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Thomas Gross

“We the People” – What is the legal meaning of “people”?

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## THE JEAN MONNET PROGRAM

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**“WE THE PEOPLE” – WHAT IS THE LEGAL MEANING OF “PEOPLE”?**

By Thomas Gross\*

**Abstract**

People is a fundamental concept in constitutional law. The legitimacy of all state action has to be rooted somehow in the people. Federal constitutional orders recognize the existence of a national and of separate regional political bodies. Therefore, the subject behind, defined as the basis of all state power, is not clear. This paper has two objectives. First, it delivers a little exercise of comparative law focusing on the use of the concept of people in the constitutional orders of the United States, Germany, Spain and the European Union. In each part it is of primary interest to inquire how the constitutional provisions use the term people. As all legal texts have to be understood in context, the second section analyses the pertinent jurisprudence of supreme or constitutional courts, with some hints to the main points discussed in legal doctrine. The second objective is to discuss more in detail the controversy on the principle of democracy and the notion people in German legal scholarship, presenting the two main lines of argument.

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## I. Introduction

*People* is a fundamental concept in constitutional law. According to the often cited definition by Georg Jellinek the *people* is one of the three elements of a state.<sup>1</sup> Without a clearly delimited people a commonwealth cannot be accepted as a state. This definition is independent from the political system and designed to fit for all states of the world.

The link between the state and the people is even more important for the concept of democracy. The people (*demos*) is essential as it constitutes the source of all governmental power. The legitimacy of all state action has to be rooted somehow in the people. This concept of popular sovereignty is essential to all democracies notwithstanding how they organize political institutions.<sup>2</sup> The ideology of the modern western nation state took for granted that the people living on the territory of a state and the body politic of that state are congruent. But in fact, almost all states are characterized by a more or less diverse population. This diversity can be based on language, religion or other cultural factors and has been multiplied by modern migration movements.

This diversity is a challenge to many constitutional orders. In France with its strong tradition as a unitary state the Constitutional Council took an important decision on the concept of *people*. In 1991 the Act on the Statute of the Territorial Unit Corsica was referred to the Constitutional Council and one of the clauses attacked was sec. 1 of this act recognizing the “Corsican people”. The court declared this clause unconstitutional.<sup>3</sup> It argued that the preamble of the French Constitution, the Declaration of Human and Civic Rights and numerous other constitutional documents for two centuries only refer to “the French people”. It also took into account that according to art. 1 of the constitution “France shall be an indivisible, secular, democratic and social Republic. It

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<sup>1</sup> GEORG JELLINEK, ALLGEMEINE STAATSLAHRE [GENERAL THEORY OF THE STATE] 183 (Athenäum reprint 3rd ed. 1976); see also, e.g., Josef Isensee, *Staat und Verfassung [State and Constitution]*, in JOSEF ISENSEE & PAUL KIRCHHOF (ed.), HANDBUCH DES STAATSRICHTS [TREATISE OF CONSTITUTIONAL LAW], Vol. II, 3, 35 (C.F. Müller 3rd ed. 2004); WALTER HALLER/ALFRED KÖLZ, ALLGEMEINES STAATSRICHT [GENERAL CONSTITUTIONAL LAW] 6-19 (Helbing & Lichtenhahn 2nd ed. 1999); JAVIER PÉREZ ROYO, CURSO DE DERECHO CONSTITUCIONAL [TREATISE OF CONSTITUTIONAL LAW] 71 (Marcial Pons 10th ed. 2005).

<sup>2</sup> FRIEDRICH MÜLLER, WER IST DAS VOLK? [WHO IS THE PEOPLE?] 17 (Duncker & Humblot 1997).

<sup>3</sup> Decision 91-290 DC of 9 May 1991, available in English at [http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank\\_mm/anglais/a91290dc.pdf](http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/a91290dc.pdf) (last visited December 1, 2012).

shall ensure the equality of all citizens before the law, without distinction of origin, race or religion.” Therefore the legal recognition of the Corsican people violates the unity of the French people and the principle of equality.

This strong unitarian position is understandable in the French constitutional tradition.<sup>4</sup> For federal constitutional orders such a simple monopolistic solution is much more problematic. They are characterized by the combination of unity and diversity.<sup>5</sup> As a federation recognizes the existence of a national and of separate regional political bodies, the subject behind, defined as the basis of all state power, is not clear. Are the component states of the federation the primary democratic entities and is the federal government only something like an umbrella? Or is there only one national people and the components derive their legitimacy from the federation? Or is a pluralism of sources of state power possible? As there is no “one size fits all” model of federalism, these questions may not find identical answers for all states. Therefore a comparative analysis may help to find out what solutions are discussed.

Even the oldest modern federation has not found a consensus in this controversy yet. The beginning of the preamble of the U.S. constitution “We the people” is a very powerful and influential formula in constitutional law.<sup>6</sup> But also the preambles of several U.S. states choose the same reference but to a different political body. The relation between these two levels is subject of a fundamental debate on the sovereignty of the states touching the basis of American federalism. In his latest book *Jürgen Habermas* has interpreted the ambiguity of the text of the U.S. constitution as a wise reserve leaving open who should have the last word.<sup>7</sup> Other German authors draw from

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<sup>4</sup> On the Napoleonic model, e.g., CONSTANCE GREWE/HELENE RUIZ FABRI, *DROITS CONSTITUTIONNELS EUROPEENS [EUROPEAN CONSTITUTIONAL LAW]* 275-278 (Presses universitaires de France 1995).

<sup>5</sup> RONALD L. WATTS, *COMPARING FEDERAL SYSTEMS* 8 (Institute of Intergovernmental Relations 3rd ed. 2008).

<sup>6</sup> Günter Frankenberg, *Constitutional transfer: The IKEA theory revisited*, 8 I-CON 563, 576-577 (2010).

<sup>7</sup> JÜRGEN HABERMAS, *ZUR VERFASSUNG EUROPAS [ON THE CONSTITUTION OF EUROPE]* 65 (Suhrkamp 2011).

it the argument that the American idea of popular sovereignty is not characterized by a will to unity, but on a pluralist understanding of the *people* based on equality.<sup>8</sup>

In Germany not only the national constitution but also many constitutions of the federal entities (Länder) refer to the *people* as the source of state power. Nevertheless the German Federal Constitutional Court (FCC) recognizes a clear primacy of the “German people” defined by the national citizenship. A parallel controversy is found in Spain where the national constitution tries to find a balance between national unity and the recognition of the diversity of peoples, organized in the Autonomous Communities. Some of the regional entities even strive for independence.

The same question has arisen in the European Union. The old promise of the “ever closer union of the peoples of Europe” laid down now in art. 1 TEU focuses on the national peoples. However, since the Treaty of Lisbon entered into force in 2009, the members of the European Parliament are no longer defined as representatives of these peoples (art. 189 TEC) but according to art. 10 (2) TEU “citizens are directly represented at Union level in the European Parliament”. Does this mean that there is now a European people, as “citizens constitute the demos of the polity”?<sup>9</sup> According to the judgment of the German Federal Constitutional Court on the Treaty of Lisbon<sup>10</sup> the sovereignty of Germany does not allow to take part in a European federal state. Although the court does not refer to the “state people” as in the judgment on the Maastricht Treaty<sup>11</sup>, it seems that for the court a *people* as the basis for a democratic order can only exist on the national level.

