle of nationality in the Institute's reform of private international law.[107]

But the (somewhat inevitable) victory of state positivism, the focus on the rights and duties of states understood as self-standing legal units did not come without qualification. The pre-war legacy of (post-Hegelian) state positivism is not wholly indifferent to the nationality concept. Johann Caspar Bluntschli, for example, firmly distinguished the state and its internal and external legal personality from the *Volk* (or *Naturvolk*) as cultural concepts, unable to ground, let alone require, the right to a state. Nevertheless, he broadly agreed with Mancini that states were informed by their nation's "character and spirit", that the nation was in fact not merely a *Naturvolk* but the highest form of political consciousness, and that, once formed, the state, as the political-institutional manifestation of the nation, had the right to protect its language, customs and institutions, as well as promoting its development. In other words, "[t]he nation fulfils this [political] mission by giving the state the character of its essence."[108] The post-war legacy is an equally hybrid one. Whatever we make of the limitations of Wilson's principle of "justice to all peoples and nationalities" and his recognition of new states in "indisputably" national

[104] *Ibidem*, p. 1803.

[105] *Communications relatives à l'Institut de droit international*, 5 Revue de droit international et de législation comparée 703 (1873).

[106] Art. 4 made war illegal except when prompted, internally, by national separatism and, externally, a decision of "international justice": *Annuaire de l'Institut de Droit International* (1925), pp. 238–239.

[107] Nuzzo (*Da Mazzini*), *supra* note 74, pp. 174-180. Crucially, though, "nationality" is here recast as "citizenship", the institutional link with a state.

[108] J.C. Bluntschli, *Allgemeines Staatsrecht geschichtlich begründet*, Literarisch Artischen Anstalt der Cottaschen Buchhandlung, München: 1863, pp. 43, 83. More broadly, J.C. Bluntschli, *Nation und Volk, Nationalitätsprincip*, in: J.C. Bluntschli, K. Brater (eds.), *Deutsches Staats-Wörterbuch*, Expedition des Staats-Wörterbuchs, Stuttgart und Leipzig: 1862, pp. 152–160.

territories,[109] the 1919 Versailles arrangements are far from marking the complete triumph of state positivism and the full authority of the state. In fact, the system to be put in place would neither ground sovereignty in pre-existing and unilateral national claims nor would allow sovereign states to exercise unbounded freedom in protecting their national character.[110] Cultural and civic meanings of nationality (cultural affiliation and citizenship) are allowed to co-exist and interact. If anything, the (largely treaty-based) system's (selected and imperfect) juxtaposition of self-determination and minority protection seeks to transcend both the "explosive" nation and the "faceless" positivistic state in ways that creatively match ideas of national individuality with enhanced legal reason.

Writing in the mid-1930s, Carlile Aylmer Macartney argued that true self-determination could only be achieved through political self-determination based on state-wide feelings of political loyalty. Minority protection thus served the purpose of recognising the groups' "narrow national ideals" in exchange for their firm integration into the political state and ultimately the end of a majority-only vision of national self-determination.[111] Aside from the actual (limited) degree of legal protection offered by the interwar treaties, Macartney's implications are essentially the depoliticization of national minorities (reduced solely to cultural groups) and the denationalisation (deculturation) of the state (reduced to a neutral state, only marginally upgraded from the faceless positivistic state upheld by doctrine). Such implications resemble the cultural/political distinction suggested by Otto Bauer in pre-war times, albeit from the very different Marxist perspective of pursuing a centralised political self-determination of the working class within a still unified Austria-Hungary.

Only a few years before Macartney's commentary, Robert Redslob looked at the "principle of nationalities" from a wider perspective, one that sought not only to identify and explain the various "solutions équitables" for minority protection in pre- and post-war domestic and international legal arrangements but also to make sense of the cultural and political meanings of national identity. If the nation is a variable and spontaneous (psychological) combination of history, language and/or religion, not merely the expression of geography, let alone race, if "[l]a nationalité ne se raisonne pas, elle est une conception intuitive, elle est une foi",[112] how then can national identity be reconciled with political loyalty? Redslob argued that

[109] *Supra* note 98, point XIII (regarding Poland). A. Cobban, *National Self-Determination*, Oxford University Press, Oxford: 1944, pp. 19–22, 22–28, 64–66.

[110] Pentassuglia, *supra* note 2, pp. 243–247.

[111] C.A. Macartney, *National States and National Minorities*, Oxford University Press, London: 1934, p. 278.

