

## Haunted by the Volksgeist: Nationality as a legal principle

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*Ladies and gentlemen,*

It is a privilege and a pleasure to give this lecture named after Peter Kooijmans, Minister of State and long-time Professor of International Law at this University. The privilege is twofold: it links my name to this admirable man, Minister of Foreign Affairs and UN rapporteur, judge at the European Court of Justice; and at the same time it places me in the highly respectable company of others who have given this lecture before me. The pleasure, too, is twofold: to begin with the invitation recalled my own brief but highly memorable acquaintance with Kooijmans, in 1988. I had just started working in my native country, to which I had returned, almost as a foreigner, after fifteen years of studying and living abroad, and I met Kooijmans when he presented me with the Mr J.C. Baakprijjs. I recall how impressed I was on that occasion (brief though it was) with his personality, a fine combination of integrity, erudition and genuine friendliness. Finally, the pleasure is that this invitation allows me to pursue the possibility of something which I consider an urgent necessity for academic scholarship at the present time: a sustained interdisciplinary dialogue between scholars in the humanities and in the legal and social sciences about the discourse of xenophobia and its political and social impact. So for both these privileges and these pleasures I thank those who have so kindly invited me.<sup>1</sup>

*National identity as a problem*

The rhetoric of national identity has in recent years come to dominate public affairs. The months and weeks prior to this lecture have witnessed the Brexit referendum, with its fraught run-up and its muddled aftermath; the equally fraught and complex Burkini issue on the French beaches; the School Lecture where Minister Schippers, straying far from her remit of Public Health Care, indulged in an ethnically-inflected bout of cultural moralizing, followed by a set of profiles in *NRC Handelsblad* (under the title “Het nieuwe nationalisme”) about Dutch “normen en waarden” as they affected various national politicians. More generally, there is the heedless and proliferating unilateralism of states like China, Russia, Turkey, Israel and Hungary, generally linked to populist, flag-waving leadership figures in

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<sup>1</sup> This being the transcript of a public lecture, held on 27 September 2016 at the Vrije Universiteit Amsterdam, the text is much more sparing in its use of source references than would normally be required, and must in many instances plead with the reader for an *experto crede*. Quotations from major international treaties are referred to merely by article/paragraph number, the treaties themselves by their placename moniker rather than their official heading. Many of the events in public affairs referred to are (or were, at the moment of delivery) a matter of public knowledge or even notoriety, and retrievable by applying an online search. Many of the insights and theoretical references regarding the study of nationalism and national stereotypes can be found in a more thorough presentation in Joep Leerssen, *Nationalisme* (Amsterdam University Press, 2015) and Manfred Beller & Joep Leerssen (eds.), *Imagology: The Cultural Construction and Literary Representation of National Characters : a Critical Survey* (Amsterdam: Rodopi, 2007).

the Berlusconi tradition.<sup>2</sup> From the tragic to the ridiculous, such cases confront us at every turn and they present dangerously attractive topics of conversation. Often that conversation becomes so heated that it is not about the problem, it is part of the problem, part of a self-stoking obsession that seeks to come to terms with national obsession – whatever we mean by that term.

In what follows I want to offer some clarifications on the notion of national identity, that thing that fires our passions and clouds our understanding, whose meaning is totally confused while its intoxicating effects seem to be everywhere. Of all the concepts that can mobilize and antagonize social groups, those of “identity” and “nation” are perhaps the vaguest and most fluid, and part of the problem seems to me that the identity wars we see raging about us, from “minder Marokkanen” to “make America great again”, and from Brexit to burkinis, are a new manifestation of virulent nationalism. I assert this on the grounds that [a] this type of populism structurally translates anti-elite sentiments and popular disaffection into xenophobia, while in turn using xenophobia to appeal to the politically disaffected part of the electorate; and that [b] the combination of unilateralism and xenophobia is recognized by the leaders of populist movements in different countries as a shared political agenda, as is manifested by the mutual support-and-information exchanges between the likes of Wilders, Le Pen, Farage and Trump: beyond their purely domestic, country-specific crusades against the vested political elite and the erosion of country’s sovereignty and cultural identity, these leaders obviously recognize in each other’s movements a common, trans-domestic set of goals and political ideals.

**Populism (or, to identify its contemporary manifestation more specifically: ethno-populism) is, I conclude, not just an affect, a flare-up of popular discontent or anti-cosmopolitanism, but a specific political programme, defined [1] by the combination of anti-elitism, charismatic media-oriented leadership, state unilateralism and xenophobia, and [2] by a rhetoric which constantly translates anti-elitism into xenophobia and vice versa.<sup>3</sup>**

As such this political programme constitutes the latest manifestation of that changeable and protean ideology, nationalism. That we have until now struggled to identify it as such was partly a result of the novelty of the phenomenon, partly of the fact that it invoked sentiments and phrases which were so commonplace that their political, ideological nature was not immediately recognized for what it was. I am thinking in particular of the fetish of “national identity”, which in the past quarter-century has come to be such a widespread notion as to be uncontentious and a part of the normalcy of things. It even found its way into European law as a principle demanding respect and capable of guiding policy.

In our *trias politica*, the judiciary has an important (and not uncontentious) corrective function in the public frictions engendered by identity politics. But does the law provide a neutral, antiseptic, passion-free ambience from where we can coolly and even-handedly weigh matters of national antagonism? I am afraid not. Notions of national identity have already crept into legal practice, and our first effort must

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<sup>2</sup> Cf. John Foot, “We’ve seen Donald Trump before – His name was Silvio Berlusconi”, *The Guardian*, Thursday 20 October 2016. Indeed the type can be traced back to the Athenian demagogue Cleon (+422 BC) and the ochlocracy he unleashed against Pericles. Cf Bruce Thornton, “The Demagogues of 2016”, *Defining Ideas*, 28 January 2016 (Hoover Institution, <http://www.hoover.org/research/demagogues-2016>)

<sup>3</sup> For a similar typology cf. Tjitske Akkerman, Sarah L. de Lange & Matthijs Rooduijn (eds.), *Radical Right-Wing Populist Parties in Western Europe: Into the Mainstream?* (London: Routledge, 2016).

therefore be to re-calibrate the toolkit and see to which extent the law itself has become mired in the ideological assumptions of national thought.

