INTRODUCTION

The idea for this book was born nearly a decade ago in Belgrade. I was monitoring the trial of Saša Cvjetan at Belgrade District Court, the first serious attempt by the Serbian judiciary to confront the legacy of war crimes from the Kosovo crisis. The defendant was prosecuted for his role in a massacre in Podujevo, which involved the killing of eighteen ethnic Albanian civilians by members of the Scorpions, a notorious irregular unit implicated in some of the worst atrocities of the Balkan wars in the 1990s. The proceedings were highly dramatic and their outcome remained uncertain until the very end. The courtroom was packed with Cvjetan's fellow Scorpions, who looked like thugs but acted like national heroes, confident that they had the Serbian state and public on their side. The presiding judge was subjected to various forms of intimidation throughout the trial, including anonymous death threats. A local human rights group managed to convince several Albanian witnesses to come to Belgrade to testify, some of them children who had survived the massacre and subsequently relocated to the United Kingdom, and worked closely with the police to ensure protection for the key insider witness – a former member of the Scorpions, who provided a shocking account of the massacre.

On 17 March 2004, the defendant was convicted and sentenced to twenty years in prison. The decision was significant, not only as a step toward strengthening the rule of law in Serbia but also as a statement that challenged the accepted narratives of Serbian nationalism, which often portrayed the Kosovo campaign as an antiterrorist operation and emphasized war crimes committed on the Albanian side of the conflict. That same day, however, the local media were preoccupied

with another story and had little time to ponder the significance of the judgment. Rumors blaming Serbs for the drowning of two Albanian children in the Ibar River had sparked violent unrest across Kosovo. In the course of the next couple of days, large Albanian crowds attacked Serbs and other minorities in more than thirty locations in Kosovo, causing several deaths, extensive property destruction, and a wave of expulsions. The riots soon spread to the streets of Serbian cities; in one incident I witnessed, an angry mob of several hundred set fire to the historic Bajrakli Mosque in the old quarters of Belgrade.

These events were unfolding five years after the end of the war over Kosovo. At a time when the rule of law seemed to provide an answer to the excesses of nationalism, the resurgence of nationalist passions and ethnic violence posed the most significant challenge to law and order since the end of the war. Understanding such contradictory developments presented an intellectual puzzle and raised a set of questions that have preoccupied me ever since, prompting and guiding the investigation that informed this book. What is the relationship between nationalism and the rule of law? Are they mutually reinforcing or conflicting? What conditions may favor one outcome over another? Are there fundamental tensions that are inherent in their interrelationship? How are such tensions managed and negotiated in practice and could they be harnessed for any productive purposes? Answering these questions requires a broader framework, which emphasizes the "deliberative" character of legal processes and takes seriously the role of law as a vehicle for public debate.

THE LACUNA IN THE LITERATURE

The relationship between nationalism and the rule of law has been largely neglected by scholars despite the fact that separately, they have often captured public discourse and political imagination in recent decades and have emerged as critical concepts for the social sciences. Since the end of the Cold War, nationalism has been invoked to reconfigure the political map of large parts of the world and has become implicated in pressing global problems, from the resurgence of ethnic conflict to the growing pressures on citizenship in an era of intensified

migration and pervasive identity politics. At the same time, the rule of law has emerged as perhaps the only universally shared political ideal and a cornerstone of domestic and international policy in promoting peace, democracy, and development. The study of nationalism has developed into a well-established, multidisciplinary field, equipped with its own academic journals, international associations, and annual conventions. The rule of law literature has moved well beyond its traditional base in legal and political theory, reflecting the growing preoccupation of social scientists with rule of law issues and the emergence of an entire "industry" that seeks to promote, rebuild, and reform the rule of law around the world. And yet, a sustained examination of the relationship between nationalism and the rule of law has remained outside the scholarly lens. Comprehensive discussions of the history, theory, and politics of nationalism barely mention the rule of law, whereas similar explorations of the rule of law often completely ignore the semantics of nations and nationalism.[1] Thinking about possible explanations for the gap in the literature is an appropriate starting point for an investigation that seeks to address it.

