Wir Sind Das Volk

Notes About the Notion of 'The People' as Occasioned by the *Lissabon-Urteil*

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Sie sang das alte Entsagungslied
Das Eiapopeia vom Himmel
Womit man einlullt, wenn es greint,
Das Volk, den grossen Lümmel

Heinrich Heine, *Deutschland Ein Wintermärchen*

Leipzig 1989: dissolution of the East German state people or *Staatsvolk* – Karlsruhe 2020: dissolution of the German people – Courts and the people as a neglected constitutional relationship –*Bundesverfassungsgericht's* versions of the people – Analysis of the concept of people – Forms of action – Political people breaks down into two: original and electoral people – *Marbury* v. *Madison* – Duality as a matter of doctrine and principle – Duality in *Lissabon Urteil* – Conflation and reduction of authority to vote – Subordination of electoral to original people – The Court's logic pushed into motion – Exposing the constitution

Leipzig & Karlsruhe On the evening of Monday, 9 October 1989 the masses in the East German city of Leipzig, who had been taking to the streets for some time in weekly marches against the communist regime, struck up a new chant. First hesitantly and then massively they sang: *Wir sind das Volk*, We Are the People. In a month the Berlin Wall would burst open and the self-proclaimed We-the-people would gush through into the Western part of the city and of the country.

Not a year later, on 3 October 1990, the buoyant East German masses were cast safely into their new mould, to become an additional part of the *Staatsvolk* of the Bundesrepublik.

This succession of events shows how a people, a *Volk*, may release itself from the bonds and structure of its state and go liquid or, so to speak, go pre-constitutional. It also shows how the masses, thus released from their state and from their

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status of a people, may find a new constitutional home. In fact, the 1989 German case seems like a model of this possibility. Just look at the simplicity and limited duration of the transition, between the people freeing itself from the mould of the German Democratic Republic and becoming part of the state people of the Federal German Republic.

The events of 1989-91 were not isolated to Germany. They lent their impulsion to Europe and had to be digested into peaceful change and development across the continent. Several European Treaties absorbed the first shocks, notably those of Maastricht (1992), Amsterdam (1997) and Nice (2001). Then a massive accession of new members and the call for a constitutional refoundation of the Union led to the Constitutional Treaty of 2004, which was concluded in the name of the citizens and states of Europe. The toned-down version to be found in Lisbon (2007) drops the *We-the-citizens* exordium, but maintains the citizens as a representative basis for the Union, next to the states.[1]

Twenty years after Leipzig, on 30 June 2009, the *Bundesverfassungsgericht* in Karlsruhe rendered its judgment on this Lisbon Treaty. It clears the Lisbon Treaty, but only just. And it draws a new line. What if a further treaty crosses that line, voiding German democracy of its substance? That treaty then shall be put to the German people's vote, to find out whether the people really wants to dissolve itself and be released from its German constitutional bond, to seek a new constitutional home in the European Union. Unless it so decides, the *Bundesverfassungsgericht* will prevent the new treaty from becoming law in Germany and, hence, in Europe.

Both situations, the past one of Leipzig in 1989 and the future one defined by the constitutional court, come under the same logic. It is the logic governing the state *Volk* in the face of the possible dissolution of its state and of itself. In the revolutionary situation and language of 1989, the people appeared in the streets.[2]

[1] It is an extremely interesting, contested and nuanced shift. The EC (now TFEU) and EU Treaties in their preambles abound with references to the (several) peoples. TFEU's preamble starts: 'Determined to lay the foundations of an ever closer Union among the peoples of Europe.' Apart from its *foundations*, the EC-Treaty in its later versions also rooted its democratic *functioning* in the several peoples, whose representatives make up the European Parliament (Art. 189 EC). The Constitutional Treaty attempted to move part of both the foundations and the functioning to the body of European citizens. Art. I-1 dropped the reference to the peoples and started: 'Reflecting the will of the citizens and the States of Europe …'. Art. I-20.2 read, squarely: 'The European Parliament shall be composed of representatives of the Union's citizens …'. The Lisbon Treaty maintained the latter shift in democratic functioning, *see* Art. 14.2. As to the foundation, however, it dropped the citizens as the Union's co-founders, together with the states, in favor of the states'(restored) monopoly. This can be read as an expression of a fundamental shift in the Union's finality between the Constitutional Treaty and the Lisbon Treaty.

