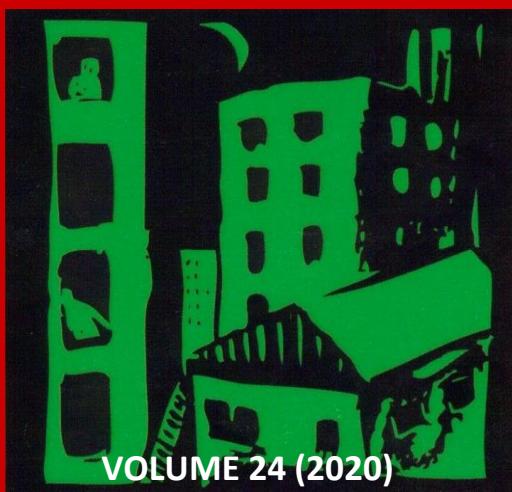


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## Who are “the people” in the German Constitution? A critique of , and contribution to , the debate about the right of foreigners to vote in multi-level democracies<sup>1</sup>

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### ABSTRACT

Democracy means power to the people, but it is not always clear who belongs to “the people”. The question has become pertinent in the age of migration where

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large groups of foreigners permanently reside outside their countries of nationality. The economic, cultural, and political integration of these foreigners is one of the pressing problems faced by democratic States in both the developed and developing worlds. One question is : whether resident non-citizens should be granted the right to vote. The answer to this question depends on who belongs to "the people". In federal and quasi-federal States with multiple levels of government the further question arises : whether "the people" is a homogenous concept that applies uniformly across all levels of government. This article contributes to the debate about the right of foreigners to vote in democratic States with multiple levels of government, such as, South Africa and Kenya. It does so by discussing the German response to the problems mentioned above. The dominant view of the German Federal Constitutional Court since the 1990s has been that "the people" only includes "German citizens" , and that attempts by lower levels of government to extend the right to vote to foreigners from Africa and elsewhere are unconstitutional. In this article I explore and critique this conventional view. I then present a positive case for the extension of voting rights to resident non-citizens under the German Constitution. Many of the arguments would apply with equal force to the debate about the right to vote of foreigners in African multi-level democracies, such as, South Africa and Kenya.

**Keywords:** Denizenship, Citizenship, Voting rights, Nationality law, Multi-level government, The people, Foreigners, Residents, Affected persons principle, Democracy.

## 1 INTRODUCTION

Abraham Lincoln famously stated that democracy means "government of the people, by the people, for the people".<sup>2</sup> It appears that one question remains central to any debate about democracy: who are "the people"? Defining "the people" is fundamental. In a democracy all power (*kratos*) derives per definition *from* the people (*the demos*) through general, direct, free, equal and secret elections.<sup>3</sup> This reveals the close connection between democracy, the people and the right to vote: those who are considered to be part of the people are those from whom State authority derives and thus are those who have or should have the right to vote. The stark opposite also applies: those who are not considered to be part of the people do not have the right to vote.

This article discusses and critiques the contemporary interpretation of the term "the people" in the German Constitution, as interpreted by the German Federal Constitutional Court (FCC) in two notorious judgments dating back to the 1990s.<sup>4</sup> In

<sup>2</sup> Lincoln A "Gettysburg Address" in Peatman J *The long shadow of Lincoln's Gettysburg Address* Carbondale: Southern Illinois University Press (2013) at XVI.

<sup>3</sup> See art 38 of the German Basic Law, 1949 or Grundgesetz, 1949 [GG]. See also s 19 of the South African Constitution, 1996 ("Every citizen has the right to free, fair and regular elections"), read with the preamble ("government is based on the will of the people") and s 1(d) ("The Republic of South Africa is founded on ... universal adult suffrage, a national common voters roll, [and] regular elections").

<sup>4</sup> *Isensee v Bavaria* 1990 BVerfGE 83, 37 [Ausländerwahlrecht I (1990)] and 1990 BVerfGE 83, 60 [Ausländerwahlrecht II (1990)].

terms of that interpretation, the term “the people” means “the German people” at all levels of government.<sup>5</sup> The *demos* is thus exclusively composed of persons with German citizenship.<sup>6</sup> This interpretation precludes the possibility of granting voting rights to foreigners without German citizenship, as any statutory law to that effect would be regarded as incompatible with the Constitution.<sup>7</sup> To prove the point, an attempt by the *Land Bremen* to introduce voting rights to non-Germans at the local level was declared unconstitutional by the *Staatsgerichtshof Bremen* in 2014, reiterating the FCC’s rulings from the early 1990s. This restrictive interpretation of the German Constitution makes the prospect of expanding voting rights to non-Germans at any level of government appear to be rather slim.

Identifying the people of a State, in a constitutional sense, with the nationals of the State, in a cultural or political sense, is not a feature unique to German constitutional law. The South African Constitution seems to entrench the same restrictive interpretation of “the people” by limiting the right to vote at all levels of government to “every adult citizen” of the State.<sup>8</sup> Yet, it is necessary to break the deadlock in this debate to allow discussion of new democratic approaches in times of mass migration, and to lay a new constitutional foundation for the integration of foreigners into society. An approach away from formal citizenship could at least partly close the gap between those persons permanently subjected to State authority but unable to vote. Currently, about 10 per cent of the German population live permanently outside the *demos*.<sup>9</sup>

To generate renewed momentum, one must (again) challenge the dominant interpretation of the German Constitution dating back to the 1990s: does the Constitution really prescribe the meaning of “the people” to mean “the German people”? Does the Constitution itself not distinguish intentionally between these two terms? Do the social developments and amendments to the Constitution since the 1990s require German courts to revisit a stance taken in 1990? To what extent is the term “the people” open to a different understanding in a multi-level government? Exploring these questions from a German perspective, as I do below, will hopefully contribute to the debate about non-citizens’ voting rights in other contexts as well. This issue is gaining ever more relevance in times of mass migration in Europe as well as in Africa.

Especially in multi-level governments, such as, Germany, Kenya or South Africa, the devolution of centralised State power raises the question whether the term “people” requires a uniform approach at all levels of government? Should the sub-levels of

<sup>5</sup> Zimmermann A & Bäumler J “Artikel 116 GG” in Friauf K & Höfling W (eds) *Berliner Kommentar zum Grundgesetz* Berlin: Erich Schmidt Verlag (2015) at para 4.

<sup>6</sup> As well as so-called ‘Status Germans’ in art 116 para 1 GG, see *infra* 2.2.5.

<sup>7</sup> Except with regard to European citizens at the local level, see further *infra* 2.2.1.

<sup>8</sup> See s 19(3) of the Constitution. By contrast the preamble proclaims that “South Africa belongs to all who live in it, united in our diversity”. This tension can be helpfully explored with reference to the German debate about non-citizen voting rights.

<sup>9</sup> It is estimated that about eight million individuals permanently reside in Germany who are not allowed to vote, see <https://www.br.de/bundestagswahl/wahl-deutscher-pass-100.html>.

government not be able to follow a broader approach of inclusion of persons subject to their authority? Like Germany, both Kenya and South Africa also apply the same voter eligibility criteria at all levels of government, thereby restricting the right to vote to citizens only.<sup>10</sup> The discussion and critique of this assumption in German constitutional law thus provides a valuable comparative perspective on a contemporary African problem: should the devolution of power still be subject to national criteria of voter eligibility, or is there scope at lower levels of government to open the franchise to members of the community that have traditionally been excluded, such as resident foreigners?

This article proceeds in two parts. In the first part I argue that the terms “the people” and “the German people” are not synonymous within the German Constitution and that, in any case, the developments since 1990 mean that the FCC’s reasoning has to be reconsidered. The second part of the article considers what would qualify a non-German for inclusion into “the people”, generally, and at the different levels of federal government, in particular. In order to determine the decisive elements, the criteria set out in the German Nationality Act are considered.<sup>11</sup> The Nationality Act links the rights of citizenship to personal, territorial or temporal links to Germany. I argue that an approach based on those same criteria, without requiring formal citizenship, allows greater flexibility without losing sight of the ideal of democracy as the self-government “of the people, by the people, for the people”.