### *Maastricht (1992) to Lisbon (2007)*

Elke Cloots, in her fine book *National Identity in EU Law* (Oxford University Press, 2015) has traced the usage of that concept, not only in national law texts but also at the European level, hinging around article 4.2 of the Lisbon Treaty (2007), which stipulates that “*The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government*”. Ironically, that treaty was initially rejected in an Irish referendum because it was apparently felt to threaten, rather than to “respect”, the Irish national identity... which is a first indication of the contradictions and non-sequiturs that riddle this field. As Cloots points out, the European Court of Justice has with increasing frequency invoked the principle of national identity in its rulings, without, as she wryly puts it, “hav[ing] a principled and coherent view of the role national identity ought to play in EU law”. It could hardly be otherwise; given the fuzzy and contradictory nature of the very concept, a principled and coherent view on its role seems an impossibility from the outset. It’s like trying to catch a cloud of smoke in a butterfly net. And while some scholars may take comfort in the thought that the wisdom of the Court will eventually fix, in successive rulings, a sensible meaning for what is at first a fluid concept, my familiarity with the *Begriffsgeschichte* of the terms in question makes me far less optimistic.

How did those words get into the Lisbon Treaty in the first place? Cloots identifies a political pressure which manifested itself first of all at the national level, and often found its way into legal practice at national level before trickling through into the European treaties. This process, I should add, did not start with the Lisbon Treaty; one can trace it back to the Treaty of Maastricht (1992), where, however, the idea of national identity presents itself euphemistically.

I am referring to the Maastricht Treaty’s cultural paragraph (article 128). Its section 1 stipulates that *The Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore*. Section 4 reiterates that “*The Community shall take cultural aspects into account in its action under other provisions of this Treaty*” – a proviso sharpened in the 1997 Treaty of Amsterdam to read: “*The Community shall take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures*”. The Lisbon Treaty incorporated this verbatim as its article 167 (167.1 and 167.4, respectively) .

In my view, the Lisbon Treaty’s political article 4.2 is in fact an extension of the similarly-worded cultural paragraphs that it had inherited from its Maastricht/Amsterdam predecessors; or, to phrase this the other way around: the 1992 Maastricht article 128 (renumbered 167 in Lisbon) prepared the ground for the 2007 Lisbon article 4.2. Both article 4.2 and 167 acknowledge nationality as a meaningful and legitimate subdivision of the European Union which the Union commits itself to “respect”. In the case of culture, that nationality principle is called “diversity”; in its political/constitutional aspect, it is called

“identity”, but that really amount to the same thing, much as a house can be defined either by its walls or by its rooms.<sup>4</sup> The Lisbon Treaty presents a political hardening of a case already made in a more fuzzy way in the previous decade: The initial provisions were about soft culture, which is just as enigmatic and undefined a term as “nation” or “identity”. Legal scholars who started to inquire about the meaning of “national identities” would have done well to have interrogated, well before the Lisbon Treaty, the meaning of “cultures” and “diversity”.

*“Cultural diversity” into “national identity”: the word-cloud and logic of particularism*

Culture (and its relationship with national identities) has for a long time been an important concern in the humanities (and in some social sciences such as anthropology). With scholars like Jurij Lotman and Claude Lévi-Strauss in mind we can define culture as **those conventions and behavioural aspects of human life that are choices (rather than natural or biological necessities), and that are diffused across communities and transmitted from one generation to another by social means, that is to say, by means of communication and education.**

**The notion of culture is by definition linked to that of diversity**, in that people do things differently in different societies, in different places, and in different historical periods. While the *natural*, biological process of ingesting our food and drink by way of swallowing has remained constant in all societies and centuries, the *cultural* aspects have been nothing if not diverse: how we cook or prepare our food or beverages, codes of table manners, how to prepare and consume alcoholic drinks, etcetera. Whenever we move from the sphere of nature into that of culture, universal anthropological constants turn into relative cultural variables: different languages, different eating habits, different styles of music, clothing, dancing, sports, or celebrating anniversaries. On top of the Maastricht/Amsterdam/Lisbon Treaties acknowledging this fact and placing it outside the remit of European unification, the Lisbon Treaty overlays this soft anthropological notion of culture and diversity with the hard-edged notion of state governance, and instead of seeing Europe as a mishmash of diversity now presents it as a jig-saw-puzzle of distinct identities. But both cases, cultural diversity and national identity, are exempted from the European process of ever closer union, and singled out as something which Europe should “respect”, i.e. keep its hands off. I shall return to the blithe, insouciant use of that slippery term “respect” later.

Words like identity, culture and nation circulate in the same semantic field: it is impossible to use any of these terms without explaining it sooner or later in terms of the other two. The nation’s identity is expressed in its culture. Cultural identity is what makes a nation, much as sovereignty, tax-raising

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<sup>4</sup> Europe can be seen either as a jigsaw puzzle of countries divided by borders, or as a crisscrossing mesh of borders which between them outline countries; a system of identities of a system of diversity. The two concepts boil down to much the same thing: the identity of each nation, when viewed in the aggregate, adds up to the diversity between nations. Note, however, that diversity also works at the intra-national (e.g. regional, ethnic, confessional) level, while the Lisbon Treaty’s political invocation (in art. 4.2) of the national identities of the member states allows for no such intra-national differentiation: diversity turns out to exist between nation-states rather than within nation-states, and the plurality of national identities emphasizes the implied unitary nature of each individual entity.

powers, and a monopoly on legitimate violence make a state. The nation's culture is what establishes its identity. Given the extreme semantic overlap between these operative terms, I think it would be wrong to treat article 4.2 in the Lisbon Treaty without placing it in the context of its cultural paragraph and its forerunners in the Maastricht and Amsterdam treaties. Besides the semantic family likeness and osmosis in the phraseology I have two additional reasons for taking this view. The first is that there is an invariable historical logic for national thought to revolve initially around "soft" matters of cultural identity and diversity, and then, subsequently, to develop the specific, "hard" social and political implications of that cultural realization.