One problem with the literature is the "methodological nationalism" that can be detected in much of the scholarship on the rule of law – the tendency to treat the nation-state as the natural unit of analysis and to assume that "nation" and "state" are in fact congruent. This tendency can be explained in part by the influence of a long tradition of the rule of law ideal that goes back to its classic origins in Greek and Roman thought, which has been concerned first and foremost with restraining state tyranny (Tamanaha 2004). The rule of law is preoccupied with the relationship between state and society to the extent that law imposes limits on the exercise of power by sovereigns and government officials, rather than with the relationship between cultural and political units. That such units are coextensive is assumed in accounts that emphasize the formal or procedural aspects of the rule of law but also in substantive conceptions, which often depend on the existence of a moral community to justify claims that the rule of law expresses certain moral and political principles inherent in the community. Nations

[1] See, for example, Smith (2001) and Tamanaha (2004). For a rare exception, see some of the essays in Fitzpatrick (1995).

are the main contenders for the role of such moral communities in the modern era, but they are also a source of moral pluralism, which nationalism both expresses and seeks to overcome. Thus, nations and nationalism potentially create as many problems for rule of law theory as they may be able to solve. Margaret Canovan (1996) argues that many political theorists tacitly assume an existing nation-state while rejecting nationhood on principle; theorists of the rule of law often presuppose an existing nation-state while avoiding the issues raised by nations and nationalism altogether.

Another challenge is the current division of labor in the literature on nationalism. As Anthony Smith (1998: 225) points out, "the study of nations and nationalism is rent with deep schisms." The field has been contested by modernist, ethno-symbolist, and critical approaches and theories of nationalism for several decades, which continue to animate much of the scholarly debate. Another schism, however, may be more important for grasping the lack of sustained examination of the relationship between nationalism and the rule of law in the literature: the distinction between analytical and normative approaches to nationalism. The tendency to segregate scholarly work by keeping norms and analysis separate in the study of nationalism discourages engagement with concepts like the rule of law, which is a political ideal and requires grappling with normative claims as well as social processes and practices.

The study of nationalism struggles to navigate the interface of norms and analysis and often conflates them in ways that cannot withstand critical scrutiny. This can be observed, for example, in debates over classification. The opposition between "civic" and "ethnic" nationalism is pervasive in the literature and has been rearticulated in a number of related typologies, such as "political" and "cultural" or "voluntarist" and "organicist" understandings of nationalism. An early version of the debate goes back to the 1882 lecture of Ernest Renan, who famously challenged the ethnolinguistic conception of nationhood: "A nation's existence is, if you will pardon the metaphor, a daily plebiscite, just as the individual's existence is a perpetual affirmation of life" (Renan 1990: 12). The opposition of civic and ethnic nationalism was developed by Hans Kohn (1944) and embedded in his account of Western and Eastern versions of modernity, taken up by

Anthony Smith (1986) in his discussion of "territorial" and "ethnic" conceptions of the nation, and later revived in the work of Michael Ignatieff (1994). And yet, as critics have pointed out, the civic-ethnic distinction is ridden with analytical and normative ambiguity. Rogers Brubaker (2004a), for example, notes that if "ethnic" is taken to denote "descent," ethnic nationalism would be defined out of existence, but if it denotes "culture," it would incorporate virtually all nationalisms. He argues that the distinction is overdrawn but also normatively loaded, and detects an attempt to legitimate certain (Western) nationalisms as liberal and inclusive while dismissing others as illiberal and exclusive.[2]

The normative aspects of nationalism are confronted head on by political theorists. Such accounts often strive to reconcile the claims of nationalism with the requirements of liberal democracy. Theorists of liberal nationalism reinterpret the relationship between culture and politics by aligning cultural communities horizontally in an overarching political framework (Tamir 1993), or positing an overarching identity that binds together culturally diverse groups in the polity (Miller 1995). Multiculturalists, on the other hand, point out that the "civic" nationalism of liberal states does not prevent them from privileging the culture of dominant majorities and diffusing it as a national culture. Some advocate supplementing liberal frameworks with group-specific rights and self-government for national minorities with a distinct "societal culture" (Kymlicka 1995), whereas others favor a "multiculturally constituted" culture that emerges from the pervasive encounters and interactions of different cultures in society (Parekh 2000). Such normative accounts, however, are always embedded in empirical analysis of the conditions that prevail in particular states and the dilemmas that confront their citizens. The liberal nationalism of David Miller (1995) reflects the circumstances of the contemporary United States, while the account of Yael Tamir (1993) is informed by the dilemmas faced by Israel; the multiculturalism of Will Kymlicka (1995) is preoccupied with Quebec and pulls in a different direction from Bhikhu Parekh's (2000) concerns with Britain.

All these approaches bear out the difficulties of managing the normative-analytical interface in the study of nations and nationalism, and

[2] See also the discussion of Kohn's original distinction in Calhoun (2007: 117–146).

suggest that there is no easy answer for resolving the underlying tensions. An inquiry into the relationship of nationalism and the rule of law inevitably encounters these challenges, perhaps even more so given the inherent normativity of the rule of law ideal itself. My approach is to acknowledge such challenges as much as possible without allowing them to stifle the investigation. Throughout the book, an effort is made to recognize the normativity of the issues at stake and to integrate it into the analysis. One way of doing this involves highlighting the role of nationalism and the rule of law in the legitimation of political order, and treating legitimacy as a critical concept that helps illuminate the complex interrelationship between nationalism and the rule of law.