### 2 DELINKING “THE PEOPLE” AND “THE GERMAN PEOPLE”

In the German Constitution the terms “the people” and “the German people” are used on different occasions.<sup>12</sup> The central norms of democracy stipulate that “all State authority is derived from *the people*”<sup>13</sup> and that Parliament should “represent *the whole people*”<sup>14</sup>. At the *Länder* level,<sup>15</sup> “in each Land, county and municipality *the people* shall be represented by a body chosen in general, direct, free, equal and secret elections”.<sup>16</sup> Despite the fact that in these norms on democracy the term “the people” is used without qualification, in German constitutional scholarship and jurisprudence, the term “the people” is interpreted to mean “the German people”. This section explores this interpretation. It raises several arguments in support of the view that the constitutional proclamation that all power derives from “the people” need not be interpreted to only

<sup>10</sup> See for a broader comparison between the two States Steytler N & Ghai Y (eds) *Kenyan-South African dialogue on devolution* Claremont: Juta (2015).

<sup>11</sup> An English version is available at:

[http://www.bmi.bund.de/SharedDocs/Gesetzestexte/EN/Staatsangehoerigkeitsgesetz\\_englisch.pdf?blob=publicationFile](http://www.bmi.bund.de/SharedDocs/Gesetzestexte/EN/Staatsangehoerigkeitsgesetz_englisch.pdf?blob=publicationFile) (accessed 11 December 2019).

<sup>12</sup> Eg art 146 GG and the preamble use “the German people”, art 20 paras 2, 28 & 38 GG use “the people”.

<sup>13</sup> Article 20 para 2 GG [emphasis added].

<sup>14</sup> Article 38 GG [emphasis added].

<sup>15</sup> Germany consists of 16 Bundesländer. Although each Land has its own constitution and constitutional court, every statute has to be in conformity with the Federal Constitution : see on the German constitutional system in general and on the federal system in particular, Currie DP *The Constitution of the Federal Republic of Germany* Chicago and London: The University of Chicago Press (1994) at 33-102.

<sup>16</sup> Article 28 GG [emphasis added].

mean “German people”, but could generally be interpreted to include both German citizens and persons not holding German citizenship.

## 2.1 The dominant understanding of democracy as representation of “the German people”

Usually, when interpreting a constitution, special emphasis is placed on the interpretation of the terms used, especially if they re-appear in different contexts and with different content.<sup>17</sup> In spite of this basic principle of schematic interpretation and perhaps rather counter-intuitively, the FCC interpreted the term “the people” to mean “the German people”, thereby suggesting that both terms have the same meaning.

### 2.1.1 The Federal Constitutional Court’s decisions in 1990

The decisions of the FCC in 1990 were concerned with electoral acts in Schleswig-Holstein<sup>18</sup> and Hamburg<sup>19</sup> that granted foreigners the right to vote in local government elections.<sup>20</sup> The FCC had to decide whether those two electoral acts were consistent with the German Basic Law. The FCC’s point of departure was article 28 of the German Constitution as it pertained to democracy at the *Länder* level. This provision stipulates that “the people” shall be represented by a “body chosen in general, direct, free, equal and secret elections”.<sup>21</sup> The question was whether the right of “the people” in article 28 permitted the extension of voting rights to foreigners at the *Länder* level. In interpreting the term “the people” the Court used the introductory sentence of article 28, which reads that the “constitutional order in the *Länder* must conform to the principles of a republican, democratic and social State governed by the rule of law, *within the meaning of this Basic Law*”<sup>22</sup>. Hence, whether foreigners could be granted the right to vote at the *Länder* level depended on the meaning of “the people” in article 28 of the Basic Law.

In this regard, the Court referred to Article 20 of the Basic Law, a provision that sets out the constitutional principles applicable to the Federation and the *Länder*. Article 20 states that “all State authority is derived from *the people*”. The Court argued that this provision is not only a statement about the sovereignty of the people but at the same time about who “the people” are.<sup>23</sup> Without further explanation, the Court went on to stipulate that “the people” are the people of Germany.<sup>24</sup> In the next step, the Court

<sup>17</sup> As an example we may refer to the so-called “Deutschen Grundrechte” ie those basic rights that refer to Germans as beneficiaries of the rights and which do not apply to foreigners directly. The difference hinges upon the explicit reference to Germans.

<sup>18</sup> BVerfGE 83, 37 [Ausländerwahlrecht I (1990)].

<sup>19</sup> BVerfGE 83, 60 [Ausländerwahlrecht II (1990)].

<sup>20</sup> In the *Land* Schleswig-Holstein citizens from six countries, namely, Denmark, Ireland, The Netherlands, Norway, Sweden and Switzerland, in possession of a residence permit (if required) and who had lived in Germany for five years were allowed to vote in local elections; in the *Land* Hamburg voting rights were granted to foreigners with residence permits who had lived in Germany for eight years.

<sup>21</sup> The wording of art 28 paras 1 & 2 GG: “In each Land, county and municipality the people shall be represented by a body chosen in general, direct, free, equal and secret elections.”

<sup>22</sup> Emphasis added.

<sup>23</sup> Ausländerwahlrecht I (1990) at para 53.

<sup>24</sup> Ausländerwahlrecht I (1990) at para 53.

argued that the people of Germany are the German people. Article 116 of the Basic Law defines who the Germans are. A German is a person in possession of German citizenship or a person formally equated with German citizens as so-called “Status-Deutsche”.<sup>25</sup> Thus, in the view of the FCC, the term “the people” in article 20 refers to the collective of Germans unified as “the German people”.<sup>26</sup>

Although the three provisions of the Basic Law, articles 20, 28 and 116, are not directly linked by the Basic Law itself, the Court inferred a logical link between these three provisions, almost as though the one provision would be directly based on the other two. The Court subsequently referred to a number of other provisions, such as, article 33 of the Basic Law, which is concerned with equal citizenship between Germans, article 56 which provides for the oath sworn by the President and members of the executive to the “German people”,<sup>27</sup> and article 146,<sup>28</sup> which refers to the “German people”, to support the Court’s approach that provisions that refer to “the people” must also be interpreted to mean “the German people”.<sup>29</sup> The Court continued to argue, with regard to the right to vote, that because State authority is derived from – in the Court’s view – “German people”, the right to vote can also only be granted to German citizens.<sup>30</sup>

Thus the reference to “German” was implicitly added by the Court to both articles 20 and 28 of the Basic Law. It followed that, in the view of the Court, the only way to include a person in “the people” at any level of government is to grant that person German citizenship.<sup>31</sup> The focus of reform, if any is needed, should be the nationality law and not electoral legislation. The approach adopted in the early 1990s by the FCC is widely supported in Germany.<sup>32</sup>

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<sup>25</sup> According to art 116 para 1 GG a “German within the meaning of the Basic Law is a person who possesses German citizenship or who has been admitted to the territory of the German Reich within the boundaries of 31 December 1937 as a refugee or expellee of German ethnic origin or as the spouse or descendant of such person”. The latter category are so called “Status-Germans” who do not hold German citizenship but are equated on the basis of their German ethnic origin, see Zimmermann A & Bäumler J “Artikel 116 GG” in Friauf K & Höfling W (eds) *Berliner Kommentar zum Grundgesetz* Berlin: Erich Schmidt Verlag (2015) at para 40 et seqq.

<sup>26</sup> Ausländerwahlrecht I (1990) at para 53.

<sup>27</sup> Ausländerwahlrecht I (1990) at para 55.

<sup>28</sup> Art 146 reads: “This Basic Law, which since the achievement of the unity and freedom of Germany applies to the entire German people, shall cease to apply on the day on which a constitution freely adopted by the German people takes effect.”

<sup>29</sup> Ausländerwahlrecht I (1990) at para 55.

<sup>30</sup> Ausländerwahlrecht I (1990) at para 56.

<sup>31</sup> Ausländerwahlrecht I (1990) at para 56.

<sup>32</sup> Isensee J “Kommunalwahlrecht für Ausländer aus der Sicht der Landesverfassung Nordrhein-Westfalens und der Bundesverfassung” (1987) *KritV* 300 at 300; Huber P M “Das ‘Volk’ des Grundgesetzes” 1989 *DÖV* at 531-536; Dederer H-D *Korporative Staatsgewalt* Tübingen: Mohr Siebeck (2004) at 190 ff; Groß T *Das Kollegialprinzip in der Verwaltungsorganisation* Tübingen: Mohr Siebeck (1999) at 165 f; Horn H D “§ 22 Demokratie” in Depenheuer O & Grabenwarter C (eds) *Verfassungstheorie* Tübingen: Mohr Siebeck (2010) 748 at 754; Grawert R “Staatsvolk und Staatsangehörigkeit” in Isensee J & Kirchhof P (eds) *Handbuch des Staatsrechts Band II: Verfassungsstaat* Heidelberg: C.F. Müller (2004) at §16 para 20; differently, Bleckmann A “Das Nationalstaatsprinzip im Grundgesetz” (1988) *DÖV* at 437; Bryde B O “Ausländerwahlrecht und grundgesetzliche Demokratie” (1989) *JZ* 257 at 257 ff.