[2] The English term of 'the people' is ambiguous. In the singular sense it is equivalent to the Nation or, in German, *das Volk*. In the plural it refers to the plurality or multitude. But the ambiguity

In the future situation anticipated by the *Bundesverfassungsgericht*, let us give it the date of 2020, the German people will be summoned to approve the dissolution of the state and of itself.

The 'Leipzig people' of 1989 made clear that it abandoned or was abandoning the (East German) political regime and its constitution. The 'Karlsruhe people' ultimately will be before the choice whether it will do the same and abandon Germany for Europe.

There is no constitutional format of action for a people to dissolve itself or to go liquid. The Leipzig protesters, a small minority out of the full Eastern German population, could thus claim to speak for all or the majority of the German Democratic Republic's Volk. This claim was confirmed by history, which heard the chant. But on what authority can the *Bundesverfassungsgericht* now define the future time, the reason and the way for the German people to go liquid in order to be recast into a new (European) mould?

The Courts and the people

Between the courts and the people there is, in the rich Western constitutional tradition, a complex and to a great extent uncharted relationship. While constitutional controls and relationships between parliament and government, between the ministers and the bureaucracy, between the people and the government and parliament, and even between the courts and political institutions, are roughly familiar to students of the constitution everywhere, this is not so for the constitutional relationship between the people and the courts.[3]

It would be convenient to be able to say that this relationship, other than the more familiar ones just mentioned, is not organised in the constitution. But that would be incorrect. It is organised, however, in a complex way and often with the help of some paradox. Thus in many countries, the courts render justice 'in the name of the people' even if organised so as to function independently from politics and certainly from the public. Likewise, on the one hand courts of law normally sit in public (giving access to the people), while on the other hand the courts are not held accountable in any way to the public. These simple aspects do not indicate a situation under the sway of a single logic or doctrine.

is never clear-cut and the plurality never purely plural. A multitude may aspire to singularity and even to the status of a Volk, as appears in the case of the Leipzig *Wir sind das Volk*. This anticipates the conceptual treatment below.

[3] This owes in part to the fact that the people, interestingly, are often not considered as a political institution. In his classic study *Courts and Political Institutions* (Cambridge, 2003), Tim Koopmans deals extensively with courts and governments and courts and parliaments or legislators, but not with the courts and the peoples.

While such paradox provides a glimpse of the complexity of the relationship between courts and the people, the latter is normally richer and more interesting than paradox can express. The *Lissabon Urteil*'s authors have a particular and well explicated affinity with the German people and even with the peoples of other countries. In the Court's conviction these *Völker*, Electors, *Staatsvölker*, Electoral *Völker* are the single bedrock of each European state.[4] This is why the *Volk*, as the soul of the state, must be respected and protected against both internal and foreign threats.

The following analysis will read the Lisbon judgment in the light of the question: why and how does the Constitutional Court make itself the interpreter of the German people? It shows up a particular and interesting relationship between this Court and 'its' people. What is the nature of this particular relationship?

The subject deserves to be approached in both an analytical and an historical way. After an inventory of the Court's references to the people, in its 'Lissabon Urteil', let us turn to the American parent constitutional court. In its ground breaking ruling of 1803, *Marbury* v. *Madison*, the Supreme Court already gave evidence of a remarkable affinity with 'its' people and in that sense is a forerunner of the *Lissabon Urteil*. Comparison of the two rulings will lead on to a conceptual analysis of the notion of 'people'. From there, the specific approach of the German constitutional court may be better understood.

The people: denominations, roles and forms of action

The Volk makes its appearance in the *Lissabon Urteil* almost right from the start of the adjudicating chapter C (marginal 207 and further), and then returns in a succession of crucial references. The references can be grouped according to how they use different denominations, how they attribute different roles to the people and how they involve different forms of action.

Denominations: people, Germans, demos

As to denomination, one often finds simply 'the people' (das Volk), as in marginals 208, 209, 210, 212, 236, 263, 270, where the German people is intended. The 'German people' in so many words also appears, in 217, 218, 227, 228, 277. Then there is reference to 'the Germans' in the sense of the people (216 and 218) and to the 'whole people' (214).