The Czech historian Miroslav Hroch has identified, at the macro-level, three phases of national movements that accumulate in a process of intensification: initially (phase A) one of cultural consciousness-raising and articulating one's separate identity, then (phase B) one of social demands, and possibly, in a final stage of intensification, a phase C of separatism. Culture comes first: the Flemish movement began with a spelling debate and with Hendrik Conscience's novel *De Leeuw van Vlaenderen*; the Estonian one with the collecting of folktales and the forming of choirs. Culture is not the cutting edge, but the fuzzy start, of national self-vindications; and the gathering doubts over the European integration project seem to have followed the same logic, from an acknowledgement of cultural diversity in 1992 to Britain triggering article 50 in 2017.

That logic is also supported by a closer scrutiny of how the cultural paragraph ended up in the Maastricht Treaty in the first place, and what its afterlife was after 1992. It was, in fact, a Dutch government initiative. Its proposed inclusion was announced by Minister d'Ancona in the run-up to the Maastricht Treaty, for which the Dutch government acted as host; and the government's decision to do so followed months of an intense public debate in the Dutch media, with participants like Maarten van Mourik, S.W. Couwenbergh, and other public commentators and action groups, who felt that the proposed treaty, with its prospect of ever closer union, threatened the country's "national identity". That idea of "national identity" could be used variously to denote either the constitutional sovereignty of the Netherlands or else the cultural identity of the Dutch nation. In the debate between 1989, the end of communism, and 1992, the signing of the Maastricht Treaty – a debate that ultimately pressurized the Dutch government towards inserting a cultural paragraph – cultural diversity and national identity or sovereignty were already interchangeable concepts.

The inclusion of cultural or national paragraphs in these successive Treaties seems to have **fed** euroscepticism rather than to have laid it to rest. I have already referred to the irony that the Lisbon Treaty, which went out of its way to show "respect" for both cultural diversity and national identities, was rejected in a referendum by the voters of Ireland because it was felt to threaten Ireland's national identity. The Dutch government, which had tried to appease emerging Dutch euroscepticism with a cultural paragraph, found that the electorate in 2005 rejected its request to accept a European constitution, much as David Cameron, after having posed for years as the defender of British interests in a hostile Europe, found he had become unconvincing in 2016 as the leader of an anti-Brexit campaign. There is a moral here: the sensibilities of identity politics are magnified rather than assuaged by humouring them (which is why recent commentators are describing such political affects in terms of "hysteria" or "fetish", i.e. emotional states without a direct or sensible rapport with, and in strident

excess of, the factual nature of their causes). Feeding such affects by treating them as if they were legitimate concerns<sup>5</sup> will legitimize the affect and encourage its ever more strident assertion. Political leaders should beware of trying to use identity politics for their own ends and what is known in English as “riding the tiger”: the tiger will eat them. The instrument is too unruly, will grow out of control, and will turn against those who thought they could wield it. The growth of blind, fanatical chauvinism to the right of the American Republican Party, the British Conservative Party or the Dutch VVD-to-PvdA middle ground, has been made possible by mainstream politicians thinking they could harness these neo-nationalist sentiments for their own party-political ends. In each case, they unleashed forces they found themselves unable to control. And in some cases (Holland, Flanders and Britain come to mind) the eurosceptic discourse that emerged around 1992 has become overlaid with a second, subsequent layer of anti-cosmopolitanism: that of anti-immigrant xenophobia, often disguising itself as a critique of Islam but in reality targeting the believers rather than their belief, and foregrounding, not their theology, but their ethnic descent. Significantly, Geert Wilders, who presents his programme as anti-Islamic, calls, not for “minder Moslims”, but for “minder Marokkanen”, and speaks of “Marokkanenproblematiek” rather than “Moslimproblematiek”. Demonstrably, the core of his xenophobia targets an ethnic group rather than a belief community; it is racial rather than denominational, and I see no grounds on which the word racism, if it has any common sense at all, could be withheld from PVV politics.<sup>6</sup>

So how did we get from Hedy d’Ancona in 1991 to Geert Wilders in 2016? The intermediary steps, where cultural diversity morphed into national identity and where the threat to the Dutch identity turned out to come, not just from the European union, but from also dark-skinned immigrants, can be traced gradually but with unmistakably directionality over the quarter-century: from Paul Scheffer’s essay *Het multiculturele drama*, which appeared in 2000, to VVD minister Rita Verdonk launching her deportation policy in 2003, and the Dutch electorate rejecting the European constitution in 2005 partly over whipped-up apprehensions concerning a possible Turkish accession. And to prove that culture remained a powerful ingredient in this new nationalism, Pim Fortuyn was elected the Greatest Netherlander of All Times in an embarrassing 2004 television extravaganza, Jan Marijnissen and Maxime Verhagen jointly proposed their “national historical museum” in 2006, and in 2015 the movie *Michiel De Ruyter*, equally toe-curling for its clumsy anachronisms as for its bombastic Hooray Patriotism, surfed the international vogue for epic-national movie blockbusters. I cannot help but see *Michiel de Ruyter* as the monstrous harvest of the pious ideal repeatedly expressed in the European Treaties: to contribute to *the flowering of the cultures of the Member States*.