These two decisions of the court can only be understood if they are read in the context of a deep controversy in German constitutional law scholarship on the principle of

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<sup>8</sup> Brun-Otto Bryde, *Die bundesrepublikanische Volksdemokratie als Irrweg der Demokratietheorie [The Federal Republican Popular Democracy as a Wrong Track of the Theory of Democracy]*, 5 STAATSWISSENSCHAFT UND STAATSPRAXIS 305, 312 (1994); ULRICH RÖDEL, GÜNTER FRANKENBERG & HELMUT DUBIEL, DIE DEMOKRATISCHE FRAGE [THE DEMOCRATIC QUESTION] 58 (Suhrkamp 1989).

<sup>9</sup> JOSEPH WEILER, THE CONSTITUTION OF EUROPE 337 (Cambridge University Press 1999).

<sup>10</sup> BVerfGE 123, 267, in English available at [http://www.bverfg.de/en/decisions/es20090630\\_2bve000208en.html](http://www.bverfg.de/en/decisions/es20090630_2bve000208en.html) (last visited December 1, 2012); comments in English can be found in 10 GERMAN LAW JOURNAL (GLJ) No. 8 (2009), available at [http://www.germanlawjournal.com/pdfs/FullIssues/Vol\\_10\\_No\\_08.pdf](http://www.germanlawjournal.com/pdfs/FullIssues/Vol_10_No_08.pdf) (last visited December 1, 2012).

<sup>11</sup> BVerfGE 89, 155, partly published in English in 31 CML.REV. 235 (1994).



democracy. According to an important school of thinking a *people* can exist only in a nation state. Federal entities or local governments as well as supranational or international organizations derive powers from that nation state but they will always be secondary and more or less limited. This understanding of democracy had a strong influence on the Federal Constitutional Court. In the last decades it has been more and more challenged by a pluralistic understanding of democracy based not on a collective but on the individual.<sup>12</sup>

This paper has two objectives. First, it will deliver a little exercise of comparative law focusing on the use of the concept of *people* in the constitutional orders of the United States (II.), Germany (III.), Spain (IV.) and the European Union (V.). In each part it is of primary interest to inquire how the constitutional provisions use the term *people*. As all legal texts have to be understood in context, the second section analyses the pertinent jurisprudence of supreme or constitutional courts, with some hints to the main points discussed in legal doctrine, for reasons of space very simplified. The second objective is to discuss more in detail the controversy on the principle of democracy and the notion *people* in German legal scholarship, presenting the two main lines of argument. This debate is important especially as it comes to differing consequences for the future development of the European Union (VI.). The conclusion will plead for a flexible understanding of *people* (VII.).

## **II. United States**

It is obviously ambitious to analyze U.S. constitutional law from a German perspective. The controversy on the relation of the federal and the state *people* has not been resolved in more than 200 years, neither in the jurisprudence of the Supreme Court nor in legal doctrine. The starting point will be the text of the U.S. constitution. But also five state constitutions will be included, not quite randomly chosen, including the oldest and the newest. The aim is to get a deeper understanding of the concept of *people* in the American federal order.

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<sup>12</sup> Armin von Bogdandy, *The European Lesson for International Democracy: The Significance of Articles 9-12 EU Treaty for International Organizations*, 23 EJIL 315, 321 (2012).

### 1. *Constitutional Texts*

The results from reading the U.S. constitution are few and ambiguous. In the preamble “We the People of the United States” are invoked as the author of the new federal constitution adopted in 1787. According to art. 1 sec. 2 cl. 1 the members of the House of Representatives are “chosen ... by the People of the several States”. Also Amendment XVII, in force since 1913, stipulates that the Senators from each State shall be “elected by the people thereof”. This seems to indicate that there is a national people and peoples of every state. The *people* is also present in Amendments IV and IX, without a clear relation to the states or the federation. Finally the term is used in Amendment X, part of the bill of rights, which is very important in the discussions on the structure of American federalism: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”

A parallel formula defining the author of the constitution is also used in the preambles of several States, e.g. in California, Georgia, Massachusetts, New York or Wisconsin, but not in all. The preamble of the Constitution of the Commonwealth of Massachusetts, adopted in 1779, hence the oldest constitution of the world still in force, already states that “We, ..., the people of Massachusetts” establish the constitution. Also the newest state constitution of Georgia, adopted in 1983, makes use of this famous introduction in its preamble.

The term people is also present in several provisions on the source of state power. Art. 5 of the *Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts* tells us about “all power residing originally in the people”. Quite similar art. 2 sec. 1 California Constitution from 1879 points out that “all political power is inherent in the people”. Art. II sec. 1 Georgia Constitution states that “all government, of right, originates with the people”. According to art. IV sec. 17 of the Constitution of Wisconsin ratified in 1848 the style of all laws shall be “the people of the state of Wisconsin, represented in Senate and Assembly, do enact as follows:”. Only the Constitution of New York does not contain such a reference.

On the other side the provisions on the right of suffrage refer to citizenship, not to the people. Amendment III of the Massachusetts Constitution uses the word *citizen* for

those entitled to vote. The right of suffrage is given in art. III sec. 1 Wisconsin Constitution to every “United States citizen age 18 or older who is a resident of an election district in this state”. Art. 2 sec. 2 California Constitution accords the right to vote to any “United States citizen 18 years of age and resident in this State”. Art. II sec. 1 New York Constitution on the qualification of voters states that “every citizen” shall be entitled to vote without qualifying this citizenship. Although art. II sec. 1 para. 1 Georgia Constitution refers to “elections by the people”, in para. 2 the definition of the right to vote is given to “a citizen of the United States” qualified by residence and age.

In the clauses on local government we find varying formulas. Art. II, XIX and XXI of the Amendments of the Massachusetts Constitution refer to the people of a county, art. XIX, XXIV, XV to the people of a district, and art. LXXXIX introduces “the people of every city and town”. Art. XIII sec. 7 Wisconsin Constitution requires that the division of a county be submitted “to the vote of the people of the county”. Art. 11 California Constitution on local government does not use the word “people” but only the term “electors”. Art. IX sec. 1 (a) New York Constitution provides that “every local government ... shall have a legislative body elective by the people thereof”. In art. IX sec. 2 Georgia Constitution on home rule for counties and municipalities the word people is not used.

## 2. Jurisprudence

The U.S. Supreme Court several times referred to the subject of democratic legitimacy in the American federal system. The controversy culminated in the case *Term Limits, Inc. v. Thornton*.<sup>13</sup> The question was whether states are entitled to impose time limits on the members of the House of Representatives and the Senators elected in that state. The majority of the Court held that such an amendment to the Arkansas State Constitution, adopted by the voters of Arkansas, violates the Federal Constitution. “Such a state imposed restriction is contrary to the fundamental principle of our representative

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<sup>13</sup> U.S. *Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995); commented, e.g., by Kathleen M. Sullivan, *Dueling Sovereignties. U.S. Term Limits, Inc. v. Thornton*, 109 HARV. L. REV. 78 (1995); ALEXANDER HANEBECK, DER DEMOKRATISCHE BUNDESSTAAT DES GRUNDGESETZES [THE DEMOCRATIC FEDERAL STATE OF THE BASIC LAW] 87 et seq. (Duncker & Humblot 2004); CHRISTOPH SCHÖNBERGER, UNIONSBÜRGER [UNION CITIZENS] 496 et seq. (Mohr Siebeck 2005).

democracy, embodied in the Constitution, that the people should choose whom they please to govern them. ... Allowing individual States to adopt their own qualifications for congressional service would be inconsistent with the Framers' vision of a uniform National Legislature representing the people of the United States.” We also find the argument that “state imposed restrictions ... violate a third idea central to this basic principle [of representative democracy]: that the right to choose representatives belongs not to the States, but to the people.” Even more explicit is the phrase: “In that National Government, representatives owe primary allegiance not to the people of a State, but to the people of the Nation.”