None the less, the Court held in an *obiter dictum* that the Constitution could be constitutionally amended to grant European citizens the right to vote at the local level within the *Länder*.<sup>33</sup> Two years after the Court handed down its decision, the German Basic Law was indeed amended. In 1992, the constitutional lawgiver altered article 28 to extend, in principle, the right to vote to European citizens at the local level.<sup>34</sup> This inclusion of Europeans was never challenged before the FCC.<sup>35</sup> In the aftermath, all the *Länder* have brought their Constitutions and laws into conformity with European requirements granting European citizens the active and passive right to vote at the local level<sup>36</sup>.

### 2.1.2. *The judgment of the Staatsgerichtshof Bremen*

The amendment to the German Basic Law opened up the voting system at the local government level to non-Germans, seemingly implying that at least at the local level, “the people” cannot be interpreted as to *exclusively* mean “the German people”. However, in January 2014 the *Staatsgerichtshof* in Bremen, the Constitutional Court of the Land of Bremen, held that the same considerations that applied in 1990 still prohibited non-EU foreigners from acquiring the right to vote in local government elections.<sup>37</sup> The background to the change of the election law was an estimate that also about 10 per cent of all persons living in Bremen were barred from voting. The government of Bremen decided to extend the right to vote to persons not in possession of German citizenship but who permanently resided in Bremen.<sup>38</sup>

The judges of the *Staatsgerichtshof Bremen* found that what applies at the federal level also still applies at the lower levels. The allowance for Europeans to vote is a formal exception that needs to be interpreted restrictively and not a principled change to the understanding of “the people” to mean “the German people” or German citizens.<sup>39</sup>

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<sup>33</sup> Ausländerwahlrecht I (1990) at para 74.

<sup>34</sup> Art 28 para 1 sentence 3: “In county and municipal elections, persons who possess citizenship in any member state of the European Community are also eligible to vote and to be elected in accordance with European Community law.”

<sup>35</sup> However, the right of European citizens to participate was unsuccessfully challenged at the *Länder* level in Bavaria, see BayVerfGHE 66, 70; some discuss whether the alteration is unconstitutional in the light of the eternity clause of art 79(3) of the Basic Law. Vogelgesang K “Artikel 28 GG” in Friauf K & Höfling W (eds) *Berliner Kommentar zum Grundgesetz* Berlin: Erich Schmidt Verlag (2015) at Art 28 para 61 *et seqq.*

<sup>36</sup> Exemplatory reference can be made to § 7 Kommunalwahlgesetz Nordrhein-Westfalen that only requires that a German citizen or a citizen from the European Union has his or her permanent residency in the respective area for the local election 16 days before the election (“Wahlberechtigt für die Wahl in einem Wahlgebiet ist, wer am Wahltag Deutscher im Sinne von Artikel 116 Abs. 1 des Grundgesetzes ist oder die Staatsangehörigkeit eines Mitgliedstaates der Europäischen Gemeinschaft besitzt, dassechzehnte Lebensjahr vollendet hat und mindestens seit dem 16. Tag vor der Wahl in dem Wahlgebiet seine Wohnung, bei mehreren Wohnungen seine Hauptwohnung hat oder sich sonst gewöhnlich aufhält und keine Wohnung außerhalb des Wahlgebiets hat”).

<sup>37</sup> StGH Bremen, Urteil vom 31. Januar 2014 – St 1/13: Ausweitung des Wahlrechts durch Landesgesetzgeber [StGH Bremen (2014) available at <http://www.staatsgerichtshof.bremen.de/sixcms/detail.php?gsid=bremen02.c.736.de> (accessed 11 December 2019).

<sup>38</sup> StGH Bremen (2014) at 3.

<sup>39</sup> StGH Bremen (2014) at 13-17.

The right to vote is accompanied by a set of rights and duties.<sup>40</sup> Beyond the exception provided for in the amended article 28, the right to participate in elections can only be granted to those with citizenship.<sup>41</sup> The *Staatsgerichtshof* Bremen even raised the question whether human dignity<sup>42</sup> requires consideration, in case a person is permanently subject to State authority in Germany.<sup>43</sup> The Court avoided an in-depth analysis of this question. Instead, it found that the Basic Law is conceptualised in a way as to resolve this question by way of the Nationality Act.<sup>44</sup> Again, the avenue of reform is naturalisation law not electoral law.

### 2.2 A critique of the German voting rights jurisprudence

The critique of the aforementioned interpretation of the German Constitution can be developed on several grounds. I list those grounds here for ease of reference and then proceed to discuss each in turn in the rest of this part. First, the Constitution intentionally distinguishes between “the people” and “the German people”, reflecting the fundamental distinction between the *pouvoir constituant* and the *pouvoir constitué*.<sup>45</sup> Secondly, since the amendment of the Constitution, “the people” from whom State authority derives includes persons not in possession of German citizenship, namely, European Union citizens. Thus, “the people” cannot be restricted to those holding German citizenship only. Otherwise one would have to conclude that State authority is derived from persons outside of “the people”. Upholding the interpretation of the FCC would thus lead to an unacceptable contradiction.<sup>46</sup> Thirdly, the central provision in the Constitution, article 38, concerned with the active right to vote, sets limits only with regard to age but not with regard to nationality.<sup>47</sup> Thus, the provision that would have been most suitable to restrict the right to vote to Germans does not provide for a limitation based on citizenship. No other provision in the Constitution, in fact, offers a solid basis for the limited approach adopted by the Constitutional Court.<sup>48</sup> Fourthly, “the people” is an open term not restricted to some kind of German *Kulturvolk*, that is, a people restricted to persons of German descent. Since the major reform of the Nationality Act in 1999, it is even less convincing to argue that “the people” are limited only to those with German citizenship *jus sanguinis* since other grounds for acquiring citizenship have finally been accepted.<sup>49</sup> Fifthly, the equal rights of so-called “Status-Germans”<sup>50</sup>, meaning persons that do not hold German citizenship but have the same

<sup>40</sup> StGH Bremen (2014) at 12.

<sup>41</sup> StGH Bremen (2014) at 12.

<sup>42</sup> Art 1 para 1 GG: “Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.”

<sup>43</sup> StGH Bremen (2014) at 13.

<sup>44</sup> StGH Bremen (2014) at 13.

<sup>45</sup> See part 2.2.1 below.

<sup>46</sup> See part 2.2.2 below.

<sup>47</sup> Art 38(2): “ Any person who has attained the age of eighteen shall be entitled to vote; any person who has attained the age of majority may be elected.”

<sup>48</sup> See part 2.2.3 below.

<sup>49</sup> See part 2.2.4 below.

<sup>50</sup> See fn 25 above for an explanation of this term.

rights as Germans, offers an example of non-citizens that are granted full citizenship rights without naturalization.<sup>51</sup> Sixthly, the object and purpose of democracy itself is undermined when one limits participation to those holding a certain nationality. Understanding the principle of democracy as a maximisation mandate (*Optimierungsgebot*) in fact supports a more progressive approach.<sup>52</sup> Finally, the binary link between people and citizenship is detrimental to both legislators and the affected persons. Resolving the problem exclusively through naturalisation might not always be the most suitable solution and unnecessarily limits the options otherwise available.<sup>53</sup>

### 2.2.1 The distinction between the *pouvoir constituant* and the *pouvoir constitué*

The utilization of the terms “the people” and “the German people”, respectively, in the German Constitution is based on the fundamental distinction between the constituent power (*pouvoir constituant*) and constituted power (*pouvoir constitué*).<sup>54</sup> While the former term refers to the sovereign exercising its constituting power, the *pouvoir constitué* refers to the sovereign as constituted and thus subordinated to the constitution. It thereby adheres to the distinction between two different concepts of “the people” as the source of power.<sup>55</sup> This approach requires us to conceptually differentiate between the very creation of the constitution and the exercise of power within the framework of the constitution. The *pouvoir constituant* is pre-eminent to the constitution and thus does not have to be identical with the *pouvoir constitué* that is only created by the *pouvoir constituant* through a transfer of power.<sup>56</sup> In general, the *pouvoir constitué* could mean a wider or smaller group of persons than the *pouvoir constituant*.<sup>57</sup>

The provisions in the German Basic Law that refer to “the German people” refer to the *pouvoir constituant*, while the term “the people” refers to the *pouvoir constitué*.<sup>58</sup> The preamble explicitly refers to “[...], the German people, in exercise of their constituent power...”. Emphasis is put on the idea that the Constitution was enacted by the German people.<sup>59</sup> Article 146 of the Basic Law, in the same vein and as a mirroring provision, requires “the German people” to decide on the expiry of the current, and creation of a new, constitution.<sup>60</sup> Due to the wording used in these framing provisions,

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<sup>51</sup> See part 2.2.5 below.