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<sup>5</sup> Which they are not. The legitimacy of citizens voicing concerns is a given under the right to free speech; but acknowledging the legitimacy of voicing concerns should not be confused with acknowledging the legitimacy of the concerns themselves. Acknowledging someone’s right to say foolish things should not mean that we should therefore take him seriously.

<sup>6</sup> An analogous case involves the recent (2015-26) court case between the ethnopopulist politician Hilbrand Nawijn and the socialist politician Lennart Feijen, who called Nawijn a racist because of comments concerning the right to Islamic-religious schooling. Nawijn felt that this was libellous (*smaad en belediging*), and that his critique of Islamic schooling was permissible under Dutch law; after having initially lost his case he won it in appeal before the The Hague *gerechtshof*. Feijen commented on the website [joop.nl](http://joop.nl) Nawijn used religion as a proxy term for race, to label a group of inhabitants which in reality was identified as such by their ethnic descent, and on that basis to deny them equality before the law.

*A specimen analysis*

To clarify my point I offer a quotation from *Michiel de Ruyter*, transcribed and translated by me from the movie as available online on Netflix.<sup>7</sup> It is the speech with which Johan De Witt accepts his appointment as Council Pensionary of the Estates of Holland, amidst factional rivalry between orangists and republicans.

*[De Witt, addressing the council]* I understand your concerns. Indeed, I believe no-one in this land understands you better than I.

*[Rises from the benches, takes the centre floor.]*

My father was imprisoned once in Loevenstein Castle because he could not bring himself to agree with the Orangist faction. That is how I learned what it is like to live in a country where one is not free to hold one's own convictions. Would you want to live in such a land? Not I; and I think none of you would. So let me ask you a question. We live in a country of traders.

<i>Sailing ship on open sea; spices on market stand; a sack with the East India Company monogram is carried to an office; barrels and produce are stored in a warehouse; a sloop with a large Dutch tricolour rows alongside a ship.</i>	We have a fleet of 20.000 ships sailing the world's oceans to do business everywhere. And in business we all cooperate, as Netherlanders. To strike a good bargain and to support each other in case of need. And what do you think?
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*[De Witt in the council hall]* Has that worked out for us, or hasn't it? Yes it has. I see that some delegates hardly fit into their benches.

*[Laughter, some stout delegates scoff good-humouredly.]*

<i>Street scenes of anti-republican or anti-Orangist pamphlets being nailed up to great popular interest. Disagreements, scuffle.</i>	And so I ask you: When you do business in the East or West Indies, <sup>8</sup> do you then trade as a republican or as an Orangist? No.
<i>English naval officers observing ship movements through a telescope; English ship firing cannons.</i>	And why do you think the English blockade our trade routes and try to stifle our trade - is that because you are Orangists or republicans? No.

*[De Witt in the council hall]* The English want to wage war with us because we are Netherlanders. Free Netherlanders.

*[Delegates tap their benches in approval]*

For in the eyes of the great monarchies our little land is too rich, too successful and too free. Because on top of all we are a republic,

<i>Coach and horses riding up to a city hall; people moving around in public square; family in horse and cart riding away from a windmill (going to church?)</i>	in which each is free to live as they like. It is a land where we all decide for ourselves how we want to worship God,
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*[De Witt in the council hall]* and where no single leader is more important than the country itself.

<i>Servile menial bowing before enthroned person in regal hall; bewigged aristocratic council studying maps.</i>	The English begrudge us that liberty. Our liberty scares them.
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<sup>7</sup> The script was written by Lars Boom and Alex van Galen, who received the *Gouden Pen* (an award for the screenplay of a film drawing more than 100,000 viewers) at the Netherlands Film Festival, 2015.

<sup>8</sup> I note in passing this euphemistic and neoliberal description of Dutch colonialism as *zakendoen in Oost en West*.

[De Witt in the council hall] Because we are prepared to die for that liberty. That's it.

[Delegates thump their benches in emphatic approval. Music sets in softly.] Because we paid for that liberty with our own blood. That's why. And I ask you: has not each one of you lost a relative against the Spaniards or the English?

[Several delegates nod pensively] And was that republican blood or Orangist blood? No. It was Netherlandic blood.

[As delegates are thumping their bench tops in serious, earnest approval:] It is our blood. This is our land.

<i>Growing plants in the wind. Windmills silhouetted against the sky. People mending fishing nets on a beach. Scenes of rope-making, carpentry, shipbuilding against swelling music. Eight men rowing a sloop seen from above. The Dutch tricolor waving on a tall ship, outlined against the sky.</i>	A land that we ourselves have wrested from the sea. A land where we earn our own happiness by working for it. In the villages, in the towns, in the ports, on the land.
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[De Witt in the council hall] We can only protect our freedom if we are prepared to fight also for the freedom of the others. That,

[Delegates listening attentively] That is the tie that unites the seven arrows in the grip of the Netherlandic Lion, gentlemen.

[Flag of the Estates General, the Dutch Lion rampant holding a clutch of arrows, waving against the sky]

That is the tie.

[Approving thumps. De Witt receives his rod of office and again takes the floor.]

Your freedom is my freedom; and that freedom I will defend to my last breath.

[Orangist delegate leads a standing ovation, shouting "Hulde!"; other delegates rise to give the standing ovation and shout "Hulde!"; only a single exception is more reserved. De Witt bows.]

The identity discourse of De Witt's speech and the imagery and music that rhetorically amplify his words, give a good example of how different political affects and ideologemes emerge jointly from a shared word-cloud. The internal division between Orangists and Republicans needs to be transcended. The higher unity in which the two should cooperate is that of being *Nederlanders*, and the benefit of this cooperation is liberty, or freedom – which is used ambiguously in a double meaning: internally, as freedom of conscience and political tolerance, and externally, to maintain the country's independence vis-à-vis external monarchical enemies, in particular England. Internal antagonism is thus replaced by an external enemy-figure.