The dissenting opinion by Judge Thomas argues that “the people of the States need not point to any affirmative grant of power in the Constitution in order to prescribe qualifications for their representatives in the Congress, or to authorize their elected state legislators to do so”.<sup>14</sup> For him “the people of the several States are the only true source of power”. Based on Amendment X he even states that the “Constitution simply does not recognize any mechanism for action by the undifferentiated people of the Nation”.

It is quite obvious that the majority and the minority depart from irreconcilable positions, giving the primacy either to the national people or to the people of the States. This controversy mirrors the heated debate on the nature of American federalism between essentially two positions, the Federalist and the State-rightist.<sup>15</sup>

In the important decision on the health insurance the majority of the court, in the opinion of Chief Judge Roberts, stressed that the U.S. Constitution is not the source of power of the States.<sup>16</sup> They do not need a constitutional authorization to act. This general power of governing, possessed by the States, is called by the court “police power”. Although the main controversy was on the scope of the commerce clause and

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<sup>14</sup> 514 U.S. at 858.

<sup>15</sup> Cf., e.g., Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987); Edward A. Purcell Jr., *Evolving Understandings of American Federalism: some Shifting Parameters*, 50 N.Y.L. Sch. L. Rev. 635 (2005-2006); Francis J. Conte, *Sink or swim together: Citizenship, Sovereignty and Free Movement in the European Union and the United States*, 61 U. Miami L. Rev. 331 (2007).

<sup>16</sup> *National Federation of Independent Business v. Sebelius*, 567 U.S. (2012), available at <http://www.supremecourt.gov/opinions/11pdf/11-393c3a2.pdf> (last visited December 1, 2012)

the taxing power of the Federal Government, this is a strong affirmation of the independent source of state powers.

*James Madison* in *The Federalist* No. 46 already discussed the relation between the people of the states and the people of the new federation.<sup>17</sup> As the provisions of the constitution he does not give a clear answer. I quote: “The Foederal and State Governments are in fact but different agents and trustees of the people...” Both of them are seen as “substantially dependent on the great body of the citizens of the United States”. Nevertheless he recognizes “that the first and most natural attachment of the people will be to the governments of their respective states”. In that line of argument *Marc Tushnet* states that “each citizen can be loyal to both a single state and to the nation as a whole”.<sup>18</sup> Although the federation has become more integrated through the centuries there is still “considerable emphasis on state and local government”.<sup>19</sup>

### **III. Germany**

In the constitutional texts of the German federal system we find a double reference to the people of the nation and of the federal entities as well. Influenced by a strong school of constitutional theory the Federal Constitutional Court has argued that the term people, concerning all levels of government, are defined by the German citizenship.

#### *1. Constitutional Texts*

The preamble of the federal constitution (Grundgesetz, GG)<sup>20</sup> refers two times to the “German people”. This subject defines itself as the author of the constitution. The last sentence of the preamble originally mentioned the goal of the German unification. Since this has been achieved, the preamble ends with the statement that the Basic law now applies for the entire “German people”.

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<sup>17</sup> James Madison, in ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, *THE FEDERALIST PAPERS*, No. 46 (1787-1788).

<sup>18</sup> Marc Tushnet, *What then is the American?*, 38 ARIZ. L. REV. 873, 881 (1996).

<sup>19</sup> WATTS, *supra* note 5, at 29.

<sup>20</sup> I use the English translation “Basic Law” by Christian Tomuschat and David Currie, available at <https://www.btg-bestellservice.de/pdf/80201000.pdf> (last visited December 1, 2012).

The last article concerning the duration of the Basic Law proclaims that it shall cease to apply on the day on which a constitution freely adopted by the “German people” takes effect. It is interesting that in art. 146 GG “deutsch” (German) is starting with a minuscule whereas in the preamble a majuscule is used. Is this the (intentional or unintentional) expression of the idea that a future German people adopting a new constitution is less dignified than the “German people” proclaimed as the author of the Basic Law?

Art. 20 (2) GG, the fundamental provision on the democratic principle, states that all state authority derives from the people. In the corresponding art. 28 (1) GG on the lower levels of government the following sentence is found: “In each Land, county and municipality the people shall be represented by a body chosen in general, direct, free, equal and secret elections.”

If we take into account the 16 constitutions of the federal entities, we find a very diverse picture. In eight constitutions (Baden-Württemberg, Bayern, Niedersachsen, Rheinland-Pfalz, Saarland, Sachsen, Sachsen-Anhalt, Thüringen) the people of this Land is defined as the author of the constitution (e.g. the Bavarian people, the people of Lower Saxony). Three other constitutions (Brandenburg, Bremen, Mecklenburg-Vorpommern) use instead the term *citizens* in the preamble. The preamble of the constitution of Nordrhein-Westfalen refers to the “men and women of the Land Nordrhein-Westfalen”. In the constitutions of Berlin, Hamburg and Hessen instead of the people the name of the Land takes the place of the author. Only the constitution of the Land Schleswig-Holstein has no preamble and therefore does not present any author at all.

In the clauses with regard to the parliaments in the Land in most cases the word people is used in order to define those represented. Only in art. 13 (1) Bavarian constitution we find the term “Bavarian people”. Art. 25 (1) Berlin constitution defines that the parliament is elected by all Germans entitled to vote. As there is no Land citizenship but only one national citizenship the right to vote in a Land depends on the residence in its territory.

## *2. Jurisprudence*

The term people has been subject of several important decisions by the German Federal Constitutional Court. Two decisions had to clarify whether aliens may have voting rights. Two other judgments, which will be discussed below, dealt with the relation of the German constitution and the European Union.

In 1990 the FCC declared in two decisions that alien suffrage in local elections was unconstitutional.<sup>21</sup> The court held that two respective statutes of Schleswig-Holstein and Hamburg violated art. 28 (1) GG. A unanimous opinion found from a systematic reading of the constitution that the *people* in a democratic state is a collection of persons defined by the German nationality. Art. 20 (2) GG defining the people as the source of all state authority is understood in a very special way, namely that it means a group of human beings bound into a unity. The court explicitly rejected the argument that public power must receive its legitimacy from all those affected by government action. This argument was not only relevant for the elections of the parliaments on the federal and the Land level but also for the representation on the local level, as the court found a homogeneity principle in art. 28 (1) GG, even though according to German constitutional doctrine the elected local bodies have no legislative power. Nevertheless, the court opened a back door for the introduction of suffrage of EU citizens in local government which was soon after the judgment introduced by the EU and ratified by an amendment of art. 28 (1) GG. Obviously the meaning of *people* on the local level is more flexible than the argument based on popular sovereignty suggests.

In the decision on the Maastricht Treaty<sup>22</sup> the FCC states that the core of the principle of democracy is that all public power derives from the “state people” (Staatsvolk). This is also an expression of the unitarian understanding of *people*. Although the German parliament is entitled to delegate limited powers to the European Union, a sufficient legitimation coming from the *people* and its influence in the Union must be secured. The court finds that the main stream of democratic influence must come from the

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<sup>21</sup> BVerfGE 83, 37; 83, 60; comment in English by Gerald L. Neuman, *“We are the people”: Alien Suffrage in German and American Perspective*, 13 MICH. J. INT’L L. 259 (1991-1992).

<sup>22</sup> See case cited *supra* note 11.

national parliaments via the governments represented in the Council. The elections to the European Parliament can only provide an additional legitimacy. However, the court sees a potential for an increasing role of the parliament, especially if a uniform election procedure will be applied.