[4] Marginal 231 of the Lissabon-Urteil: 'In a functional sense, the source of Community authority, and of the European constitution that constitutes it, are the peoples of Europe with their democratic constitutions in their states.' Note: this contribution uses the provisional English language translation of the Urteil; it is good enough to raise no conceptual problems in the current context.

Repeated reference is made to other peoples, as in 'the peoples of Europe' (231), to 'the people' in a more abstract and comparative sense (268, 269) and to the non-existent people of the European Union (277, 279, 280, 296), called (an inexistent) 'demos' in 297 and maybe sometime holder of 'sovereignty of the people' in 347.

Roles: creator, guarantor

Much more interesting than this terminological variety is the diversity of roles attributed to the people. The most crucial and comprehensive role draws on the Basic Law's Article 20(2), reading: 'All state authority proceeds from the people …'. In marginal 209 the Court takes this to mean:

> On the federal level of the state that is founded on the Basic Law as its constitution, the election of the Members of the German *Bundestag* is the source of state authority – with the periodically repeated elections, state authority time and again newly emanates from the people.

This reading deserves to be amply discussed later.

In other references, the people is less the actor or the formative unit of its will, as in marginal 210, but the repository of representation by members of the Bundestag, as in 214: 'Every Member of Parliament is a representative of the whole people …'. 'A majority decision in Parliament represents at the same time the majority decision of the people.'

Apart from its role in voting for Parliament and in being represented by Parliament, the people is also the creator and ultimate guarantor of the constitutional order. Marginal 216 reads:

> The constituent power of the Germans which gave itself the Basic Law wanted to set an insurmountable boundary to any future political development.

The same body which gave itself the Basic Law is also the only authority which can, if necessary, jump this insurmountable boundary. In those cases, incidentally, the people is called 'the Germans' and 'the German people' (marginals 216, 217 and 228 respectively). Marginal 228 reads:

> The Basic Law does not grant the bodies acting on behalf of Germany powers to abandon the right of self-determination of the German people under Germany's sovereignty under international law by joining a federal state [the EU, wte]. Due to the irrevocable transfer of sovereignty to a new subject of legitimisation that goes with it, this step is reserved to the directly declared will of the German people alone.

Breaking down the roles attributed by the court to the people, one obtains at least the following list: a) holder of sovereignty; b) holder of a single majority will; c) source of all state authority; d) body of citizens splitting itself into majority and minority; e) ruler by representation; f) original creator of the constitution and the state; g) final dissolver of the constitution and the state.

Interestingly, this diversity in the roles of the people seems to be no concern for the Court. It conceives of the people as one and of its roles as logically flowing from this conceptual unity. The same appears to be the case with the forms of action by the people.

Action: immediate and mediate

The people's existence in the eyes of the Court is mostly related to action. This is natural, as we are in the realm of politics, which is about action. The people acts immediately through voting and in a mediate way through its representatives in parliament. Voting is, in the eyes of the Court, the preferred and most authoritative form of action of the people. It is the emanation of state authority from the people. In elections, 'state authority time and again newly emanates from the people' (marginal 209). In the vote for dissolution of the constitutional order and for 'the irrevocable transfer of sovereignty to a new subject of legitimisation that goes with it, this step is reserved to the directly declared will of the German people alone' (marginal 228).

This is the result of a first inventory of the German Constitutional Court's view of the people, *das Volk*. So far it will suffice to note that the Court conceives of the *Volk* on the one hand as the single source of German constitutional authority but, on the other hand, in a diversity of names, roles and forms of action. It does not seem to find this diversity in any way problematic or to be aware of possible friction or incompatibility between some of the roles and forms of action. The diversity cannot affect the Court's inherent and overriding conceptual unity of the people.

In order to put this Court's concept of the people into doctrinal perspective, let us now turn to the American Supreme Court's ruling of 1803, *Marbury* v. *Madison*. This reveals some of the logic of a constitutional court's relationship with the people and it has some instructive anecdotes.

The US Supreme Court and its People, or John Marshall's sleeping beauty

At the end of February 1801, just before the inauguration of his successor Thomas Jefferson, the parting second president John Adams showered a spree of appointments of justices on the young republic. This was meant to play a trick on

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Jefferson, Adams's old friend who had turned into a political opponent and enemy. Adams was a federalist; Jefferson had developed into a republican. The split between federalists and republicans may be seen as the foundation of a political party system for the US.