<sup>52</sup> See part 2.2.6 below.

<sup>53</sup> See part 2.2.7 below.

<sup>54</sup> Karpen U “Kommunalwahlrecht für Ausländer” (1989) *NJW* 1012 at 1013.

<sup>55</sup> Unruh P argues that the Constitution consistently reflects the distinction between *pouvoir constituant* and *constitué*; see *Der Verfassungsbegriff des Grundgesetzes* Tübingen: Mohr Siebeck (2002) at 397.

<sup>56</sup> Dederer (2004) at 193; see generally on the *pouvoir constituant* Hofmann H “Über Volkssouveränität – eine begriffliche Sondierung” 2014 *JZ* at 861-868.

<sup>57</sup> Dederer (2004) at 193.

<sup>58</sup> Karpen (1989) at 1013.

<sup>59</sup> Preamble: “the German people, in the exercise of their constituent power, have adopted this Basic Law”. It does not matter here whether or not this claim is entirely accurate historically.

<sup>60</sup> Article 146 [Duration of the Basic Law]: “This Basic Law, which since the achievement of the unity and freedom of Germany applies to the entire German people, shall cease to apply on the day on which a constitution freely adopted by the German people takes effect.”

it is generally accepted that the “German people” is the *pouvoir constituant* of the Basic Law.<sup>61</sup>

It has been argued that, because article 146 is concerned with one aspect of State authority and this provision refers to “the German people”, “the people” in article 20 must be interpreted accordingly.<sup>62</sup> Yet, when upholding the difference between the *pouvoir constituant* and the *pouvoir constitué*, article 146 is a reflection of the power of the *pouvoir constituant*, whereas article 20 is a reflection of the power of the *pouvoir constitué*. While only the *pouvoir constituant* may have the power to decide on the constitution in its entirety, the *pouvoir constitué* in article 20 does not necessarily refer to the same group.<sup>63</sup> Thus, the respective provisions do not have to be interpreted in the same way as they reflect two different concepts, and functions, of “the people”. Moreover, in addition to articles 20 and 146, article 1(2) of the Basic Law, which sets out the fundamental obligation to respect human rights and the world order, stipulates that “the German people acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world”. History explains the explicit reference to the German people. From this understanding follows the obligation to respect human rights, peace and justice in the world as a commitment even preceding the Basic Law itself, binding the *pouvoir constituant* to this fundamental obligation.<sup>64</sup> Only on one other occasion is reference made to the “German people”. On assuming office, the Federal President, the Chancellor and every Minister must swear an oath of office dedicating their efforts to the wellbeing of the “German people”.<sup>65</sup> Why swear the oath for the benefit of the *pouvoir constituant*? Although these office holders are (indirectly) voted into office by the *pouvoir constitué*, their power, as well as the limits of their power, were granted by the *pouvoir constituant*. They are bound by the constitution and even if the *pouvoir constitué* would demand that certain laws be made, any statutory law must conform to the limits set by the Basic Law and thus by the *pouvoir constituant*.<sup>66</sup> Indeed, other provisions within the Basic Law concerned with State authority and the principle of democracy refer only to “the people”, without the qualifying word “German”. Articles 20(2), 21, 28 and 38 all use the term “the people” only.<sup>67</sup> The “German people” as *pouvoir constituant* opted for democracy and transferred the power to “the people” as *pouvoir constitué*. The two concepts are not identical; a definition of the latter is not logically implied in the former.

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<sup>61</sup> Dederer (2004) at 172.

<sup>62</sup> Dederer (2004) at 172.

<sup>63</sup> Not very clear in Unruh (2002) at 388.

<sup>64</sup> Dederer (2004) at 172.

<sup>65</sup> Article 56: “I swear that I will dedicate my efforts to the well-being of the German people, promote their welfare, protect them from harm, uphold and defend the Basic Law and the laws of the Federation, perform my duties conscientiously, and do justice to all. So help me God.”

<sup>66</sup> Article 79 para 3 GG reads: “Amendments to this Basic Law affecting the division of the Federation into the *Länder*, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.” These provisions set out the boundaries for any changes to the Constitution.

<sup>67</sup> The only other provision referring to the “German people” is art 138 GG which refers to legal provisions enacted for the “Liberation of the German People from National Socialism and Militarism”.

## 2.2.2 *The inclusion of European citizens: part of “the people” outside “the people”?*

According to the FCC, “the people” is interpreted to mean “the German people”. Yet, the Basic Law in 1992 endowed European citizens with the right to vote at the local level. If the two terms “the people” and “the German people” really mean the same, then Europeans are allowed to vote as persons outside “the people”. This approach can hardly be reconciled with the idea that *all* State authority must be derived from “the people”, according to article 20(2) of the Basic Law as interpreted by the FCC. While the local level in Germany is regarded as an expression of self-government, it is generally agreed that the exercise of State authority even at the lower levels forms part of State authority.<sup>68</sup> Thus, even State authority at the local level must derive from “the people” and, according to the limited understanding of the FCC, from “the German people”.<sup>69</sup> Yet, in article 28(1) it is now stated that “[i]n county and municipal elections, persons who possess citizenship in any member state of the European Community are also eligible to vote and to be elected in accordance with European Community law”. No one claims that these voters are Germans if they remain in possession of their French, Greek or Romanian citizenship. Is article 28 not consistent with article 20(2), or is article 20(2) wrongly interpreted by the FCC to only refer to the German people?

One of the main arguments for the dissenting opinion of Judge Sacksofsky in the judgment of the *Staatsgerichtshof Bremen*<sup>70</sup> is indeed the change of the Constitution since 1990. Since the inclusion of European Union citizens through article 28(1), the basis of the FCC judgments from the 1990s has fallen away.<sup>71</sup> Article 28(1) leads to a contradiction if it allows Europeans to vote at the local level while the term “the people” in the Basic Law remains strictly understood to mean the “German people”.<sup>72</sup> In order to avoid this internal contradiction, it is much more convincing to argue that the term “the people” is open-ended at the federal and lower levels of government, and that Europeans residents in Germany should, in this sense, be considered part of “the people”.<sup>73</sup> Hence, while in 1990 article 20 might have inspired the restrictive interpretation of article 28, it is now article 28 that requires a change of the interpretation of article 20 in order to reconcile otherwise conflicting interpretations.

One may argue that the local level is altogether different as it is concerned with local self-government. Yet, local self-government is also part of State authority.<sup>74</sup> The

<sup>68</sup> *Ausländerwahlrecht II* (1990) at para 45; see also *BVerfGE* 8, 122 at 132; *BVerfGE* 38, 258 at 270 and *BVerfGE* 47, 253 at 272.

<sup>69</sup> *Ausländerwahlrecht I* (1990) at para 53; see also Maunz T & Scholz R “Article 28” in Maunz T & Dürig G (eds) *Grundgesetz-Kommentar*, Lfg. 73 (2014) at para 89.

<sup>70</sup> *StGH Bremen* (2014), Dissenting Opinion of Judge Sacksofsky at 20.

<sup>71</sup> *StGH Bremen* (2014), Dissenting Opinion of Judge Sacksofsky at 21; see also Eickenjäger S & Valle Franco A “Ausweitung des Wahlrechts für Migranten? Anmerkung zum Urteil des Bremischen Staatsgerichtshofes vom 31.1.2014” (2015) 2 *ZAR* 52 at 54.

<sup>72</sup> Lenski S-C “Der Bürgerstatus im Licht von Migration und europäischer Integration” (2012) *DVBl* at 1057.

<sup>73</sup> On the general requirement to interpret the Constitution without contradictions see Maurer H *Staatsrecht* 6th ed Munich: C.H. Beck (2010) at 23.

<sup>74</sup> *Ausländerwahlrecht II* (1990) at para 40.

main point of the FCC in its 1990 decision was that the homogeneity clause requires harmonisation between the interpretation of articles 28 and 20 of the Basic Law. Thus, due to the fact that local self-government is also State authority, it is almost inevitable that the term “the people” in article 20 must now be interpreted to include people other than German citizens if non-Germans are allowed to vote in local government elections. The German Constitution should be regarded as “a living instrument”<sup>75</sup> that may change and develop over time. Developments in Europe since the 1990s requires a re-interpretation of the term “the people” more than two decades after the 1990 judgment. Yet, the majority of the *Staatsgerichtshof Bremen* argued that the exceptional character of article 28(1) rather supports the restrictive interpretation of “the people” still prevailing in German constitutional law and scholarship.<sup>76</sup> On the contrary, the amendment of article 28(1) in 1992 fundamentally changed the nature of this provision and of the understanding of the term “the people” in the Basic Law.