In the decision on the accession to the Treaty of Lisbon<sup>23</sup> the FCC shifts the emphasis from the concept of *people* to an egalitarian understanding of democracy. It stresses that “the shape of the European Union must comply with democratic principles as regards the nature and the extent of the transfer of sovereign powers as well as with regard to the organizational and procedural elaboration of the Union authority acting autonomously (Article 23 (1), Article 20 (1) and 20 (2) in conjunction with Article 79 (3) of the Basic Law).” Although the present treaties are far from that stage, the court discusses the possibility that “the threshold were crossed to a federal state and to the giving up of national sovereignty”, but “this would require a free decision of the people in Germany beyond the present applicability of the Basic Law and the democratic requirements to be complied with would have to be fully consistent with the requirements for the democratic legitimation of a union of rule organized by a state.” “As a representative body of the peoples directly elected by the citizens of the Union, the European Parliament is an additional independent source of democratic legitimation ... As a representative body of the peoples in a supranational community, characterized as such by a limited willingness to unite, it cannot, and need not, as regards its composition, comply with the requirements that arise at state level from the equal political right to vote of all citizens.”

It is quite clear that the particular system of distributing the seats of the European Parliament among the member states according to the principle of degressive proportionality (art. 14 TEU) is seen critical by the FCC. The fact that in Germany much more votes are needed to gain one seat in the European Parliament than in small Member States is a violation of the equal right to vote for the FCC. The court even links this right with the “eternity clause” in art. 79 (3) GG, defining that the core provisions of the constitution not to be subject to an amendment, including the principle of

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<sup>23</sup> See case cited *supra* note 10; the following citations are in marginal numbers 244, 263, 271.



democracy. The democratic legitimacy of the present European Parliament does not fulfill the requirements deriving from the courts understanding of democracy. From that perspective a considerable additional transfer of powers to the European Union would require a new constitutional basis in Germany. The president of the FCC made clear that the court wanted to mark a red light for European integration protecting the core national constitutional identity.<sup>24</sup>

#### IV. Spain

Spain is a European state with a considerable internal diversity but a strong unitarian tradition. The Constitution of 1931 already opened the way for regional autonomy, but this development was suppressed during the dictatorship of General Franco. The new constitution adopted in 1978 had to find a balance between national unity and the aspiration of several minorities, especially the Basques and the Catalonians, to more autonomy or even independence.<sup>25</sup> The result is a compromise which did not succeed in calming all controversies. Since 2000 there was a new wave of reforms of the Statutes of Autonomy which gave the Constitutional Court the opportunity to decide on the limits of the process of regionalization.<sup>26</sup> Nevertheless it is seen to be a success story.<sup>27</sup> In some aspects Spain is now more decentralized than Germany.<sup>28</sup>

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<sup>24</sup> Andreas Voßkuhle, *Der europäische Verfassungsgerichtsverbund* [The European Compound of Constitutional Courts], 29 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 1, 7 (2010).

<sup>25</sup> On the debates in the constitutional convention cf. FRANK MODERNE & PIERRE BON, LES AUTONOMIES RÉGIONALES DANS LA CONSTITUTION ESPAGNOLE [THE REGIONAL AUTONOMIES IN THE SPANISH CONSTITUTION] 33-48 (Economica 1981); Jordi Solé Tura, *Das politische Modell des Staates Autonomer Gebietskörperschaften* [The Political Model of the State with Autonomous Administrative Units], in ANTONIO LÓPEZ PINA (ed.), SPANISCHES VERFASSUNGSRECHT [SPANISH CONSTITUTIONAL LAW] 249, 251-261 (C.F. Müller 1993).

<sup>26</sup> Luis Ortega Álvarez, *La posición de los Estatutos de Autonomía con relación a las competencias estatales tras la Sentencia del Tribunal Constitucional 31/2010, de 28 de junio, sobre el Estatuto de Autonomía de Cataluña* [The position of the Statutes of Autonomy in relation to the state competencies after the Judgement of the Constitutional Court 31/2010, 28<sup>th</sup> of June, on the Statute of Autonomy of Catalonia] 90 REVISTA ESPAÑOLA DE DERECHO CONSTITUCIONAL 267 (2010).

<sup>27</sup> Juan Fernando López Aguilar, *La organización territorial del estado y las competencias de las comunidades autónomas* [The Territorial Organization of the State and the Competencies of the Autonomous Communities], in FRANCISCO BALAGUER CALLEJÓN (ed.), MANUAL DE DERECHO CONSTITUCIONAL [TREATISE OF CONSTITUTIONAL LAW] Vol. I, 281, 283 (Editorial tecnos 2005); GREWE/RUIZ FABRI, *supra* note 4, at 327.

<sup>28</sup> WATTS, *supra* note 5, at 42: “one of the most decentralized countries in Europe”.

### 1. *Constitutional Texts*

The introductory sentence of the Spanish Constitution (Constitución Española, C.E.)<sup>29</sup> states that “ ... the Spanish people have ratified the following Constitution”. The preamble instead invokes “the Spanish nation” proclaiming its will, “... [p]rotect all Spaniards and peoples of Spain in the exercise of humans rights, of their culture and traditions, languages and institutions...” According to art. 1 (2) C.E. “National sovereignty belongs to the Spanish people, from whom all state power derives.” This clause is accompanied by art. 2 C.E.: “The constitution is based on the indissoluble unity of the Spanish Nation, the common and indivisible homeland of all Spaniards; it recognizes and guarantees the right of the nationalities and regions of which it is composed and the solidarity among all of them.” In the chapter of the Constitution on the Self-governing Communities the term people is not used.

It is interesting to note that the preamble uses the word people in the singular as in the plural. Also in art. 2 C.E. the “Nation” as well as the “nationalities” are mentioned. Both phrases recognize the diversity of the population of Spain. Nevertheless only the Spanish people as a whole is defined as the source of democratic state power in sec. 1 which has been put at the beginning of the constitution. This is mirrored in an interesting way in the statutes of some autonomous regions, because the self-government of the regions does not include constitutional autonomy but the statutes have to be adopted by representatives of the region and the national parliament.<sup>30</sup>

A reference to the people is found in art. 1 of the Statute of Autonomy of the Basque Country<sup>31</sup>, adopted in 1979: “The Basque People or “Euskal-Herria”, as an expression of their nationality and in order to accede to self-government, constitute an Autonomous Community within the Spanish State ...” Also art. 6 is relevant as it defines “Euskera” as

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<sup>29</sup> An English translation is available at [http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist\\_Normas/Norm/const\\_espa\\_texto\\_ingles\\_0.pdf](http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texto_ingles_0.pdf) (last visited December 1, 2012).

i) <sup>30</sup> The Constitutional Court calls this “norm-compact” (norma pactada) in Sentencia 31/2010, 28 June 2010, available at <http://boe.es/boe/dias/2010/07/16/pdfs/BOE-A-2010-11409.pdf> (last visited December 1, 2012).

<sup>31</sup> An English translation is available at [http://www.basques.euskadi.net/t32-448/en/contenidos/informacion/estatuto\\_guernica/en\\_455/adjuntos/estatu\\_i.pdf](http://www.basques.euskadi.net/t32-448/en/contenidos/informacion/estatuto_guernica/en_455/adjuntos/estatu_i.pdf) (last visited December 1, 2012).

the “language of the Basque People”. At the end of the Statute we find the additional provision that “The acceptance of the system of autonomy established in this statute does not imply that the Basque People waive the rights that as such may have accrued to them in virtue of their history and which may be updated in accordance with the stipulations of the legal system.” It obviously has the intention to mark the differences on the aspirations for independence.