NATIONALISM, LEGITIMACY, AND THE RULE OF LAW

Although the study of nationalism and the rule of law literature have not been engaged in a productive dialogue, there are interesting parallels in the way they regard the significance of their respective subjects of study. In one of the classic surveys of nationalism, Anthony Smith describes nationalism as the dominant principle of legitimation of the state and the international order in the second half of the twentieth century, and underscores the "near universal acceptance of 'nationalist' propositions as the sole grounds for the exercise of state power" (Smith 2001: 120). In his seminal study on the rule of law, Brian Tamanaha argues that the idea of adherence to the rule of law has universal appeal and the rule of law stands as "*the* preeminent legitimating political ideal in the world today" (Tamanaha 2004: 4; emphasis in the original). There is more in these assertions than a self-referential bias about the importance of one's own subject of study. By emphasizing the legitimating functions of nationalism and the rule of law, such claims draw attention to the importance of legitimacy as a central dynamic that needs to be examined in seeking to understand their interrelationship.

Investigating the interactions of nationalism and the rule of law through the prism of legitimacy requires some conceptual clarifications. My approach to nationalism is aligned with scholars who acknowledge that the multiplicity of nationalist ideologies, movements, and projects cannot be comprehended and done justice to in treating "nationalism"

as a single phenomenon, but nevertheless emphasize the significance of a common rhetoric that holds this multiplicity together in the "discourse of nationalism" (Calhoun 1997: 21–22; Özkirimli 2000: 228–230). All forms of nationalism share a certain way of seeing the world and constructing social reality, and make normative claims about the primacy of nationalist interests and values and the moral significance of the opposition between "us" and "them" through which nations work as categories of practice. Seen in this way, nationalism represents a form of discourse premised on a particular theory of legitimation of state power, one that "regards the nation as the only source of legitimacy" (Özkirimli 2000: 230).

There is also no one "rule of law" that can be authoritatively defined from the outset and employed throughout the inquiry. Theorists have put forward a range of understandings that invoke two core meanings of the rule of law ideal: formal conceptions that are concerned with the sources and form of legality, and substantive conceptions that are also interested in the content of law (Tamanaha 2004: 91–92; Craig 1997). Formal theories of the rule of law start from the proposition that laws must be general, prospective, clear, and stable, and elaborate additional requirements such as access to justice and restraints on discretion (Raz 1979), congruence between official action and declared rule (Fuller 1969), avoidance of arbitrary distinctions between groups of citizens (Hayek 1960), and adherence to democratic procedures in determining the content of law (Habermas 1996). Substantive theories of the rule of law build on formal legality but go further by specifying requirements also for the content of law, such as the primacy of human rights (Dworkin 1978) and equal citizenship (Allan 2001). The two branches of the rule of law represent a continuum, as formal versions have substantive implications whereas substantive versions incorporate the formal ones. More importantly for the purposes of this book, all these formulations can be reinterpreted as principles of political legitimation. The dominant conceptions of the rule of law elaborate a set of attributes that can also be understood as principles underpinning the legitimacy of political order, some of them concerned with legal form and procedure, others with substantive issues such as individual rights. Approached in this way, the rule of law designates a spectrum of understandings, all of which are closely bound up with legitimacy.

As social phenomena and sources of political legitimacy, nationalism and the rule of law interact in complex and often contradictory ways. On the one hand, nationalism and the rule of law coexist and reinforce each other, and may be seen as not only compatible but mutually constitutive. The rise and spread of nationalism since the nineteenth century has often unfolded in parallel with the strengthening of the rule of law in the modern state, as nations have furnished structures in which the rule of law ideal can take root. The integrative and legitimating work done by nations and nationalism can serve as a catalyst for the development of the rule of law by encouraging the emergence of unifying solidarities, promoting ideas of self-government, and facilitating the extension of individual rights and citizenship. These dynamics are implicit in many of the modernist and ethno-symbolist "grand narratives" in the study of nationalism, which often emphasize factors such as the extension of citizenship rights (e.g., Breuilly 1993; Smith 1991). The nation-state, which binds together cultural and political units, has so far provided the most favorable framework for advancing the rule of law ideal. As Craig Calhoun puts it, the nation-state is "basic to the rule of law, not only because most law remains a domestic matter of nation-states but because most international law is literally that: structured by agreements among nation-states" (Calhoun 2007: 4).