In addition, the shared ground between Netherlanders is characterological, *moral* in the sense that it derives from their mores: they are by nature traders, *kooplui*, who by their nature need cooperation, and their vindication of freedom is therefore a national characteristic of the Dutch nation as a whole, as is their industriousness. These moral characteristics are illustrated by historical references, as a shared memory or heritage, by invoking the sacrifices made by each family in the fight for freedom and the struggle against the sea.

The oratory reaches a climax of pathos in which the notion of *blood* is brought in, as something symbolical (shed in the case of freedom) and a physical bond between all men sitting in the hall. Blood



and soil are then linked in two consecutive sentences, while the music swells and the imagery intercalates the notions of nation and state: scenes from everyday life are dovetailed with heraldic symbols and flags. The climax itself is the acclamation of a charismatic strong leader, who raises the hormones of the overweight burghers, now roaring, thumping their benches and channelling their inner machos, by passionately declaring a willingness to do battle and if need be to die.

All these features are characteristic of the discourse of nationalism as encountered also in the heyday of that ideology between 1840 and 1950. "Nationalism" may seem a heavy-handed characterization for what is, after all, a mere popcorn movie, aiming to entertain the general public with a generic repertoire of historical heroics.<sup>9</sup> Indeed, the De Witt speech, with its manipulative use of pathos music on the soundtrack, flag-waving images and blood-and-soil rhetoric, its way of morphing the need for freedom of conscience and social cohesion into the need to fight foreign enemies under a charismatic leader, is merely a hidden cargo in the larger framework of the movie. Few viewers will, after seeing the movie, recollect it as such, and fewer still will have noted its rhetorical trickery. It is not part of the action, but sets the scene for the actual narrative, is part of its flavour like sugar in tomato ketchup, and constitutes a message that is hidden in the background.

But that is how nationalism has often been at work in post-1945 Western Europe: as what Michael Billig in his 1995 book has termed *Banal nationalism* – that is to say: a subliminal "hidden persuader" tucked away in the margins of a larger story, something which is operative while escaping notice. Curiously, De Witt's hard-core nationalistic propaganda speech (mid-way between Charles De Gaulle in 1940, George W. Bush in 2003 and Geert Wilders now) is unobtrusively tucked away in the clichés of banal consumer culture.

The De Witt speech is a digest of nationalist pieties in general currency, anachronistically projected back into the situation of the 1650s. And that anachronism, too, is a structural feature of how nationalism works. By presenting present-day populist nationalism as the sort of thing that ensured the survival of the United Provinces in the 1650s and '60s, it also, falsely, attempts to glorify its own populist nationalism as being the direct continuation and sole legitimate successor of De Witt and De Ruyter. In all these respects, then, in its deliberate choice of words and images and in its automatic, generic, conventional qualities, this fragment from *Michiel de Ruyter* illustrates how tightly notions like history, character, mentality, identity and freedom are intertwined in the word cloud of nationalism.

#### *The word-cloud and the law: Trying to get a focus*

Words like "national" and "identity" come at us, then, in fuzzy shape, as part of a cloud, and it is as part of a word-cloud, not as part of hard-chiseled treaty articles or legal judgements that we must get a focus on them.

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<sup>9</sup> The IMDB website characterizes the film with the plot keywords "bare breasts, naval battle, naval officer, cannon, epic".

*Identity* is a much over-used word; but in common parlance, such as it is used by politicians and journalists, refers to the uniqueness, non-interchangeability and recognizability of a given thing (person or group). “My identity” refers to the fact that I am different from everybody else; technically, as a legal personality and social agent, with my own unique BSN and DigiD log-in code (which may be vulnerable to “identity theft”), and morally, as the sum total of characteristics and preoccupations, values and attitudes, experiences and characteristics that define me and that I stand for (which may be vulnerable to “character assassination”). Each of my characteristics, to be sure, I can share with others: my gender, my age, my family background, my political preferences or my taste in music will also be encountered with other people; but my identity as an individual (tantamount to what may also be called my “individuality”) is defined by the uniqueness of the specific combination of characteristics. Group identity is much less complex and usually based on a single unifying trait, such as preferring Apple computers to Windows computers, or Ajax to Feyenoord, or suffering from a particular ailment, or owning a certain kind of dog or motorcycle.

Two things follow from this. One is that individuals are much more complex than any of the groups to which they can belong, and that group identity is invariably established by a process of simplification: by ignoring the things that make the group members different from each other.<sup>10</sup> Nationalist discourse, as we have seen, usually tries to preclude the group’s subdivisions, involves a call for internal unity, that is to say, to be strong together, despite internal differences. Often, indeed invariably, external enemies are set up to overrule internal differences, and it is by now well recognized that one of the weaknesses of the EU is that it lacks such external enemy figures.

The traits that constitute group identity are only meaningful if they are recognized as being so. One might divide humankind into groups that prefer either apricot jam or strawberry jam, but in practice that distinction has not been raised to any conscious or meaningful level, and does not motivate people to act upon it, or even, in extreme cases, to fight or die for it. There is a sliding scale as to which traits are considered meaningful, and which ones are trivial. And in that pecking order of the traits-recognized-as-meaningful, that shared nationality is among the most powerful. Its only serious competitors are religion, race, and, in some instances, gender; class is no longer the meaningful group mobilizer it once was.

Why is nationality such a super-powerful group-identifying characteristic, trumping most others? In my view, because it is ambivalent. On the one hand, nationality is linked to language, the very operating system with which we shape our communication and social interaction. If we define a nation as an intercommunicating group, then a common language shapes a nation, while language differences are thresholds between nations. People who speak the same language share a fundamental human condition and experience, as fundamental as gender or age. But unlike gender or age, nationality has a second underlying implication, and that is its link to the state, the most powerful institution on earth.