The Estatut of Catalonia, adopted in 2006<sup>32</sup>, invokes several times the “Catalan people” in the preamble. Almost at the end we find this section: “In reflection of the feelings and wishes of the citizens of Catalonia, the Parliament of Catalonia has defined Catalonia as a Nation by an ample majority. The Spanish Constitution, in its second Article, recognizes the national reality of Catalonia as a nationality.” Also in art. 1 Catalonia is defined as a nationality, but in art. 2 (4) it is written: “The powers of the Generalitat [the institutions of Catalonia] emanate from the people of Catalonia and are exercised according to this Estatut and the Constitution.” This is repeated in art. 5 referring to the “historical rights of the Catalan people” as the basis of self-government and in art. 55 (1) declaring that Parliament represents the people of Catalonia.

If we look at the statute of one of the regions of the Spanish heartland, Castilla y León, reformed for the last time in 2007<sup>33</sup>, surprisingly we find at the end of the preamble the reference to “people of Castilla y León”, which, represented by its parliament, has proposed the present statute of autonomy approved by the national parliament. As in Catalonia we read in art. 20 of the statute that the people of Castilla y León is represented in the parliament of the region. Also the statute of the region of Madrid<sup>34</sup>,

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<sup>32</sup> An English translation is available at [http://www.parlament.cat/porteso/estatut/estatut\\_angles\\_100506.pdf](http://www.parlament.cat/porteso/estatut/estatut_angles_100506.pdf) (last visited December 1, 2012).

<sup>33</sup> Available at [http://www.jcyl.es/web/jcyl/binarios/195/628/ESTATUTO%20DE%20AUTONOMIA.pdf?blobheader=application%2Fpdf%3Bcharset%3DUTF-8&blobheadername1=Cache-Control&blobheadername2=Expires&blobheadername3=Site&blobheadervalue1=no-store%2Cno-cache%2Cmust-revalidate&blobheadervalue2=0&blobheadervalue3=JCYL\\_delaPresidencia&blobnocache=true](http://www.jcyl.es/web/jcyl/binarios/195/628/ESTATUTO%20DE%20AUTONOMIA.pdf?blobheader=application%2Fpdf%3Bcharset%3DUTF-8&blobheadername1=Cache-Control&blobheadername2=Expires&blobheadername3=Site&blobheadervalue1=no-store%2Cno-cache%2Cmust-revalidate&blobheadervalue2=0&blobheadervalue3=JCYL_delaPresidencia&blobnocache=true) (last visited December 1, 2012).

<sup>34</sup> Available at <http://gestiona.madrid.org/wleg/servlet/Servidor?opcion=VerHtml&idnorma=1&word=S&wordperfect=N&pdf=S> (last visited December 1, 2012).

the Spanish capital, adopted in 2010, refers in art. 9 to the “people of Madrid” represented in the parliament of the region.

## *2. Jurisprudence*

In 2008 the Spanish Constitutional Court on application by the national government struck down an act of the Basque parliament calling for a consultative referendum on the independence of the Basque Country.<sup>35</sup> It was invalidated on the one hand because art. 149.1.32 C.E. only gave the competence to call for a referendum to the central state. On the other hand the court found that the act invoking a “Basque people’s right to decide” presupposes the existence of a subject, equivalent to the holder of sovereignty, the Spanish people. This would question the constitutional order and the procedures for amending the statutes of the Autonomous Communities. “Action on the part of other channels such as the Autonomous Communities or any other State body is not appropriate, because above all these is always, expressed through the decision of the Constitution, the wishes of the Spanish people, exclusively entitled to national sovereignty, basis of the Constitution and origin of any political power.” Therefore the referendum was annulled and until today no compromise was found.

A group of Members of the national Spanish Parliament has attacked several dozens of Articles of the Estatut de Catalonia in the Constitutional Court, including the clauses using the words “nation” and “Catalan people”. The majority of the court in its decision from 2010<sup>36</sup> finds that terms as “nation” and “people” are conceptually compromised, equivocal and controversial in politics, but it claims that the Constitutional Court is the only authority to decide with final character on the interpretation of the constitution. It interprets the reference to the people of Catalonia in art. 2 (4) and 5 of the Estatut not as a challenge to the unity of the Spanish nation but as a reference to the democratic principle also enshrined in the national constitution. The people of Catalonia therefore

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<sup>35</sup> S.T.C. 103/2008, September 11, 2008; an English translation is available at <http://www.tribunalconstitucional.es/en/resolucionesrecientes/Pages/JCC1032008en.aspx> (last visited December 1, 2012).

<sup>36</sup> S.T.C. 31/2010, June 28, 2010, sec. II. para. 7-9, available at [http://www.tribunalconstitucional.es/en/resolucionesrecientes/Documents/SENTENCIA\\_RI\\_8045-2006.pdf](http://www.tribunalconstitucional.es/en/resolucionesrecientes/Documents/SENTENCIA_RI_8045-2006.pdf) (last visited December 1, 2012).

only means the sum of all Spanish citizens who will be affected by the norms and decisions of the Generalitat.

The difference in the outcome of the two cases, although both are concerned with the *people* of a region, is easy to explain. If even the statutes of regions in the traditional heartland of Spain invoke a *people* of the region, it would be difficult to uphold, like the French constitutional court did in 1991, that there is only one national people. The first two articles of the Spanish constitution also recognize that the population is not homogenous. The problem of the Basque referendum was that it more or less openly questioned the primacy of the Spanish constitution and thus challenged the compromise found in 1978. If the conflict cannot be avoided, like the court did by a benevolent interpretation of the Estatut in the Catalanian case, the principle of unity will prevail.<sup>37</sup>

## V. European Union

Whether the European Union is a federal system or not, is subject of a long controversy.<sup>38</sup> But notwithstanding this conceptual problem there is a long and fruitful tradition of comparing Europe and the U.S.<sup>39</sup> From the beginning the Communities were different from traditional international organizations and had powers close to those of a state.<sup>40</sup> Although the Constitutional Treaty failed, the European Union in the Lisbon era has new features. The financial crises have made quite clear that the end of integration is not reached as we find new initiatives for a European constitution.<sup>41</sup> Whereas the European Court of Justice has refrained from touching upon the controversial questions of the democratic foundation of the Union, the literature is abundant and not confined to legal scholars.

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<sup>37</sup> See PÉREZ ROYO, *supra* note 1, 197-202.

<sup>38</sup> Cf. Stefan Oeter, *Federalism and Democracy*, in ARMIN VON BOGDANDY & JÜRGEN BAST (eds.) *PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW* 55 (Hart 2. ed. 2010).

<sup>39</sup> Cf., e.g., Francis G. Jacobs & Kenneth L. Karst, *The “Federal” Legal Order: The U.S.A. and Europe Compared – A Juridical Perspective*, in MAURO Cappelletti, Monica Seccombe & Joseph Weiler (eds.), *INTEGRATION THROUGH LAW*, Vol. I, 169 (Walter de Gruyter 1986); see also Conte, *supra* note 15; HANEBECK, *supra* note 13.

<sup>40</sup> WEILER, *supra* note 9, at 336.

<sup>41</sup> E.g., by German Foreign Minister Westerwelle, available at <http://www.zeit.de/politik/ausland/2012-03/eu-verfassung-westerwelle> (last visited December 1, 2012); Sikorski & Westerwelle, *New York Times*, September 17 2012, available at: <http://www.nytimes.com/2012/09/18/opinion/a-new-vision-of-europe.html> (last visited December 1, 2012).