On the other hand, the relationship between nationalism and the rule of law is marked by deep tensions and contradictions: nationalism often appears incompatible with the rule of law and signals its retreat. Nations work as structures of integration but also of exclusion: their bounded character cannot be easily reconciled with the notion of equality before the law. The rule of law is called into question whenever national loyalties and fidelity to law come into conflict, whether law itself is employed or subverted in the pursuit of particular nationalist projects and purposes. Some of the challenges for the rule of law may arise from subtle forms of discrimination and bias in the everyday administration of justice; others are more serious and may amount to maintaining regimes of differentiated citizenship. At the extreme, the pursuit of the nationalist principle precipitates the breakdown of the rule of law: as Ernest Gellner has pointed out, cultural and political boundaries can only be made to coincide if the national group "either kills, expels, or assimilates all non-nationals" (Gellner 1983: 2).

The tensions between nationalism and the rule of law are particularly acute when the state itself is harnessed by nationalists, thus limiting the ability of law and legal institutions to absorb and mediate social conflict and to underwrite the legitimacy of the existing order. When states are challenged by nationalist movements, the outcome often hinges on the commitment of the state and its agents to uphold the principles of the rule of law and harness their legitimating power. In both scenarios, nationalism and the rule of law are associated with competing political agendas and sources of legitimacy.

At the current juncture, the tensions between nationalism and the rule of law have become more important in a variety of contexts. This could be explained in part by contemporary developments affecting the character of nationalism and of the rule of law that shape their evolving relationship. Some of these changes are internal to nationalism and reflect its remarkable success in organizing the modern polity. The forces that have been driving the alignment of cultural and political units in the nation-state are also working to pull them apart. Anthony Smith (1995) points out that the national state is far from retreating, despite global trends that may be limiting its power in economic and military matters.[3] In fact, the penetration of the state in the cultural and social domains has been further augmented, for example in public education and cultural policy. Smith identifies an "internal" crisis of legitimacy of the nation-state that derives precisely from this unprecedented penetration in the cultural field, which prompts recent immigrants and long-standing minorities to call into question the national articulation of identity and culture. Their claims for cultural expression and autonomy, in turn, elicit a backlash, because they are seen as threatening the nation: "And these perceptions are grounded in a social transformation wrought by the very expansion and penetration of the national state, and by its project of national acculturation and homogenization" (Smith 1995: 95). Smith believes that the contradictions will be eventually resolved as new nation-states are constructed

[3] The main thrust of the debate over nationalism and globalization concerns the questions of whether or not nationalism is on the retreat, and how it is transformed and reconstructed, in a global era. See Hobsbawm (1990); Smith (1995); Kaldor (2004); Calhoun (2007).

and the nationalist principle is reaffirmed. A more likely outcome, however, is the entrenchment of such contradictions in existing states, continuously reproducing the conditions that engender crises of legitimacy and disrupt political and legal orders.

Another important issue concerns the changing role of war in shaping collective identities. Nation-states were often forged in the experience of war with other states and colonial powers, and nations depended on contests with external enemies for their mythologies, political claims, and emotive power. Waging such wars often involved bargains between states and citizens that encouraged the development of the rule of law domestically, for example through the extension of citizenship rights in exchange for conscription and taxation. In this sense, nationalism and the rule of law were mutually constitutive. The dramatic decline of interstate war in recent decades has important implications for the ability of states to shape collective identities, which are yet to be fully understood. In most contemporary wars, nationalism is mobilized against internal "others" and disrupts the rule of law; in fact, it both encourages and feeds off the spread of lawlessness and insecurity. Zygmunt Bauman notes that such wars give rise to group solidarity based on active complicity in atrocities, as communities "need enemies that threaten their extinction and enemies to be collectively persecuted, tortured and mutilated, in order to make every member of the community into an accessory" (Bauman 2001: 22). The violence produces communities of accomplices where extremist political ideologies and projects can thrive, and rebuilding the rule of law in the aftermath of war becomes a daunting task.

Similar dynamics can be observed in the West, where the discourse of nationalism is more likely today to take the form of xenophobia than jingoism, and the favorite targets of nationalists are immigration and Islam. But whether it is driven by far-right political movements in established democracies or campaigns for ethnic cleansing in collapsing states, this "new nationalism" (Delanty 2000; Kaldor 2004) presents serious challenges for the rule of law in every society where it takes root. It promotes social exclusion and hinders integration, eroding the legitimacy of political and legal orders without being able to provide any viable alternatives. As Gerard Delanty (2000: 96) notes, "Whatever