### 2.2.3 Article 38 of the Basic Law: a meaningful silence?

Article 38 of the Basic Law is concerned with elections to the German Parliament and thus with the right to vote at the federal level. Article 38(2) sets out the preconditions for the active (who is allowed to vote) and the passive (who can be voted for) right to vote. This would have been the perfect place in the Basic Law to restrict the right to vote to German citizens only. However, the provision merely proclaims that to be able to vote, a person must be above the age of 18. Thus, according to the Basic Law, the right to vote at the federal level could not be granted to persons under the age of 18.<sup>77</sup> As a matter of fact, the provision makes no mention of citizenship. The element of age as the sole restriction in the Constitution could, as an *argumentum e contrario*, be seen as an indication that the Constitution itself did not intend to predefine who is generally eligible to be granted the active right to vote insofar as nationality as a voter eligibility criterion is concerned.

This interpretation is further supported by the fact that the right to petition in article 17 of the Basic Law is granted to “every person”. The right to participate in the political process in Germany by “addressing written requests or complaints to competent authorities and to the legislature” is also not restricted to German citizens.<sup>78</sup> The German Basic Law is generally open to the participation of foreigners in the German political process. This understanding is supported by a comparative analysis of other constitutions around the world.

A considerable number of constitutions in and beyond Europe indeed expressly reserve the right to vote exclusively for their citizens. In the South African Constitution in section 19(3), the right to vote is explicitly granted, and arguably limited, to

<sup>75</sup> With regard to the European Convention on Human Rights, ECtHR, *Tyrrer v United Kingdom*, (Appl No. 5856/72) Judgment of 25 April 1978, Series A no 26 at para 5.

<sup>76</sup> StGH Bremen (2014) at 15.

<sup>77</sup> Pieroth B “Artikel 38 GG” in Jarass H D & Pieroth B *Grundgesetz für die Bundesrepublik Deutschland* Munich: C H Beck Verlag (2014) at 23.

<sup>78</sup> Sieveking K “Kommunalwahlrecht für Drittstaatsangehörige – kosmopolitische Phantasterei” oder Integrationsrecht für Einwanderer?” (2008) 4 ZAR 121 at 123.

citizens.<sup>79</sup> This requirement applies to all levels of government : the national (section 46(1)), provincial (section 105(1)) and local (section 157(2)). The South African Constitution does not provide for a definition of “citizenship” but only requires that Parliament must regulate the acquisition, loss and restoration of citizenship (section 3(3)). Similar reference to “the people” as being composed of citizens can be found in other constitutions in Europe : in Belgium, France, Greece, and Italy.<sup>80</sup> In these countries foreigners usually are not granted the right to vote. Yet, it is important to note that in countries whose constitutions do not restrict “the people” to citizens, the right to vote is often granted to foreigners : namely, in Denmark, Ireland, The Netherlands and Sweden.<sup>81</sup> In Spain foreigners can generally be granted voting rights under the condition of reciprocity, that is, if Spanish citizens are also granted the right to vote in the respective other country.<sup>82</sup>

In sum, there is no provision within the German Constitution that explicitly confines the right to vote to German citizens, neither in article 38 nor in any other provision. Also: in the light of other constitutions, the absence of a clear determination that “the people” means the citizens only, it could be interpreted as generally permitting the extension of voting rights to non-citizens.

#### *2.2.4 No restriction to a “German Kulturvolk” and the changing composition of the demos*

Supporters of the “people-equals-German people” interpretation<sup>83</sup> often refer to the Maastricht Decision in which the FCC proclaimed that even as part of an ever closer European Union, it is required that the Member retain substantial political fields of action, in which the “relatively homogenous” peoples of Europe, spiritually, socially and politically speaking, can express their will in the democratic process.<sup>84</sup> However, it is quite unclear what the FCC meant when referring to a “relatively homogenous” people in this regard. This line of argument does not follow directly from the Constitution nor from the Nationality Act.<sup>85</sup>

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<sup>79</sup> However, some argue that this is rather a minimum requirement instead of a restriction of the possibility to grant the right to foreigners. Yet, currently, the possibility to get enrolled on the national common voters roll is provided to South African citizens; see generally on the right to vote, Le Roux W “Migration, representative democracy and residence based voting rights in post-Apartheid South Africa and post-unification Germany (1990-2015)” (2015) 3 VRÜ 263.

<sup>80</sup> Max-Planck-Institut “Bericht des Max-Planck-Instituts für ausländisches öffentliches Recht und Völkerrecht, 14. März 1990” in Isensee J & Schmidt-Jortzig E (eds) *Das Ausländerwahlrecht vor dem Bundesverfassungsgericht: Dokumentation der Verfahren* Heidelberg: Müller (1993) 284 at 287 ff.

<sup>81</sup> Max-Planck-Institut (1993) at 296, 309 & 324 et seqq.

<sup>82</sup> Max-Planck-Institut (1993) at 329.

<sup>83</sup> Horn (2010) at 754 para 28; Isensee J “Staat und Verfassung” in Isensee J & Kirchhof (eds) *Handbuch des Staatsrechts Band II: Verfassungsstaat* Heidelberg: C.F. Müller (2004) § 15 at 121; Roellecke G “Souveränität, Staatssouveränität, Volkssouveränität” in Murswieck D, Storost U & Wolff H (eds) *Staat - Souveränität - Verfassung Festschrift für Helmut Quaritsch zum 70. Geburtstag* Berlin: Duncker & Humboldt (2000) 15 ff.

<sup>84</sup> BVerfGE 89, 155 (186) - Maastricht.

<sup>85</sup> See also Lenski (2012) at 1059 et seqq.

Very little historical information exists about the choice of the terms “the people” and “the German people” in the respective provisions of the Basic Law. Reference is often made to the predecessors of the Basic Law that referred to “the German people”,<sup>86</sup> and this interpretation was maintained during the division of Germany, to stress that all Germans belong to one united Germany.<sup>87</sup> Yet, the general opinion is that the German Constitution has no underlying notion of a “German *Kulturvolk*”, a people restricted to the German culture or bloodline. Neither article 16 of the Basic Law (concerned with German citizenship) nor article 116 of the Basic Law may be interpreted in a way that would restrict the possibility to grant German citizenship to persons who are culturally unrelated to Germany.<sup>88</sup>

The FCC itself stressed that any changes to “the people” should be made *via* changes to the Nationality Act.<sup>89</sup> Indeed, the 1999 reform broadened the circumstances under which German citizenship can be acquired. Prior to the reform it was mainly German descendants who became German citizens, reflecting the *jus sanguinis* approach. Under the current Nationality Act, persons may acquire citizenship due to their own residency in Germany or because they are descendants of permanent residents for a certain period of time.<sup>90</sup> Thus, a Turkish or Algerian citizen may gain German citizenship, becoming a German within the meaning of article 116, if he or she so desires, after expiration of a relative short period of eight years, if the other preconditions set out in the nationality law are met.<sup>91</sup> The notion of “the German people” as a “relatively homogeneous” sovereign is undergoing revision under the new Nationality Act. By the same token the concept of the “the people” is not restricted to a “relatively homogeneous” predetermined group.

### 2.2.5 The historic example of “Status-Germans”

The German Basic Law itself notably contains an example of granting citizen-like rights to persons who do not possess German citizenship. Those migrants and expellees who came to Germany after World War II were by way of article 116(1) immediately treated as though they were German citizens with the same rights and obligations as citizens. These migrants are generally referred to as “Status-Deutsche”.<sup>92</sup> They were not granted German citizenship and were thus not Germans in the formal sense. Yet they have full German citizens’ rights, including the right to vote.<sup>93</sup>

<sup>86</sup> Ausländerwahlrecht I (1990) at paras 67-71.

<sup>87</sup> Zimmermann & Bäumler (2015) at para 33.

<sup>88</sup> Wallrabenstein A *Das Verfassungsrecht der Staatsangehörigkeit* Baden-Baden: Nomos Verlagsgesellschaft (1999) at 155 ff.

<sup>89</sup> Ausländerwahlrecht I (1990) at para 56.