### *1. Constitutional Texts*

Already the preamble of the Treaty of Paris establishing the European Coal and Steel Community in 1951 wanted “to establish, by creating an economic community, the foundation of a broad and independent community among peoples”. The determination “to establish an ever-closer union among the peoples of Europe” is documented at the very beginning of the Treaty of Rome signed in 1957 establishing the European Economic Community. This formula of the “ever closer union of the peoples of Europe” is now found in the preamble of the TEU and in art. 1, i.e., at a very prominent place. The word “peoples” is used in three other parts of the preamble of the TEU and the TFEU and twice in art. 3 TEU. The term “European peoples” is found only in a less important place, in art. 167 (2) TFEU on Union action in the field of culture.

As far as the political representation is concerned, a remarkable change has occurred. One of the organs of the original Communities was the Assembly composed, according to art. 20 ECSC and art. 137 EEC, by “representatives of the peoples of the member States of the Community”. Art. 21 ECSC and art. 138 EEC provided for an indirect election by the national parliaments until 1979 when the first direct election took place. The term “Parliament” is used in the Treaties since the Single European Act, in force since 1987.

The Treaty of Lisbon, in force since 2009, goes a remarkable step further. Now the members of the European Parliament are no longer defined as representatives of the peoples but according to art. 10 (2) TEU “citizens are directly represented at Union level in the European Parliament”. This phrase had a predecessor in art. I-20 Treaty establishing a Constitution for Europe: “The European Parliament shall be composed of representatives of the Union’s citizens.”

### *2. Jurisprudence*

As far as I can see there is very little pertinent jurisprudence by the European courts. In 1979, shortly before the first direct election the Court strengthened the consultation right of the European Parliament with the argument that this power “reflects at community level the fundamental democratic principle that the peoples should take part

in the exercise of power through the intermediary of a representative assembly”.<sup>42</sup> Later the ECJ has wisely abstained from entering into these fundamental controversies.

## **VI. The German controversy on the principle of democracy**

The result of this short comparative overview is that national constitutional texts are ambiguous. Although the U.S. constitution does not use the term *American people*, the author of the constitution was clearly seen as a political body different from the peoples of the states. Many state constitutions do not hesitate to declare that they emanate from the people of that state. In the German Basic Law the preamble and the last article refer to the “German people”, but the important clauses on the origin of state power and on elections use the neutral term people. Nevertheless, the FCC has concluded from the system of the constitution that it only means the Germans, with an exception for the participation of EU citizens in local elections. This finding is difficult to reconcile with the main argument. But also half of the Länder constitutions claim that the people of the certain Land is the origin of the constitution. The same double reference to a national and to regional peoples is found in the Spanish constitutional texts.

At first sight European law is clearer. None of the treaties has ever invoked the “European people”. The term is used only in the version of the “peoples of the member States”. However, the new clause that the European Parliament represents the Union’s citizens elaborated in the convention for the Constitutional Treaty and in force since the Lisbon Treaty marks a new step in the development of the European Union: It stresses the direct relation between the citizens and the European Parliament which is independent from the member states. Hence, this formula leaves open which subject is represented.<sup>43</sup>

The problem how to interpret the *people* is closely related to the understanding of the principle of democracy. The decisions of the German Federal Constitutional Court on the right to vote of foreigners and on the development of the European Union must be

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<sup>42</sup> ECJ, Case 138/79, *Roquette Frères*, [1980] ECR 3333, para 33; confirmed in Case C-300/89, *Commission v. Council*, [1991] ECR I-2867, para 20.

<sup>43</sup> Martin Nettesheim, Art. 10 EUV [TEU] para 21, in EBERHARD GRABITZ, MEINHARD HILF & MARTIN NETTESHEIM (eds.), *EUV/AEUV [TEU/TFEU]* (C.H. Beck 2010).

read against the background of a fundamental debate in German constitutional doctrine. In order to resume the abundant literature the positions can be roughly reduced to two main schools of thinking. I have called them the monistic and the pluralistic interpretation of democracy.<sup>44</sup> This is more or less identical with the distinction between a holistic and an individualistic theory.<sup>45</sup>

### *1. The monistic theory*

According to the monistic understanding of democracy the existence of a *people* is a historical fact. The *people* can be defined by factors like a common language, religion or culture but the essential prerequisite is the will to unity. The roots of this idea go back to the 19<sup>th</sup> century when Germany was first occupied by the troops of Napoleon and then divided into many sovereign states before the nation state was founded in 1871.<sup>46</sup> The creation of the second German empire was thus interpreted as bringing the people already existing into the necessary form of the nation state. This preexisting homogenous collective, the nation, is the origin of the constitution and of all state power.<sup>47</sup> In the idealistic tradition such homogeneity can also be fostered by state action, mainly through education.<sup>48</sup> Only states with a homogenous nation are regular, all other are seen as a danger for peace.<sup>49</sup> This is certainly not completely wrong if we look, e.g., at the dismembering of Yugoslavia, but we find other examples like India.

*People* and nation thus are more or less equivalent. They comprise all persons with the German nationality. The only way to “enter” the nation is the acquisition of the German citizenship. As a consequence of the ethnic dimension of the definition of people, for a long time the rules governing the national citizenship have been based on the *ius*

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<sup>44</sup> THOMAS GROSS, DAS KOLLEGIALPRINZIP IN DER VERWALTUNGSORGANISATION [THE COLLEGIAL PRINCIPLE IN THE ORGANISATION OF THE ADMINISTRATION] 163 et seq. (Mohr Siebeck 1999).

<sup>45</sup> See Armin v. Bogdandy, *supra* note 12, at 321.

<sup>46</sup> See Bryde, *supra* note 8, at 309; AMARYLLIS VERHOEVEN, THE EUROPEAN UNION IN SEARCH OF A DEMOCRATIC AND CONSTITUTIONAL THEORY 29 (Kluwer 2002).

<sup>47</sup> Cf. Isensee, *supra* note 1, at 66; UDO DI FABIO, DER VERFASSUNGSSTAAT IN DER WELTGESELLSCHAFT [THE CONSTITUTIONAL STATE IN THE WORLD SOCIETY] 91 (Mohr Siebeck 2001); for a critical discussion see FELIX HANSCHMANN, DER BEGRIFF DER HOMOGENITÄT IN DER VERFASSUNGSLEHRE UND EUROPARECHTSWISSENSCHAFT [THE CONCEPT OF HOMOGENEITY IN CONSTITUTIONAL SCHOLARSHIP AND IN EUROPEAN STUDIES] (Springer 2008).

<sup>48</sup> MÜLLER, *supra* note 2, at 33.

<sup>49</sup> CARL SCHMITT, VERFASSUNGSLEHRE [CONSTITUTIONAL THEORY] 231 (Duncker & Humblot 1928).



sanguinis principle. In 2000 they were modified, including now an element of *ius soli* in the German legislation. But the idea that ethnic homogeneity is a prerequisite for democracy is still strong.

The monistic tradition in Germany, like the State-rightists in the U.S. and the defenders of the principle of unity in Spain, does not tolerate ambiguity in the definition of the origin of power.<sup>50</sup> These theories are attractive because they deliver simple solutions. There is only one basic state organization and all public power essentially derives from that entity.<sup>51</sup> American defenders of state rights emphasize that the states are sovereign although the U.S. constitution does not use this term. The historical development is interpreted as giving the primacy to the states meanwhile the federal government has only limited powers delegated from the people in the states, including those related to external sovereignty.