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<sup>10</sup> Logically, this also implies that groups can be sub-divided, whereas the *in*-dividual, as the word itself tells us, is non-divided, a single atomistic integer. It also means that the validity of general observations concerning groups-at-large is proportionate to the specificity of their unifying characteristics, and inversely proportionate to their numerical size. While it is possible to say meaningful (non-trivial and verifiably valid) things about “20-30 year-old vegetarian musicians from Friesland”, it is much more difficult, if not impossible, to formulate meaningful generalizations about “Netherlanders”, “women” or (the extreme case) “people”.

The state exercises an ongoing gravitational force on public life through its all-pervasive institutions and powers, inculcates its dominance by its educational system and civic structures.

National identity is therefore, from the outset, linked to a mixed experience, one cultural and the other political, referring both to a linguistic and to a civic collectivity. The quoted segment from *Michiel de Ruyter* cross-cuts scenes from communal and familial everyday life with symbols of state, flags and heraldry. The nation-state is part national community (people, families, everyday life), part state organization (navy, parliament). That is the immense strength and also the confusing power of the notion of national identity: it brackets personal and public, culture/ethnicity and citizenship, and makes us forgetful of how distinct these two things in fact are.

This complex relation between ethno-cultural and civic nationality is at the root of many of the fraught debates that we see unfolding at present. In the French Republic, for instance, the sovereign people – a civic concept like no other – cannot be internally divided; this has led to a great intolerance on the part of the French state towards manifestations of cultural particularism: religious (the secularism of the French state is notorious) but also cultural. The French Republic has refused to sign the European Charter for regional and minority languages and cannot recognize Basque or Breton because its constitution insists that “the Republic’s language is French”. The Burkini ban imposed by some French mayors last summer follows from the same stance: civic-mindedness engendering single-mindedness, with a grotesque intolerance for cultural diversity within the French body politic.

Conversely, in many countries the notion of nationality seems to be, not so much a civic issue – a matter of taxes, passports and voting rights – as a cultural or indeed a moral one. Underneath the term “identity” we often see the alternative nomenclature of “traditions” or Dutch *normen en waarden*. Significantly, social cohesion in The Netherlands were felt to be served by the establishment of a National Historical Museum, mooted in 2006 in cross-party government consensus, locating nationality, not in the contemporary implications of citizenship, but in the shared culture of a “canon” of historical memories. (This cultural “canon” was also established in 2006 by a government-mandated commission.)

Very often, civic problems are discussed in ethnic terms. The recent furore over the delinquency of Zaandam “vloggers” was by default linked to their ethnicity – Turkish in this case. I doubt whether this ethnic profiling of delinquent behaviour is in fact helpful – let alone Prime Minister Rutte’s outburst that “they can get lost, go back to Turkey, beat it”. It might make just as much sense to see the group identity of the delinquents in question in terms of their gender and age group: as young-adult males, a demographic cohort notoriously prone to collective aggression and transgressive behaviour driven by peer pressure. Seen in that light, the delinquents of the Zaandam’s Long Hot Summer of 2016 – Turkish in this case – seem to form part of a cohort that also comprises ethnically Dutch vandals, such as certain supporters of large-city football clubs, or the protesters who (identifying themselves as “Feyenoord supporters”) with obscene chants notoriously intimidated and disrupted a hearing about a relief centre for asylum seekers in Steenbergen in October 2015. By rights, the Zaandam and Steenbergen delinquents ought to be facing similar sanctions under Dutch law, and deserve similar opprobrium from the media and in public opinion, regardless of ethnicity; indeed our constitution imposes this as a duty. Yet in the public debate, such is the strength of nationality as a group-defining trait delinquents from

ethnic minorities are identified by their ethnicity, while the ethnicity of delinquents from the autochthonous majority population goes unnoticed, and alternative traits, such as age/gender (raucous young-adult males in tightly-bonded group behaviour) are overlooked. This is a fundamental condition where legal judgement and public sentiment are structurally at cross-purposes.

### *Continuity, self-determination, and Savigny*

But Identity not only takes shape as a differentiation from Others, it is also the thing that provides solidity in changing circumstances. As the philosopher Paul Ricœur reminds us, the concept of identity has two components: besides the aspect of uniqueness or non-interchangeability there is the aspect of permanence, of self-sameness over time. One is synchronic, setting the subject off against the rest of the world; the other is diachronic, explaining why the Joep Leerssen of 12 June 2016 is the selfsame (“identical”) individual as the Joep Leerssen who was born on 12 June 1955. This diachronic meaning of identity is in fact the oldest and firmest one, originally used to express the fact that the evening star and the morning star are in fact identical – both are the planet Venus, but visible at different moments. Likewise it is important in legal cases to establish the identity of exhibits as displayed to the court with the objects found on the crime scene (meaning that a reliable paper trail of documentation has to establish the impossibility that the original object had at some point been replaced by another). In the case of fugitive war criminals living under an assumed “identity”, it is of paramount importance to establish the identity between the present-day suspect and the wartime criminal. In all these cases, identity establishes “permanence over time”. So too in the case of corporate relations, even states. And it is here that we can trace the operative presence of the nationality principle in legal thought back to its real historical roots – well before the Maastricht Treaty.