[112] Redslob, *supra* note 21, p. 16.

this is not an issue that can be limited to technical legal solutions for selected states, no matter how important they were. Instead, it should have been seen as a general issue faced by all states, the roots of which were to be found "non dans le domaine des règles de droit, mais dans la sphère de la psychologie", that is, through "une compréhension adéquate des valeurs en presence."[113] Unlike Macartney, Redslob rejected the radical distinction between wide (identity-free) political loyalty and narrow, group-specific cultural protection by recognising both the political-institutional aspects of sub-state national ideals (beyond merely historical and cultural consciousness) and the broad cultural/moral foundations of the state (i.e. the nation) taken as a whole. Aside from minority protection and the exceptional solution of autonomy, or even secession, for certain groups with a heightened sense of national identity and separateness, Redslob crucially argued (in the footsteps of Mancini and Savigny) that the state's *own* identity was not limited to "le jeu des droits et des fonctions". It inevitably rested on a "puissance emotive", on an overarching moral and cultural unity, as various historical precedents indicated. It inevitably translated into "un Etat national", beyond the "fantaisie" of a purely rationalistic and utilitarian state that mainstream legal positivists came to embrace.[114] He made the "principle of nationalities" work, dynamically and dialectically, in both directions as it traced it back to the (self-determination) idea of "libre arbitre, la disposition de soi-même."[115] As shown by the 1919 Versailles system, the onerous task of international law is autonomously to reflect this deeper phycological dynamic (refusing exceedingly radical variants of both national identity and statism), however partially and imperfectly given the nature of legal constructions.[116] For Redslob, the state, in its own search for moral unity, was about balancing and harmonising underlying national constellations, perhaps reasonably favouring the dominant nation in its constitutional essentials,[117] provided that there was no radical incompatibility – or that there was even the nesting – between "les deux génies en cause",[118] that there were no historical resentments, and no threats of war from a kin-state. These conditions, especially the last two, would prove chimerical in late-1930s Europe as Nazi Germany readied to exploit the nationality card as a purely political pretext

[113] *Ibidem*, p. 70.

[114] *Ibidem*, p. 73.

[115] *Ibidem*, p. 77.

[116] *Ibidem*; Pentassuglia, *supra* note 2, pp. 243–247.

[117] Redslob, *supra* note 21, p. 77, broadly refers to "la nation cristallisée autour de l'Etat". I borrow from Liav Orgad's concept of constitutional essentials to signal a core space of cultural/normative values underpinning a state's national identity, which Orgad discusses in the context of immigration (Orgad, *supra* note 1, pp. 203-229).

[118] Redslob, *supra* note 21, p. 78. He offers, *inter alia*, the British case of a moral unity across sub-state national diversities (*ibidem*, p. 77).

for launching its military assault on the continent. But Redslob's reading of (legal) history was undoubtedly an extraordinary, expanded attempt to reclaim as much as possible the "law of peoples" from the law of states. The conditions he identified for state unity in the face of national diversity were as relevant to the interwar years as they are still relevant today.

CONCLUSIONS: THE POLITICAL AND CULTURAL LAYERS OF "NATION" AND THEIR IMPACT ON SELF DETERMINATION IN INTERNATIONAL LAW

The present analysis has sought to demonstrate that "nation" operates historically as a general conceptual category whose main (variable) cultural and political meanings inevitably inform later and modern conceptions of peoples' self-determination. It has made three largely interrelated claims. The first general claim is that the broad inherited political/ territorial/ institutional ("civic") and cultural meanings of a nation (and later "people"), far from being exclusively modern creations, do have a long historical pedigree, one that manifests itself in different forms and degrees, from ancient and pre-modern times up until at least the interwar years.

Although we should distinguish a very early naturalistic (essentially ethno-cultural) understanding of *natio* from later ideas interwoven with certain traditions of legal-institutional thought, overall, the idea of a nation across history reflects a constantly shifting balance and even coordination between broad cultural elements and political, institutional and/or territorial dimensions.[119] At one general level, the progressive shift in the meaning of "nation" as a collective and self-conscious political agency conferring authority on political institutions, especially in the eighteenth century, does not in itself disconnect the genealogy of the concept from the earlier manifestations or articulations of national individuality, be they reflected in the evolution of *natio* from *gens*, the processes of cultural unification under the early dynastic monarchies, or the emerging claims to live under the laws and customs of the historical community in question against all attempts at assimilation or subordination.