In Germany (as in Spain) on the other side primacy is given to the federal level. There is only one German (or Spanish) people defined by the national citizenship. *Carl Schmitt* who might be seen as the founding father of the monistic theory even denied that the United States of America and Germany under the Constitution of Weimar are federations because both give primacy to the constituent power of the national people.<sup>52</sup> This monistic theory was followed by the influential constitutional judges Ernst-Wolfgang Böckenförde, Paul Kirchhof and Udo Di Fabio. They were all members of the second chamber of the FCC and this might explain the tendency of the judgments discussed above.

From that point of view a Land as well as the European Union can only have a secondary legitimacy. The powers of a Land are based on the framework of the federal constitution. Art. 28 (1) GG requires that the fundamental principles in the federal constitution are also binding for the constitutions of the Länder. Since 1992 art. 23 (1) GG contains a parallel requirement for the European Union. Hence, the federal constitution defines the basic rules for all other levels of government.

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<sup>50</sup> Cf. Neuman, *supra* note 21, at 334-335.

<sup>51</sup> Stefan Haack, *Demokratie mit Zukunft?* [*Democracy with a Future?*], 67 JURISTENZEITUNG 753, 754 (2012) states this very clear: every legal order needs a highest unity defining all rights and duties.

<sup>52</sup> See SCHMITT, *supra* note 49, at 389.

In the Lisbon Treaty decision of the FCC the primacy of the federal constitution is linked with the sovereignty of the nation state. It is obviously seen as a prerequisite for the democratic order.<sup>53</sup> National and popular sovereignty are thus merged, based on the right to decide who may take binding decisions on what issue.<sup>54</sup> This is, by the way, an astonishing interpretation especially for the Basic Law which was adopted in 1949 under the occupation regime. Was the Federal Republic of Germany no democracy before it gained independence from the Western allied powers in 1955, with some remaining restrictions abolished only not until the reunification in 1990? How could the Federal Republic of Germany in 1952 transfer powers to the European Steel and Coal Community without full sovereignty?

Also the strict insistence of the FCC on the principle of equality concerning parliament elections is the result of a monistic interpretation of democracy. It completely ignores that also in the German federal state the composition of the second chamber, the Bundesrat, is not based on the idea of strict electoral equality, because smaller Länder have more votes in the Bundesrat than it would correspond to the number of their citizens or the strength of their population (art. 51 (2) GG).<sup>55</sup> Nevertheless, the Bundesrat has important powers in the legislative process.

It is quite obvious that departing from the monistic theory, democracy on the European level cannot be the same as in a nation state. Many scholars in the German debate stress that Europe is not and never will be a state as the conditions for a democratic order are not fulfilled.<sup>56</sup> This critical approach mainly addressed against the constitutionalization of Europe is based on several elements.<sup>57</sup> One important argument is that a common

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<sup>53</sup> On the origin of this argument see CHRISTOPH MÖLLERS, STAAT ALS ARGUMENT [STATE AS ARGUMENT] 376-417 (C.H. Beck 2000).

<sup>54</sup> DI FABIO, *supra* note 47, at 91, who speaks of “Kompetenz-Kompetenz”.

<sup>55</sup> Christoph Schönberger, *Lisbon in Karlsruhe: Maastricht’s Epigones at Sea*, 10 GLJ 1201, 1211-1213 (2009).

<sup>56</sup> Cf., e.g., Matthias Pechstein, Art. 1 TEU para 10, in RUDOLF STREINZ (ed.), EUV/AEUV [TEU/TFEU] (2nd ed. 2012); see THOMAS OPPERMAN, CLAUS DIETER CLASSEN & MARTIN NETTESHEIM, EUROPARECHT [EUROPEAN LAW] 24 f. (C.H. Beck 5th ed. 2011); MATTHIAS HERDEGEN, EUROPARECHT [EUROPEAN LAW] 77-80 (C.H. Beck 14th ed. 2012).

<sup>57</sup> A broad overview is found in ANGELA AUGUSTIN, DAS VOLK DER EUROPÄISCHEN UNION [THE PEOPLE OF THE EUROPEAN UNION] (Duncker & Humblot 2000).

language is a necessary prerequisite for a political community.<sup>58</sup> Another point is the lack of a common public opinion, a truly European political debate, especially in the media.<sup>59</sup> We also find the argument that there is no sense of solidarity.<sup>60</sup> The European Parliament, even as it has now gained almost the same legislative powers as the Council, is not the representative of a European people and therefore, it cannot deliver the same kind of legitimacy as a national parliament. As long as this situation lasts, the national parliament as the representative of the “German people” is not entitled to give away substantial elements of state power to the European Union.

## *2. The pluralistic theory*

The pluralistic interpretation of democracy is based on the idea that government should be accountable to those affected by its decisions. The origin of state power is not a social collective but the group of human beings living under the authority of the government. The purpose of democracy is to establish a working system of accountability between those who govern and those who are governed.

The basis of democracy is the individual human right to self-determination.<sup>61</sup> The democratic dimension of human rights is often underestimated as long as they are seen in the perspective of the individual versus the state. This view neglects that all human rights depend on a legislative framework in order to implement the scope and especially the restrictions of the rights. This is quite obvious for social rights and rights to state protection but it is also true for classical civil and political rights. Every legal order defines limits for the right of free speech in order to protect rights of others or common goods. These limits are set by the legislature in statutes, often after controversial

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<sup>58</sup> Dieter Grimm, *Does Europe need a Constitution?*, 3 ELJ 282, 292 (1995).

<sup>59</sup> UDO DI FABIO, *Der neue Artikel 23 des Grundgesetzes – Positivierung vollzogenen Verfassungswandels oder Verfassungsneuschöpfung?* [*The new art. 23 Basic Law – Positivation of an Accomplished Transformation of the Constitution or New Creation of the Constitution?*], 32 DER STAAT 191, 204 (1993); MARCEL KAUFMANN, *EUROPÄISCHE INTEGRATION UND DEMOKRATIEPRINZIP* [EUROPEAN INTEGRATION AND THE PRINCIPLE OF DEMOCRACY] 270-71 (Nomos 1997).

<sup>60</sup> Fritz Ossenbühl, *Maastricht und das Grundgesetz – eine verfassungsrechtliche Wende?* [*Maastricht and the Basic Law – a Constitutional Turn?*], 128 DEUTSCHES VERWALTUNGSBLATT 629, 634 (1993).

<sup>61</sup> This is elaborated in Thomas Gross, *Postnationale Demokratie – Gibt es ein Menschenrecht auf transnationale Selbstbestimmung?* [*Postnational Democracy – is there a Human Right to Transnational Self-Determination?*], 2 RECHTSWISSENSCHAFT 125 (2011).

debates. As the effective scope of the human rights depends on legislation, every holder of such a right has an interest to participate in the legislative process. Therefore, democratic representation is – beside the right to go to court – an essential tool of effective human rights protection.

Where this representation is necessary, is depending on the allocation of legislative powers. As modern government, not only in federal systems, is always organized on several levels the *people* can only be defined in relation to the part of public power concerned. Therefore a representation on the local, regional, national and European level is possible or even necessary. From the individual's point of view there is no need to trace back the origin of power to one of these levels. This understanding also allows to disconnect the term people from the nationality of the persons entitled to participate.