The idea that *pacta sunt servanda* means that the contracting parties maintain their identity over time together with their obligations. We cannot simply abolish our past obligations by saying that we are now a different sort of country from what we used to be. That continuity principle was made abundantly clear in the text of the Versailles Peace Treaty, when the post-1918 government of Germany was held responsible for the belligerence of the defunct Empire of Wilhelm II. Indeed in the very wording of the treaty’s article VIII.1.231 we see the anomaly:

*The Allied and Associated Governments affirm and Germany accepts the responsibility of Germany and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies.*<sup>11</sup>

The same continuity principle means that post-1975 Vietnam – the country ruled by the North Vietnamese government after its victory over South Vietnam – had to accept the international debts incurred by South Vietnam, the enemy state just vanquished and abolished. Again, the continuity

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<sup>11</sup> With thanks to Wim Roobol, who first pointed this out to me. The treaty is here concluded, not between governments, but between governments on the one hand and a nation-at-large (“Germany”) on the other.

principle was invoked to support the right of the Baltic republics to secede from the USSR, arguing that the sovereignty they had enjoyed between 1920 and 1940 had been suspended but not abrogated by their inclusion into the USSR from 1940 until 1989. Indeed many declarations of independence, from the Irish one in 1916 onwards, invoke a primordial self-governing sovereignty that had been historically suppressed but was never fundamentally abolished. This is how the Irish declaration of independence of 1916 phrases it:

*We declare the right of the people of Ireland to the ownership of Ireland, and to the unfettered control of Irish destinies, to be sovereign and indefeasible. The long usurpation of that right by a foreign people and government has not extinguished the right, nor can it ever be extinguished except by the destruction of the Irish people.*

Such continuity principles recall the ancient-regime mystique of the king's two bodies, the principle that, although individual monarchs may die, the monarchy they represent does not die with them, but is immediately transferred to their legitimate heir; whence the well-known dictum "the king is dead, long live the king".

This continuity principle underwent a change in the Romantic nineteenth century, the time when the state was re-defined as a nation-state. In the Napoleonic states of Europe, the continuity principle was located, not so much in the monarch as in the identity of the nation – whatever that may mean. Regime changes necessitated this shift. This was most foregroundedly the case in France, which between 1800 and 1900 went from being a republic to becoming an Empire, then a restored absolute monarchy, then a constitutional monarchy, then a republic again, then an empire again, and then a republic again. Each new regime came to power in a violent regime change, like the Vietcong conquering Saigon. By the mid-century there was an obvious need to reconcile these successive, mutually antagonistic regimes, and during the 1830s and early 1840s king Louis-Philippe made this a prime concern of his monarchy. He created a National History Museum in the palace of Versailles (dedicated "A toutes les glories de la France"), and the plaza where Louis XVI had been decapitated was cleansed of its hateful, discordant memories and transformed into something called, significantly, the Place de la Concorde. Most significantly, the corpse of the dead emperor Napoleon was brought back from his place of exile, St. Helena, and when the coffin reached the king, Louis-Philippe declared that he received and saluted his imperial predecessor "*au nom de la France*". The use of "La France" as a transhistorical principle is remarkable, foreshadowing the use of "Germany" in the Versailles Treaty. It implies that although the regimes of the day may succeed each other in a dialectics of enmity, each represents a higher principle that unites them all, an abstract, timeless principle called "La France".

Louis-Philippe's gesture, to resolve the vicissitudes and contradictions of history into a higher, transcendent unity is the very definition of Romanticism; we usually link it with the philosophy of Hegel and the idea of sublation or *Aufhebung*. Old conflicts are, not forgotten, but *aufgehoben* – in the three meanings of that German term. They are lifted to a higher plane; they are abrogated and rendered powerless; and they are put in storage, as a memory of the past, an object in a museum display. And as the name of Hegel indicates, this strategy to establish a continuity and permanence amidst violent changes was a German invention and can be traced back to the Napoleonic period.

The abolition of the Holy Roman Empire of the German Nation immediately drove German intellectuals like Fichte to the conclusion that institutional continuity and indeed a German identity now rested, not with the powerless princes vanquished by Napoleon or by the Imperial institutions of the *Heiliges Römisches Reich deutscher Nation*, but with that underlying *Deutsche Nation* itself. Accordingly, Fichte held his famous *Reden an die Deutsche Nation* in Berlin in 1808, and Friedrich Ludwig Jahn in 1810 wrote his treatise with the title *Deutsches Volkstum* – a neologism at the time. Crucially, Fichte placed the diachronic notion of identity at the core of his definition of the nation. Like other political philosophers before him, he saw the nation in terms of a social contract, but defined this contract as a transgenerational one, linking parents and children, ancestors and posterity. What held the Nation together was not just the shared social and political conditions of the given situation, but also the inheritance passed on from generation to generation. This notion of passing on, in Latin, is *tradition*. And what is passed on in this tradition is, precisely, culture. Indeed culture is defined by the semiotician Jurij Lotman as the (non-biological, socially communicated) “memory of the community”. This is how community, memory, tradition and culture had to be linked into that word-cloud where they mutually define each other, so that whoever invokes one cannot help but also call into play, implicitly or explicitly, the others.

A very early theorist of this diachronic, culturally inherited identity had been the great legal scholar Friedrich Carl von Savigny, contemporary of Fichte and Hegel. He had been a legal scholar of the old school, pre-Napoleonic, for whom jurisprudence meant the knowledge of a doctrine assembled over a long period by a cumulative process of one judicial ruling following another – case law, in short. Historicism was second nature to him; assessing any legal problem meant tracing its historical roots and precedents. For this reason the new system imposed by Napoleon, which derived constitutions from natural rights, and under these constitutions devised statute-books for the regulation of criminal cases and civil conflicts, was repugnant to him. The law for him was not a recipe book for conflict management, but the long, accumulated expression of how a society had dealt with moral and social frictions and complexities. This also meant (and here he fell back on Montesquieu) that what was good law for one society might not necessarily be so for another. The law should follow the moral sensibilities and moral outlook of the society in which it had crystallized as part of its history and historical experiences. Legal systems were specific to nations, expressed their nations’ traditions-culture-memories-traditions, in short, were part of the nation’s identity – except that that modern word was not yet available in these years. Savigny coined a new word for his own use, he spoke of *Volksgeist*.