At the same time, the cultural meaning of "nation" is not limited to merely objective factors but encompasses political-institutional dimensions. Indeed, the analysis contends that legal/philosophical historicism (broadly understood), in its constant tension with contractarian state theories, plays a critical role in shaping a substantive idea of a nation in legal thought centered around common culture and laws,

[119] F. Meinecke, *Cosmopolitanism and the Nation State* (trans. R. B. Kimber), Princeton University Press, Princeton: 1970, especially Chaps I, II; *see also* Romeo, *supra* note 12.

which eventually feeds into international legal scholarship (and practice). Against natural lawyers and state of nature theorists, the historicist approach argues that there exists a normative core of national (social) individuality which, whatever its (obvious) similarities with other national societies, is invariably rooted in distinctive, not wholly translatable cultural patterns, in distinctive historical streams of which law and institutions are an integral part. Thus, central to the idea of a nation is that, unlike other communities with historical or cultural consciousness, and generally in response to some real or perceived (internal or external) domination,[120] the nation "has or aspires to or conceives itself entitled to some form of specifically appropriate governmental or institutional expression", as one distinguished commentator put it.[121] This political-institutional meaning becomes amplified and democratised in the eighteenth century by Rousseau's ideal of popular sovereignty, and it is presented even more flexibly by Herder's broad view of political government and participation, but it is not entirely unknown, albeit in more embryonic (and essentially pre-republican) form, in earlier centuries.[122]

What is very important to note, though – and this brings us to this article's essential second claim – is that while pre-modern notions of *natio* (and people) ordinarily focus on descent/ethnicity and lack a legal/institutional dimension, later substantive articulations of nation or nationality (and thus people) prompted mainly by historicist thinking (between the sixteenth and nineteenth centuries) are informed by *broader* ideas of cultural/moral national distinctiveness, alongside political/institutional agency.

The third interrelated claim is that the nation concept – as historically discussed in legal/philosophical thought and eventually inherited by the modern idea of "people" under international law – effectively comes into view as a cluster (or plural) concept informed (in theory or de facto) by the case-specific relationship between political/territorial/institutional factors and substantive cultural/national elements. Indeed, it is no coincidence that this variable constellation of cultural and political meanings has informed later and modern conceptions of peoples' self-determination, particularly in relation to free choice, the delimitation and character of the self-determining community, state unity, and a broader sense of humanity. As "people" replaces "nation" (now linked to "state") in common international legal terminology, the idea of "people" under international law remains equally shifting

[120] *See e.g.* Section 3.2 on Rousseau's advice to the Poles to preserve the identity of the Polish nation against foreign coercion.

[121] MacCormick, *supra* note 17, p. 260.

[122] *Ibidem*, pp. 260–261; both the Scottish (1320) and Dutch (1581) cases mentioned in Section 1 appealed, in different ways, to consent/freedom, institutions, and culture/tradition. Piirimäe (*Herder*), *supra* note 56, Ch. 7. *See also* Section 2 (Hotman and Bodin).

and elusive, lacking a precise definition, and equally informed (at least in theory or de facto) by a variable relationship between cultural and political/territorial/institutional meanings.[123]

Again, at one level, the tension and entanglement of free choice and substantive approaches to self-determination, as outlined in previous sections, is reflected in the prioritization of subjective or objective factors in addressing national claims. While the political approach lays emphasis on a territorially situated set of individuals' free will, on the people's choice and aspirations (e.g. through plebiscites, referenda, elections, etc.), not their substantive outlook, and the cultural approach values free choice and critical reflection yet assumes peoplehood or nationhood to be for the most part the product of history involving whole societies, political and cultural meanings cannot displace one another from a self-determination perspective since both of them, where taken separately, reveal intrinsic limitations. The political approach may prove too abstract and thus fail to capture an "authentic" people or its genuine will. The cultural approach proves too narrow if, without a politically and institutionally organised choosing "self" and/or a broader idea of cultural (national) distinctiveness, it allows for merely social determinism and ethnocentrism. In this regard, a focus on "ethnic" self-determination or the "ethnic" dimension of "peoplehood" to explain its "cultural" profile, as indicated at the beginning of this article, may prove misleading.

Although international law has historically prioritized territoriality (e.g. *uti possidetis/territorial* integrity) and its attendant political processes, the "people" category remains in principle open to a variety of (explicit or implicit) conceptions (mostly linked to the ways of *implementing* self-determination), as the international community relentlessly faces substantive national claims within political communities, at state and sub-state levels, and civic and cultural meanings continue to colour to varying degrees the legal right to self-determination and the protection of sub-state national groups.[124] The substantive idea of a nation discussed here from an historical perspective ultimately problematises a de facto formalistic view of self-determination as well as the reductionist (largely Marxist-oriented) variant of

[123] *See* also J. Fisch, *The Right of Self-Determination of Peoples – The Domestication of an Illusion*, Cambridge University Press, Cambridge: 2015, Ch. 3.