After his inauguration on 4 March, Jefferson ordered James Madison immediately to discard the few appointment letters which had not yet been served. One of those who were passed over in this way, William Marbury, brought a case before the Supreme Court and before his freshly appointed co-federalist John Marshall, asking for an order of mandamus to get the letter delivered.

John Marshall had just been appointed by Adams to succeed Oliver Ellsworth as chief justice. He was no full career lawyer. By then, at age 46, he had been through all forms of public life, from being a comrade-in-arms of George Washington in the American revolutionary war to taking part in the Philadelphia Convention and serving as secretary of state to John Adams.

Marshall was in a fix. He knew that he could not order Madison to deliver the letter. Why not? Because Madison would certainly refuse to obey and in that way expose the Court's precarious authority. Thus together they would damage the young Constitution. But neither could Marshall let the matter pass unvindicated.

In his judgment the Chief Justice starts by unequivocally condemning Madison's action and by stating that Marbury's rights had been violated. This sufficed to shame Madison and Jefferson. Could Marshall then give the order to deliver the letter? We know he could not do so without provoking a losing stand-off. This explains why he took refuge in a legal manoeuvre. Alas, he reasoned, Marbury's claim happened to be based on an Act of Congress (the Judiciary Act of 1789) which was contrary to the Constitution and hence needed to be discharged. So the legal manoeuvre involved the introduction of constitutional review, which Marshall sought to do anyway.

It was an act of legal and constitutional genius, killing several birds with one stone. Marshall snubbed the government, avoided being snubbed in return by the administration and, by creating constitutional review, in the long run created leverage for the Supreme Court over the political institutions. William Marbury was not vindicated, but, well, his was a lost cause anyhow, as courts cannot make appointments.

Why mention the anecdote surrounding the creation of constitutional review in the US? For one thing because they evidence that the Marbury ruling, the 'dawn of constitutional law in the US', was not an act of doctrinal legal reasoning alone, but one involving bluffing and politics. George Marshall knew exactly what he was doing and did it with great political cunning, respecting the given political context.

In his delightful book about these events and their context, Bruce Ackerman shows how Marshall's ruling was part of a tactical retreat in the head-on clash between the Supreme Court, dominated by Federalists, and Jefferson's presidency which had swept the new Republican party into power. [5]

The main reason, however, to revisit the case here is Marshall's formal and logical argument for creating constitutional review. He sanctified the Constitution as the most authentic utterance of the will of the original American people which created the Constitution ('We the People'):

> That the people have an original right to establish for their future government, such principles, as, in their opinion, shall most conduce to their own happiness is the basis in which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

In Marshall's words the act of the people giving birth to the Constitution is such a 'great exertion' and the people itself is so unique and authentic in this pristine action, that attempts of its representatives in a later stage to express the people's will through legislation need to be regarded with some distrust. Hence constitutional review. In this way Marshall made the Supreme Court the self-appointed guardian of that sleeping beauty We-the-People, exhausted from its original exertion, even against legislation in the name of the people that is alive and voting.

We need not accept that Marshall seriously believed what he said about the original people and its original rights. The people he refers to did not exist in 1787 in any sociologically verifiable way. Having been involved in all the stages of conflict, from the war of independence to the political infighting leading up to the ratification of the Constitution, Marshall was very much aware of the less than harmonious realities under that shining cover of 'We the People'. What did exist and could speak in its name, was the small elite whose authority rested on having won the war of independence and having led the nation from there.[6]

As is common knowledge, the 'We the People' of the Constitutional preamble was an expedient needed to overcome the problem that not all of the states even

[5] *The Failure of the Founding Fathers. Jefferson, Marshall and the Rise of Presidential Democracy* (Cambridge, Harvard University Press 2005).

[6] *See* Joseph Ellis, *His Excellency. George Washington (*2004, Vintage 2005), p. 115. Marshall from the battle of Valley Forge was a lifelong champion of Washington's legacy in American history. 'Marshall wrote the definitive Washington biography of his time and subsequently imposed, for all time, Washington's version of America's original intentions in his landmark decisions as the nation's pre-eminent jurist and most influential interpreter of the Constitution.'

participated in the drafting of the Constitution and that the instrument therefore was made to enter into force upon ratification of only nine out of the thirteen states. So the exordium could not be 'We the States', as was originally drafted, and would be 'We the People' instead, a great leap forward into a promised but distant land.[7]

Marshall knew what he was doing to secure institutional leverage. As a guardian of the Constitution the constitutional judge will logically seek the patronage of that authority which has created the constitution: the 'original people' or 'constituant'. This notwithstanding the clear awareness that much of this original people is a fiction and, worse, that invoking it will be at the expense of those authorities that do have the actual authority to speak in the name of the people, both on the basis of the constitution and of their election, to wit Congress and the Presidency.