What Savigny synthesized as *Volksgeist*, and Jahn as *Volkstum*, stood at the centre of the new sense that nations have separate identities. The *Volksgeist* sets each nation apart from the others, and establishes its continuity across succeeding generations. And I submit that it is in this discursive and intellectual tradition that we have to locate our current notion of “national identity”. It brought a word-cloud together around notions of a mentality and essential character expressed at the successive stages of the nation’s history, uniting it despite its inner divisions and setting it off against its external enemies, and justifying its claim to sovereignty and freedom. In other words, the semantic mycelium that I tried to outline at the beginning of this lecture was created, woven from its various component parts, in the early decades of the 19<sup>th</sup> century to justify a new kind of state. This ideal was to lead national movements

across Europe against the ancient multi-ethnic empires, from Ireland, Iceland to Bulgaria and Finland. Many of the so-called nation-states that came into being in the century after Savigny emerged from such national movements, and the mycelium of their discourse was in fact elevated into a principle in international law when President Wilson took it to the Parisian conference table as the “right to the self-determination of peoples”. Accordingly, the constitutions of many post-Versailles states invoke, in their preambles or opening articles, the overriding and informing mandate of the nation. That invocation of a transcendent, spiritual principle as what justifies the very sovereignty of the state is what still inspires the most remarkable word in the treaties of Maastricht, Amsterdam, and Lisbon: the unargued claim to Respect. The crux of the national identity problem in my view is the almost religious dogma that the nation, its identity, its culture, deserves Respect, deserves respectfully to be left untouched by the rest of the world.

I have no time left to discuss how these discursive trends crystallized in the state order between the treaties of Versailles and Lisbon; there is plenty of work there for future collaboration between historians, philologists and legal scholars. But we may take it as a given that the Lisbon Treaty was only one mushroom among the many that have shot up from the centuries-old mycelium of national essentialism, first formulated in the opening decades of the 19<sup>th</sup> century. I have traced the mycelium of this particular mushroom back, by way of the cultural paragraph in the same Treaty of Lisbon and its antecedent in the Maastricht Treaty, to a generally distributed dogma of Respect-deserving, culturally-based national identities that had already found its way into legal thinking in the century between Savigny and the Treaty of Versailles.

#### *Conclusion: Word-clouds, hate-speech, and the law*

To trace word-clouds rather than individual phrases in legal documents is not just a matter of linguistic navel-gazing or an exercise in *Begriffsgeschichte*; I suggest that it is an urgent necessity in the present-day political climate to analyse the semantics and rhetoric of nationalism – all the more so, since the slippery semantics of the “nation” also shade into the discourse of ethnicity and race; and it is at this point that the law has taken a firm stance, outlawing the spreading of racial hatred. So where does cultural patriotism shade into national chauvinism and racial hatred?

The etymology of the word “nation” (involving the idea of group membership by *birth*) and the tendency to see nations and languages in a family-tree line of descent in different degrees of familiarity, meant that a structural vagueness is at work whether the ethnic cohesion of society is a sociocultural matter (involving a shared culture and language) or a genealogical matter (involving a shared ancestry). Usually the two get lumped together in an undifferentiated notion of transgenerational continuity; the nation can be seen variously as a transgenerational group socialized into the same language, historical memories and behavioural patterns, or as a descent community sharing the same parentage and historical experiences. The distinction was (and is) tenuous. Hence the concepts of race and nation were never sharply distinguished, and the notion of a shared bloodline was repeatedly invoked without clarification whether this was meant metaphorically or literally. Examples range from the Dutch national anthem “Wien Neêrlands Bloed door d’aadren vloeit, van vreemde smetten vrij” to the “blood”

references in the De Witt speech from the Michiel de Ruyter movie. Similarly, the notion of “our DNA” is used nowadays ambiguously, either as a metaphor (as our cultural operating system, our fundamental assumptions) or as something literally, physically true (as something passed on from parents to children along with one’s genetic code, skin colour etc.).

Nation and race thus stand in an uneasy relationship, being neither identical concepts nor altogether distinct. This is a problem when we face the problem of racist hate speech – something which is forbidden by law and inadmissible under our constitution. It is very difficult to establish, from case to case, where exactly each individual speech act stands on the slippery slope that leads from chauvinistic patriotism to xenophobia to downright racism and racial hatred. Often things are phrased euphemistically, so that chosen phrases surreptitiously encode something that in its explicit form is unsayable, as when Boris Johnson discredited Barack Obama’s opinions on Brexit by invoking his “part-Kenyan” background and imputing to him something called an “ancestral dislike of the UK.” In English this type of language is known as “dogwhistle racism”,<sup>12</sup> and it takes some semantic finesse to assess the extent to which such coded euphemisms, tapping into a tacitly implied semantic mycelium, using one word from the word-cloud to invoke another, are in fact actionable under law. Examples of dogwhistle racism in Dutch political rhetoric are the above-mentioned cases of Geert Wilders’s sliding usage between Muslim and Moroccans, and that of Hilbrand Nawijn.

The discourse of national identity is as slippery as it is socially divisive. It probes the boundaries of what is socially and indeed legally permissible, and the law, even though it has itself taken the slippery language of national identity on board, will need to confront this amorphous, protean problem. The expertise of scholars in the humanities (who, as I have tried to demonstrate in this lecture, have made the study of complex language, meanings and identity-articulations their specialism) may provide useful assistance. I hope that this lecture may count as a first appetizer for such a collaboration between the law and the humanities on the topic of national identity and everything that those words entail.

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<sup>12</sup> With reference to whistles whose tone is so pitched as to be inaudible to humans yet audible to dogs: the complicit target audience knows what is meant, without the use of words that would give away the toxicity of the message.