<sup>90</sup> See in general Hailbronn K & Farahat A “Country Report on Citizenship Law: Germany, EUDO Citizenship Observatory 2015” available at [http://cadmus.eui.eu/bitstream/handle/1814/34478/EUDO\\_CIT\\_2015\\_02-Germany.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/34478/EUDO_CIT_2015_02-Germany.pdf?sequence=1) (accessed 11 December 2019)

<sup>91</sup> § 10 Nationality Act.

<sup>92</sup> Zimmermann & Bäumler (2015) at paras 40-46

<sup>93</sup> Zimmermann & Bäumler (2015) at para 41.

The practice of extending the rights of citizenship under article 116 of the Basic Law to non-citizens supports the claim that the extension of voting rights is a political rather than constitutional decision. While article 116 refers to persons who could show a certain link to Germany, in practice, the requirement of some German roots was rather loose. Many persons fled the Soviet Union and South-Eastern European States without real knowledge of the German language, let alone knowledge or proof of German culture or descent. To grant these people refuge as well as political rights without naturalisation was a clear and justified political decision following World War II.<sup>94</sup> Here is an historical precedent embraced by the German Basic Law where individuals were granted the right to vote without first requiring naturalisation. The extensive equalisation of "Status-Deutsche" shows that it is possible under the Basic Law to include a person in the demos, even though that person is not in possession of German citizenship.

#### *2.2.6. The principle of democracy requires inclusion not exclusion*

One of the founding principles of the German Constitution is that Germany is a democratic State. In this regard a founding principle can be understood as an obligation that is constantly and progressively developing and thus requires constant adjustment in order to achieve the most compatible contemporary understanding. The South African Constitution speaks in section 39 in this regard of the duty to "promote" the founding values of the constitutional order. This is the understanding of principles as optimisation or maximisation mandates ("Optimierungsgebote") developed by Robert Alexy.<sup>95</sup> If the principle of democracy is understood as an optimisation mandate, or to use the words of Armin von Bogdandy, that societies can be "democratic, more democratic and most democratic",<sup>96</sup> then the object and purpose of the principle of democracy speaks against restricting the term "the people" to "the German people".<sup>97</sup> Thus, if the Constitution is by its wording open to an understanding of representation either of a smaller or a wider group, an interpretation should opt for the wider meaning.

In her separate opinion in the *Staatsgerichtshof Bremen* case, Judge Sacksofsky argues that article 28 of the Basic Law requires the inclusion of non-citizens, based on the understanding that democracy should further the idea of self-determination.<sup>98</sup> Those affected should be included, founded on the basic consideration of human dignity.<sup>99</sup> She argues that any unjustified limitation restricts human dignity. Judge

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<sup>94</sup> Zimmermann & Bäumler (2015) at para 42.

<sup>95</sup> Alexy R *Begriff und Bedeutung des Rechts* 3rd ed München: Alber (2011) at 130; especially for the principle of democracy see Hain K-E *Die Grundsätze des Grundgesetzes* Baden-Baden: Nomos Verlagsgesellschaft (1999) at 159 ff.

<sup>96</sup> von Bogdandy A "Demokratisch, demokratischer am demokratischsten?" in Bohnert J, Gramm C, Kindhäuser U, Lege J, Rinken A & Robbers G (eds) *Verfassung – Philosophie – Kirche. Festschrift für Alexander Hollerbach zum 70. Geburtstag* Duncker & Humblot: Berlin (2001) at 363-384.

<sup>97</sup> See also Schliesky (2004) at 619-620 ("Maximierungsgebot").

<sup>98</sup> StGH Bremen (2014), Separate Opinion of Judge Sacksofsky at 23.

<sup>99</sup> StGH Bremen (2014), Separate Opinion of Judge Sacksofsky at 24.

Sacksofsky does not expressly state whether the constitutional understanding of “the people” as “the German people” is correct. She merely argues that the *Länder* could integrate non-Germans if they so wish because article 28 needs to be interpreted restrictively in its limiting function. In fact, it could be argued that the principle of democracy requires the *Länder* to have the discretion to promote or optimise democratic ideas and approaches in a multi-level government.

In summary, and to conclude the first part of our discussion, all the arguments introduced above suggest that it is not desirable to equate the terms “the people” and “the German people” as they are used in the German Basic Law. These arguments range from technical issues pertaining to the interpretation of specific articles in the Basic Law, to more holistic considerations about democracy as a principle. Whether considered individually or in combination, these arguments all support the calls that the German FCC revisit and change the foundation of the voting rights jurisprudence it developed in the early 1990s.

### 3 MULTI-LEVEL GOVERNANCE AND THE VOTING RIGHTS OF FOREIGNERS IN FEDERAL STATES

The most important question remains: how can the term “the people” be positively defined if it is not equated with “the German people”? Who should be considered to form part of “the people”? Who should be granted the right to vote? In the second part of this article I argue for a new and different approach to the allocation of voting rights,<sup>100</sup> and then explore two suggestions. First, it is necessary to distinguish between the federal, or national, level of government and lower, or sub-national, levels of government. It should be possible to develop different conceptions of “the people” at different levels of government.<sup>101</sup> Secondly, substantive criteria should be developed, in place of formal citizenship, to identify who are entitled to the right to vote and who not. These criteria are already contained in the German Nationality Act.<sup>102</sup>

#### 3.1 A new approach to the allocation of voting rights

As seen above, given the FCC’s 1990 voting rights decisions, the only possibility of granting individuals full political rights in Germany is by way of naturalisation. This considerably limits the political options of legislatures to include non-Germans into those who are eligible to vote, as the legislatures in Hamburg, Schleswig-Holstein and Bremen had to discover. Frankly, naturalisation has far-reaching consequences and, besides the positive effects for many, might not be an attractive or even a realistic option for all.<sup>103</sup>

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<sup>100</sup> See part 3.1 below.

<sup>101</sup> See part 3.2 below.

<sup>102</sup> See part 3.3 below.

<sup>103</sup> See eg for the US : Mazzolari F “Determinants and effects of naturalization. The role of dual citizenship laws”, Rutgers University, 1 May 2006 available at [http://www.iza.org/conference\\_files/MEM2006/mazzolari\\_f2691.pdf](http://www.iza.org/conference_files/MEM2006/mazzolari_f2691.pdf) (accessed 11 December 2019).

Upon naturalisation, the naturalised persons might be in possession of dual citizenship,<sup>104</sup> which is not without complications from an international point of view.<sup>105</sup> The naturalised persons might even have been asked to give up their former citizenship - either by the law of the new host State or by the law of the former home State.<sup>106</sup> Naturalization is a serious step, touching upon the identity of a person. Many permanent residents in fact want to retain their citizenship, even though they live away from home for many years.<sup>107</sup> Wishing to retain the possibility to return to her home country and family one day does not mean that a foreigner who permanently lives and works in a German town is not fully committed to Germany as well.

This truth lies behind article 116 of the Basic Law and the recognition of returnees as "Status-Germans".<sup>108</sup> This category enabled the returnees to retain their citizenship rights in the States from which they were expelled; these non-citizens were treated as though they were Germans, without forcing them to immediately take up German citizenship.<sup>109</sup> Thus, the approach was chosen to effectively put those persons on a par with German citizens in all aspects of life, including civil and political rights, without immediately requiring naturalization with all its positive and negative consequences.

### **3.2 Different approaches to determine who belongs to "the people" and should have the right to vote**

In the German Federal State, the decoupling of "the people" and "the German people" requires a re-thinking of the term "democracy", on the one hand, and the homogenisation mandate in article 28, on the other hand.<sup>110</sup> Indeed, it is an open question whether the demos should refer to only those persons holding citizenship, or to all those under German State authority, or even to all those who are equally affected by German governmental decisions.

In the past, the FCC itself supported the idea that democracy serves the "self-determination of all",<sup>111</sup> in a much more progressive way than in the voting rights cases

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<sup>104</sup> Münch I *Rechtspolitik und Rechtskultur* Berlin: Berliner Wissenschafts-Verlag (2011) at 83 ff.; Uslu can S *Zur Weiterentwicklungsähigkeit des Menschenrechts auf Staatsangehörigkeit* Berlin: Duncker & Humblot (2012) at 400 ff.

<sup>105</sup> See on development towards dual nationality Martin D A "New rules on dual nationality for a democratizing : between rejection and embrace" (1999) 14 *Georgetown Immigration Law Journal* 1.

<sup>106</sup> A persons is still generally required to give up his or her previous citizenship according to § 10 para. 4 Naturalization Act; exceptions are possible according to § 11 Naturalization Act.