From a pluralistic point of view it is not problematic that the term people is equivocal. This approach is much more flexible and open for the consequences of global developments questioning the tradition of the nation state. It avoids the confusion between popular sovereignty and state sovereignty.<sup>62</sup> Democracy is not confined to homogeneous exclusive social groups organized in a nation state. The *people* legitimizing binding decisions can be found in very diverse settings.<sup>63</sup> A working democracy is possible in very small local communities as well as in very large multi-ethnic countries like India.<sup>64</sup>

From that point of view the extension of the concept of democracy to the European Union is not a real problem. Nor is it a new idea. Already in the debate on the ratification of the Rome treaties in the German Bundestag in the year 1957, Dr. Mommer, speaking for the Social Democratic Party required that the European Parliament should have legislative powers. Although in support of the access to the

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<sup>62</sup> See AUGUSTIN, *supra* note 57, at 387; PÉREZ ROYO, *supra* note 1, at 116-119.

<sup>63</sup> Thomas Schmitz, *Das europäische Volk und seine Rolle bei einer Verfassungsgebung in der Europäischen Union [The European People and its Role in the Making of the Constitution of the European Union]*, 39 EUROPARECHT 217, 221 (2003).

<sup>64</sup> See Philipp Dann, *Federal Democracy in India and the European Union: Towards Transcontinental Comparison of Constitutional Law*, 44 LAW AND POLITICS IN AFRICA, ASIA, LATIN AMERICA 160 (2011); WATTS, *supra* note 5, at 36-38.

Communities, he nevertheless stressed how he regrets that the Assembly did not have the right to legislate but only the Council of Ministers.<sup>65</sup>

Meanwhile several scholars have developed alternative models of democracy adequate for the special features of the EU.<sup>66</sup> Jürgen Habermas in his latest book on the constitution of Europe concludes from the Lisbon Treaty that there is now a double adherence of the citizens.<sup>67</sup> They are Union citizens and members of the state peoples at the same time and they participate in both qualities in the process of constitutionalizing Europe. This corresponds to the older theory of a dual source of input legitimacy, which is now explicitly written down in art. 10 (2) TEU.<sup>68</sup> The theory of multiple *demos* with a variable geometry<sup>69</sup> reflects the multi-level-structure of democracy found as well in federal states as in the supranational polity of the European Union. In the same sense the polyarchic model of constitution for Europe reacts on multiple, complementary identities.<sup>70</sup>

## VII. Conclusion

The concept of *people*, despite (or because) its fundamental importance in constitutional law, is not clear and uncontroversial. *People* is but a formula to define collectives of human beings based on a certain interpretation of the historical development. This is especially clear in Spain where the quest of more autonomy or even independence in Catalonia and the Basque Country is rooted in “historical rights”. Many constitutions therefore have found ambiguous clauses in order to veil the conflicts between the federal and the regional level. Constitutional theory should not try to find

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<sup>65</sup> The full German text of the debate on 5 July 1957 is available under <http://www.cvce.eu/viewer/-/content/43155f28-285a-4990-9ca0-9883cb4d15ae/en> (last visited December 1, 2012).

<sup>66</sup> This corresponds to expectations drawn from empirical research in public opinion, cf. Piret Ehin, *Competing Models of EU legitimacy: the Test of Popular Expectations*, 46 JCMS 619 (2008).

<sup>67</sup> See HABERMAS, *supra* note 7, at 62 et seq.; for a shorter version in English c.f. Jürgen Habermas, *The Crisis of the European Union in the Light of a Constitutionalization of International Law*, 23 EJIL 335 (2012); this view is already held by Koen Lenaerts & Marlies Desomer, *New Models of Constitution-Making in Europe: the Quest for Legitimacy*, 39 CML Rev. 1217, 1251 (2002).

<sup>68</sup> Armin v. Bogdandy, *supra* note 12, at 322; an early contribution is Claus Dieter Classen, *Europäische Integration und demokratische Legitimation* [*European Integration and Democratic Legitimacy*], 119 ARCHIV DES ÖFFENTLICHEN RECHTS 238 (1994).

<sup>69</sup> See WEILER, *supra* note 9, at 344 et seq.

<sup>70</sup> Cindy Skach, *We, the Peoples? Constitutionalizing the European Union*, 43 JCMS 149 (2005); see also Schmitz, *supra* note 63, at 222.

the one and only solution based on a certain understanding of political communities. It is preferable to use flexible concepts open for future developments.<sup>71</sup> Only on the basis of the pluralistic interpretation of democracy federal structures are understood properly.

We should borrow from a very old definition of the *people* given by Cicero: “The *people*, however, is not every association of men, however congregated, but the association of the entire number, bound together by the compact of justice, and the communication of utility.”<sup>72</sup> For him, the association is not based on language, religion or other cultural factors but on a common will to promote justice and on the utility of the results of government action. The *people* defines itself in the process of association we – since more than two hundred years - call constitution.<sup>73</sup> This “process of interaction between political elites and ordinary citizens” is not confined to a determinate time in history, it is a permanent challenge.<sup>74</sup> Especially in federations the relation between the institutions and the degree of diversity in the society is not stable but changes over the times.<sup>75</sup>

The western nation state is only an exceptional phenomenon in history as on the global scale.<sup>76</sup> There are many ways to build a republic. It is not a necessary condition for a democracy that all persons belong to only *one people* and that *this people* belongs to only one state. Europe as well as the United States have a long history of overlapping identities. We should remember that the main historical purpose of the European Union

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<sup>71</sup> Steffen Augsberg, *Wer ist das Volk?*, 27 ZEITSCHRIFT FÜR GESETZGEBUNG 251 (2012).

<sup>72</sup> MARCUS TULLIUS CICERO, DE RE PUBLICA 1, 25, 39: “Est igitur res publica res populi, populus autem non omnis hominum coetus quoquo modo congregatus sed coetus multitudinis iuris consensu et utilitatis communione sociatus”; English translation by Barham, available at [http://oll.libertyfund.org/?option=com\\_staticxt&staticfile=show.php%3Ftitle=546&chapter=83295&layout=html&Itemid=27](http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=546&chapter=83295&layout=html&Itemid=27) (last visited December 1, 2012). I thank Hubert Cancik for his hint on that text.

<sup>73</sup> Joseph Weiler, *In defence of the status quo: Europe's constitutional Sonderweg*, in JOSEPH WEILER & MARLENE WIND (eds.), EUROPEAN CONSTITUTIONALISM BEYOND THE STATE 7, 9 (Cambridge University Press 2003); on the old humanist idea of *respublica Christiana* cf. João Marques de Almeida, *The Peace of Westphalia and the Idea of Respublica Christiana*, available at: [http://www.ipri.pt/prog\\_invest/tema.php?id=2](http://www.ipri.pt/prog_invest/tema.php?id=2) (last visited December 1, 2012).

<sup>74</sup> BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 187 (Harvard University Press 1998); VERHOEVEN, *supra* note 46, at 187.

<sup>75</sup> WATTS, *supra* note 5, at 19-23.

<sup>76</sup> Marlene Wind, *The European Union as a polycentric polity: returning to a neo-medieval Europe?*, in WEILER & WIND (eds.), *supra* note 73, at 103.

is to overcome the deadly rivalry of nations. It is the most advanced example of a global tendency towards a world of diminished state sovereignty and increased cooperation.<sup>77</sup> The gradual evolution of European integration is not understood by the proponents of the thesis that the EU will only be democratic if it is as homogeneous as the Member States. It depends on the will of the Europeans what kind of constitutional order they want to have.<sup>78</sup> Europeans are a *people* in the making but the outcome of the process we will only know in the future.

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<sup>77</sup> WATTS, *supra* note 5, at 4.

<sup>78</sup> Christoph Möllers, *Pouvoir Constituant – Constitution – Constitutionalisation*, in ARMIN VON BOGDANDY & JÜRGEN BAST (eds.), *supra* note 38, 169, 204.