[124] *See e.g.* Council of Europe, Recommendation 1735(2006): *The concept of "nation"*, available at: https://www.aelpa.org/documentos/reformas/EACAT/ConsejoEuropaNacion.pdf (accessed 31 March 2026); Additional Protocol on the Rights of Minorities to the European Convention on Human Rights, 1 February 1993, Rec. No. 1201, Doc. No. 6772 (1993); UN General Assembly, Resolution 61/295: United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007; I. Brownlie, *The Rights of Peoples in Modern International Law*, in: J. Crawford (ed.), *The Rights of Peoples*, Oxford University Press, Oxford: 1988, pp. 5–6, 16.

that idea as a generic/tactical emancipatory claim.[125] Ruled out unilateral secession as a legally acceptable expression of national (or people's) individuality (other than perhaps in the ever-elusive Lockian form of resisting injustice),[126] as well as the right of nations to a state of their own (including *terre irredente*) or to a distinct legal personality separate from states, the interwar regime would at least create an opportunity in international legal scholarship to recognise the need for, not only minority protection as a corrective to majority-focused (national) self-determination, where available, but also a thorough reassessment of the foundations of *state unity* beyond merely civic or merely cultural (or ethnic) conceptions of the nation. Here again, and from a self-determination perspective, Redslob's interwar work crucially highlighted the common social (substantive) bond affecting the entire self-determining political community. In today's terms, he built on the nineteenth-century tradition of thought on the principle of nationality to offer an enriched image of national identity as a broad and dynamic concept – as a normative/cultural core, not the affirmation of ethnic or ideological uniformity – that can explain and absorb demographic changes.[127]

Admittedly, "nation" has sometimes led to the radicalisation of the concept, with an obvious fallout for international law, in terms of the moral supremacy of the nation over the individual or other groups (Rousseau/Hegel) and/or the absolutist supremacy or radical autonomy of the state over, or in relation to, other states or entities (Fichte/Hegel), reflected especially in the rise of militaristic imperialism and subsequent colonisation. Yet one should not conflate those conceptions – or aspects of those conceptions – with the concept itself, nor should one conflate the concept with its deliberate exploitation by political actors for purposes of their own, or even less so, with elements of the morality and legality of the time (expressed, for example, in Mancini's later defense of the inapplicability of the principle of nationality to non-European territories). All the key traditions of thought embracing a substantive idea of the nation, within or without the state (Herder), derive from a broader idea of *humanity* which recognises national diversity as one crucial aspect of human diversity. At its core, the nation, however particular in time and space,

[125] *Contra* M. Koskenniemi, *see* G. Pentassuglia, *Group Identities and Human Rights: How Do We Square the Circle in International Law?*, in: A.M. Biró (ed.), *Populism, Memory and Minority Rights: Central and Eastern European Issues in Global Perspective*, Martinus Nijhoff Publishers, Leiden: 2018, pp. 294–295.

[126] The Aaland Islands Question (On the Merits), Report by the Commission of Rapporteurs, League of Nations Council Document B7 21/68/106, 1921; *Reference Re Secession of Quebec* [1998] 2 SCR 217, paras. 134–135.

[127] For a similar concept (arguably similarly to various nineteenth-century international legal scholars of "nationalities", *supra* note 95), *see* A.D. Smith, *Nationalism: Theory, Ideology, History,* Polity Press, Cambridge: 2010, pp. 13–15, 29. On nationality/national identity and ethnicity, *see also* Pentassuglia, *supra* note 2, pp. 267–268.

nevertheless reflects the broader moral Kantian goal of respecting autonomous human beings in what they (many of them) regard as integral to their sense of communal belonging and necessary to articulate concrete forms of mutual recognition and solidarity through laws and institutions which underpin their individual freedoms.[128] The contemporary legal vocabulary of human rights, of which the right to self-determination is one of its foundational pillars, has inevitably inherited and sought to absorb, however tentatively, that underlying national claim. It has done so within the well-established limits of inter-state non-use of force, decolonisation, societal pluralism and non-discrimination.[129]

While international law has elevated the general concept of self-determination to a "constitutional" norm of *jus cogens* against the right of governments, it is no exaggeration to argue that the legacy of the philosophical-legal debate around the idea of a nation assessed in the foregoing sections continues to pressure, directly or indirectly, both the core and the edges of that concept. If it is certainly the case that, as a matter of international *law*, no state can trample on the *political and cultural* self-determination of its people(s), let alone of that of those groups falling under the jurisdiction of another state, and that, crucially, substantive national claims or practices can today inform the scope and reach of self-determination vis-à-vis the rights of others,[130] this is due to the enduring dimensions of national belonging unearthed by philosophers, historical jurists and policy-makers throughout the centuries against assumptions of generic legal and/or moral uniformity.

[128] *See e.g.* MacCormick, *supra* note 17, p. 261.

[129] Pentassuglia, *supra* note 2, pp. 267–268.

[130] For various examples, ibid. It is worth noting that at such key junctures in history as the 1919 Versailles settlement or the former Yugoslavia settlement in the 1990s, legal standards in the field were treated as "fundamental laws" of a constitutional nature or even deemed to be part of *jus cogens*.