<sup>107</sup> See eg a case in which a Turkish citizen who lost their Turkish citizenship when acquiring German citizenship re-applied for the Turkish citizenship six years later and the consequences with regard to the German citizenship, Bundesverfassungsgericht, decision of 08 December 2006, 2 BvR 1339/06.

<sup>108</sup> Antoni M "Artikel 116" in Hömig D (ed) *Grundgesetz* Baden-Baden: Nomos Verlagsgesellschaft (2013) 1.

<sup>109</sup> Antoni (2013) 1.

<sup>110</sup> Groß T *Das Kollegialprinzip in der Verwaltungsorganisation* Tübingen: Mohr Siebeck (1999) at 163 ff.; Sterzel D "Die Einheit von Grundrechtsidee und Demokratieprinzip des Grundgesetzes" in Blanke T *et al* (eds) *Demokratie und Grundgesetz* Baden-Baden: Nomos Verlagsgesellschaft (2000) at 156 ff.

<sup>111</sup> BVerfGE 44, 125 at 142 – Öffentlichkeitsarbeit.

of the 1990s. In the very decision about non-citizen voting rights, the Court still proclaimed that, generally, congruence between being subordinated to State authority and possessing political rights is desirable.<sup>112</sup> In its decision on the voting rights of Germans *who live abroad*, the FCC stressed that the main consideration behind the right to political participation is the ability to participate in public dialogue.<sup>113</sup> The persons that elect the government should be able to discuss and exchange political ideas.<sup>114</sup> In her separate minority opinion, Judge Lübbe-Wolff elaborated on the requirement of a common responsibility shared equally by all citizens.<sup>115</sup> In her opinion, the main test for inclusion in the people and the electorate is whether a person has to bear equal responsibility for the political decisions of the elected government.<sup>116</sup> Constitutional scholars often argue that the demos should include those who are directly or equally affected by a political decision.<sup>117</sup> Lenski suggests that persons sharing the same issues and concerns and who are therefore all affected by decisions of the government should be allowed to vote for that government.<sup>118</sup> It has also been suggested that, in place of the traditional perception about national identity and citizenship, the focus in determining “political citizenship” (regardless of formal citizenship) should be on public welfare.<sup>119</sup>

Bauböck ties all of this together by arguing that democratic inclusion requires a consideration of all these aspects ( ranging from having a stake in the outcome of the election, being affected by the outcome of the election, to being subject to the jurisdiction of the elected government ), and that these considerations vary in importance at different levels of government.<sup>120</sup>

### 3.3 The absence of a homogenous “people” in multi-level governments

Turning to the German Constitution again, article 28 is generally understood to require homogeneity between the federal or national level of government and all lower or sub-national levels of government, thus guaranteeing democracy at all the different levels.<sup>121</sup>

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<sup>112</sup> Ausländerwahlrecht I (1990) at para 56; this aspect is particular stressed by Bryde BO “Das Demokratieprinzip des Grundgesetzes als Optimierungsaufgabe” in Blanke T et al (eds) *Demokratie und Grundgesetz* Baden-Baden: Nomos Verlagsgesellschaft (2000) at 63.

<sup>113</sup> Germelmann argues that due to modern forms of communication persons can also take part, even if they live abroad : see Germelmann C F “Das Wahlrecht von Auslandsdeutschen im Lichte globaler Kommunikations- und Aufenthaltsgewohnheiten” (2014) *Jura* 310 at 310-322.

<sup>114</sup> BVerfGE 132, 39 at para 40 [Wahlberechtigung Auslandsdeutschen (2012)]; this of course reminds us of Habermas’s discourse theory in Habermas J *Faktizität und Geltung* 4<sup>th</sup> ed Frankfurt am Main: Suhrkamp (1994) at 625 ff.

<sup>115</sup> Wahlberechtigung Auslandsdeutschen (2012), Dissenting Opinion of Judge Lübbe-Wolff at para 73.

<sup>116</sup> Wahlberechtigung Auslandsdeutschen (2012), Dissenting Opinion of Judge Lübbe-Wolff at para 73.

<sup>117</sup> Bryde (2000) at 59; Bryde BO “Ausländerwahlrecht und Grundgesetzliche Demokratie” (1989) 44 *JZ* at 257; Le Roux (2015) at 276.

<sup>118</sup> Lenksi (2012) at 1062.

<sup>119</sup> Lenski (2012) at 1063.

<sup>120</sup> Bauböck R *Democratic inclusion: a pluralistic theory of democratic citizenship* at 23 available at <http://www.law.uvic.ca/demcon/papers/Victoria-Democratic-Inclusion-Part1.pdf> (accessed 11 December 2019).

<sup>121</sup> Kichhof F “Art 83 GG” in Maunz T & Dürig G (eds) *Grundgesetz-Kommentar* Munich : C H Beck Verlag (2015) Rn. 31.

The exact scope of this obligation is open to much debate. It is generally understood that “the people” at the *Länder* and lower levels have to be partly identical to “the people” at the federal level.<sup>122</sup> The people of the *Länder* must, to coin a metaphor, always be a slice of the same cake as the people at the national level.

However, this identity of the people throughout the State is based on a misperception or an “identity illusion”. Even under the current interpretation of the Basic Law and electoral legislation, the people who are allowed to vote at the lower levels of government are not entirely identical with the people who are allowed to vote at the federal level. First, as mentioned above, European citizens are already allowed to vote at the local government level. Secondly, some *Länder* allow persons to vote at the age of 16, while at the federal level the minimum voting age is 18.<sup>123</sup> Thirdly, Germans that live abroad and are not resident in one of the *Länder* are not allowed to vote at the lower levels if they are not registered in any German town, but can still vote at the federal level. Thus, different considerations already govern the question of who is eligible to vote at the different levels of government.

As a matter of fact, the demos is currently, and increasingly, a “wobbly mass” that never has any sharp contours, in the sense that there is certainty about who is an active member of “the people” and who is not. There is no indicator to determine whether anyone will make use of their right and vote in the next elections. The FCC itself has stressed that “the people” is not a static and unchanging entity.<sup>124</sup> In fact, in today’s world, people move between cities within Germany, in the European Union, and around the world.<sup>125</sup> At any given point in time, “the people” from whom State authority derives, might include other people at the local, *Länder* or federal levels, depending on who currently resides in Germany and in which of the respective *Länder*, who successfully applied for German citizenship, who is on holiday and forgot to vote beforehand, who does not wish to exercise the right to vote, or who has left Germany permanently.

Expatriate Germans who permanently reside outside of Germany are especially supportive of the notion that “the people” is an open rather than closed concept. Although those Germans not residing in Germany generally belong to the category of “German people”, they must live in Germany for at least three consecutive months in order to have the right to vote.<sup>126</sup> Thus, whether they belong to the demos or not

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<sup>122</sup> Jarass/Pieroth *GG* 14 Auflage Munich : CH Beck (2016) art 28 & para 10.

<sup>123</sup> At the local level this is the case in Baden-Württemberg, Northrhine-Westphalia, Lower Saxony, Saxony-Anhalt, Mecklenburg Western Pomerania and Berlin; at the local and *Länder* levels in Bremen, Schleswig-Holstein and Brandenburg.

<sup>124</sup> *Ausländerwahlrecht I* (1990) at para 56.

<sup>125</sup> Lenski (2012) at 1060.

<sup>126</sup> § 12 *Bundeswahlgesetz* grants the active right to vote to persons over the age of 18, who have had a place to live in Germany for three months, and are not excluded from the right to vote in terms of § 13. According to para 2 a person is also allowed to vote although they live outside Germany if he or she had lived in Germany for three consecutive months (above the age of 14 and not longer than 25 years ago) or is for other reasons personally and directly familiar with the political circumstances in Germany and affected by it ; see also *BVerfGE* 132, 39.

depends not on their nationality but on an active decision whether to reside in Germany for a relatively short period of time or not.

In a federal State, the independence and inter-dependence of the levels of government are definitive of the character of the State. The Basic Law provides for a certain minimum of homogeneity between the federal and the *Länder* levels, without defining the exact contours of this homogeneity. Over and above this minimum requirement, the federalist structure allows *Länder* to diverge from the federal approach. The homogeneity requirement should thus rather be interpreted restrictively when it comes to voting rights. Room should be provided for the different approaches adopted in the *Länder*, at least at the local level. If the FCC had not been so strict in 1990, different *Länder* could have used their own experiences to contribute to the discussion on how integration of foreigners can be achieved effectively and thoughtfully without naturalisation.

### **3.4 Criteria other than citizenship for granting the right to vote to foreigners**

In 1999 the coalition of Social Democrats (SPD) and Greens (Bündnis 90/die Grünen) undertook a major reform of German nationality law. As in most democracies, German citizenship can be acquired on three grounds: descent as a direct personal and ethnic connection with the German bloodline (*jus sanguinis*); territorial connection (qualified *jus soli*); and duration of residency (time). The granting of citizenship confirms officially that one or more of the respective grounds have been met and that a person thus formally belongs to the German people.

A personal nexus to Germany by descent is most apparent with regard to expatriate Germans who live abroad. At the federal level, all those in possession of German citizenship are currently allowed to vote. These persons have a very general and very strong personal link to Germany. According to section 2 of the German Electoral Act (*Wahlgesetz*), to acquire the right to vote, it is merely required that expatriate Germans have lived in Germany for three consecutive months after turning 14. Even if they do not fulfil this requirement, they may still argue that they are particularly affected by decisions taken in Germany and on that basis acquire the right to vote.<sup>127</sup>

A modern understanding of political participation should be based on the elements that secure an active and relatively permanent link between participants and the government of Germany. In order to broaden the understanding of “the people” over and above the formal possession of citizenship, the elements already present in naturalisation legislation could be applied without the need to acquire formal citizenship. The fact that a person is permanently and actively connected to the government of a State, is the main ground why foreigners without citizenship should be

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<sup>127</sup> § 12 Wahlgesetz (see fn 126 above) suggests a certain understanding of “Betroffenheits-“ with regard to Germans living abroad.

regarded as belonging to “the people”. Such persons are usually referred to as residents, and their participation as based on their “denizenship”.<sup>128</sup>

If the term “the people” conceptually and constitutionally allows integration of non-citizens, as argued in this article, those residents that fulfil the requirements of the Nationality Act should be regarded as eligible to vote, even without naturalisation. Doing so would allow the political integration of all those who permanently reside in Germany while they live in Germany, without requiring naturalisation, on the one hand, and without excluding those permanently subordinated to State authority, on the other hand. A foreigner, who has been resident in Germany for more than eight years would therefore be able to vote without applying for and obtaining citizenship,<sup>129</sup> provided that they provide sufficient evidence of their ongoing residence (such as, official registration as a resident of the town where he or she lives and works).

It is no longer convincing to argue that those who do not want to acquire German citizenship also do not deserve to have the right to vote. Permanent residents or denizens are indeed affected by decisions of the government, similarly to German citizens; they can take part in the political dialogue and bear the responsibility for governmental decisions. Therefore, they should be allowed to take part in the political discourse and elections.<sup>130</sup> They already have the same obligations as German citizens to pay taxes and to obey the laws. They are equally affected by decisions of German authority, be it about traffic regulations, shop opening hours or tax increases. The famous battle call of the American revolution already demanded: “no taxation without representation”.<sup>131</sup>

With regard to those who argue that foreigners should not be allowed to vote because they can always leave and so escape any further responsibility for governmental decisions, the same consideration holds true with regard to foreigners who were granted German citizenship. A person in possession of her former citizenship can always return to his or her home country and thereby evade the responsibility of electoral outcomes, or even vote from abroad once citizenship is granted. Moreover, German citizens can also emigrate. German expatriates retain the right to vote in federal

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<sup>128</sup> Bast J “Denizenship als rechtliche Form der Inklusion in eine Einwanderungsgesellschaft” (2013) 10 ZAR 353 at 353.

<sup>129</sup> Of course, to become a German by way of time and place of residence, further material preconditions have to be fulfilled after eight years. However, the right to vote should be acquired after complying with the formal requirement of eight years’ residence. The right to vote *while resident in Germany* is still different from the right to return to Germany in the future having previously resided there. Citizenship as opposed to denizenship includes this right to return as an essential element.

<sup>130</sup> A very general development can be observed that the differences between citizens and foreigners are diminishing; cf Gärditz K F “Der Bürgerstatus im Lichte von Migration und europäischer Integration” *VVDStRL* 72 (2013), S 49-163 (87 ff); Thym D “Freizügigkeit in Europa als Modell? EU-Migrationspolitik zwischen Offenheit und Abschottung” (2011) *EuR* at 487; Benhabib S “Die Dämmerung der Souveränität oder das Aufstreben kosmopolitischer Normen? Eine Neubewertung von Staatsbürgerschaft in Zeiten des Umbruchs” in Kreide R & Niederberger A (eds) *Transnationale Verrechtlichung* Frankfurt: Campus Verlag (2008) 209 at 216; di Fabio U *Der Verfassungsstaat in der Weltgesellschaft* Tübingen: Mohr Siebeck (2001) at 51 ff & 67 ff.

<sup>131</sup> Bryde (2000) at 64.

elections but do not have to bear responsibility for the electoral outcome as they do not reside in Germany.

The counter-argument that foreigners who have not become naturalised may not be sufficiently integrated, also does not speak against granting non-citizens the right to vote. First, Germans also do not have to fulfil any material conditions, such as, proving knowledge of German political parties or the German Constitution. The right to vote in Germany is altogether a formal right. To argue that foreigners might not be sufficiently politicised and therefore may not vote is discriminatory. In addition, the mere fact that a person would register in order to vote already indicates that he or she is at least willing to integrate and is interested in entering into the political dialogue in Germany. In comparison to German citizens, a foreigner would have to be proactive and register for the election; thus already showing his or her willingness and engagement. These foreigners would enter the political dialogue,<sup>132</sup> and would indeed prove their willingness to take responsibility for the *res publica* in Germany.<sup>133</sup>

### 4 CONCLUSION

Democracy means power to the people, but it is not always clear who belongs to "the people". The question has become pertinent in an age of migration where large groups of foreigners permanently reside outside their countries of nationality. The economic, cultural, and political integration of these foreigners is one of the pressing problems faced by democratic States in both the developed and developing worlds. One question that arises is whether resident non-citizens should be granted the right to vote. The answer to this question depends on who belongs to "the people". In federal and quasi-federal States with multiple levels of government the further question arises whether "the people" is a homogenous concept that applies uniformly across all levels of government.

This article sought to contribute to the debate about the right of foreigners to vote in democratic States with multiple levels of government, such as, South Africa and Kenya. It did so by discussing the German response to the problems mentioned above. The dominant view of the German FCC since the 1990s has been that "the people" only includes "German citizens" and that attempts by lower levels of government to extend the right to vote to foreigners from Africa and elsewhere is unconstitutional. In this article I explored and critiqued this conventional view. I argued that the attempt to link "the people" to "German citizens" as the basis of democracy is too formal and too static. Nonetheless, it took a great deal of effort to decouple these two terms as it is widely presumed that the term "the people" in the German Basic Law means "the German people". This interpretation makes it impossible to grant foreigners voting rights. My main argument was that the German Constitution does not link these terms as inevitably and inseparably as is usually argued. It is much more convincing to interpret the terms "the people" and "the German people" in their respective settings in the Basic Law itself. Doing so revealed three things: first, the Constitution does not define who

<sup>132</sup> BVerfG 132, 39 – Auslandsdeutsche, para 40.

<sup>133</sup> Wahlberechtigung Auslandsdeutschen (2012), Dissenting Opinion of Judge Lübbe-Wolff at para 71.

“the people” are and does not restrict the active right to vote to Germans; secondly, non-Germans were already included in “the people” when voting rights were extended in 1992 to Europeans to vote in local government elections, and even earlier to so-called “Status Germans”; and thirdly, the Constitution proclaims Germany to be a democracy, requiring us to strive towards better fulfilment of this fundamental principle.

The exclusion of large groups of residents from political participation based on their nationality is unhealthy for any democratic State. Democracy demands a congruence between the government and the governed or those who are subordinate to State authority. Granting the right to vote to foreigners would further the integration of non-citizens without demanding that everyone first go through the process of becoming a formal citizen with all the negative emotional and legal consequences that might be attached. The argument for the inclusion of resident foreigners in the demos and extending voting rights to them is strengthened by the character of Germany’s multi-level government. The federal nature of the State makes it possible for integration to take place differently at the different levels of government, allowing for voting rights to foreigners at the lower levels of government while restricting the right to vote at the national or federal level to citizens.

The argument presented above focused at times on the technicalities of German constitutional law but have wider relevance. If the case I make for the delinking of voting rights and citizenship in Germany is valid, many of the same arguments would apply with the same force to the debate about the right to vote of foreigners in African multi-level democracies, such as Kenya and South Africa.

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