Marshall in fact split the American people into two distinct personae and pitted these against one another. This act of constitutional ingenuity is of great importance for constitutional doctrine following the invention of popular sovereignty. Let us take a closer look.

The people's two bodies: The original and the electoral people

The notion of 'people' is ancient and has become a rich well of meanings. The word can be used to refer to the masses, the plebs and the populace, or conversely, to the fountain of all democratic authority, the People. In Rousseau's distinction it may refer either to the many or to the general whole (distinguishing the *will of all* from the *general will)*. It may mean something like a natural tribe (as in 'my people') or something like a fortuitous set of subjects. It may also be the (intelligent) general public, the (emotional, superficial or average) man in the street, the (wise or madding) crowd, the organised or unleashed mob, etc. This endless variety of meanings conveys the sociological diversity of the reality covered by the single concept.[8]

For the sake of using 'the people' as a tool of thinking and of acting in the public realm, one needs to organise this diversity. Let us then first pick from the aforementioned grab bag of various meanings only those which have legal and constitutional relevance, leaving aside the others. It is done by selecting the meanings which refer to a people endowed *with the capacity of binding action*. This way, one derives what may be called the 'political people', or 'the nation'. It is the one which we are interested in.

[7] William Peters, *A More Perfect Union* (New York, Crown 1987), p. 204.

[8] It might be useful to include Elias Canetti's insights in 'the masses' into the analysis at this point. For reasons of economy, this is not pursued here.

Inside this class of 'political people' we follow Marshall in *Marbury* in operating a further bipartition, according to as the aggregate intended may act in two distinct ways. It may act in the context of an existing set of constraints or constitution, or it may act to *create* such forms and constraints for itself anew. This draws on the famous distinction from the abbé Sieyès between, respectively, the *constitué* and the *constituant*, or between the creator and the creature. The one, *le constitué*, most pedestrian and familiar, is the body which manifests itself in elections and other votes under the constitution. It is the electorate or, more generally, the voting public. We call it the 'electoral people'.

The other form of the political people is that which, in its founding act, is seen to have established the constitution. Its act may be something like Hobbes' social contract to which subjects are understood to have agreed, or it may be something like a popular mass acclaiming a new regime after the overthrow of the old one. Or it may be the fountain of authority springing from a successful uprising, rebellion or revolution. This is where you find, also, the American preamble's 'We the people'. The people acting and manifesting itself thus, or symbolised to have done so, we shall call the 'original people'.

To sum up: the category of the 'political people' again breaks down into two subcategories: the electoral and the original people. As we can see, this breakdown was operated by John Marshall right at the time of the appearance of the people as the cornerstone of the US.

Now it is all well and good to establish such analytical distinctions, but one knows that reality will not conform itself to them, neither voluntarily nor fully. This goes for the two steps taken. The first separation, discarding most meanings of 'people' (such as the mass, the crowd, the public, the mob) for the benefit of isolating a 'political' people, will tend to deny political relevance to the man in the street-people or to the crowd, or the tribe, or the masses. We do know, however, that the 'man in the street' people is not in fact entirely unrelated to the political people or the electorate. The press, the media, the polls and public relations are there to cultivate the link between the two. So is the distinction unsound? Not quite. Even if not absolute, it is better to have it available than not to have it. Let us see why.

The notion of 'the people' is one with a great gravitational pull. It tends to attract and mix up all its meanings into a single sphere of heavy associative and suggestive power. To break it down into distinct versions is useful if only to deal with it intelligently and to avoid coming under its spell. It is a matter of intellectual restraint. In a later stage one may then rediscover and analyse what binding elements there are between the different aspects or versions.[9]

[9] The notorious argument that an entity of public law, in order to be viable as a political community, needs a pre-existing'demos' , i.e., a sort of sociological uniformity among its human sub-

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Likewise the second breakdown, inside the category of political people, between the original and the electoral people, is too rigid and simple to conform fully to reality. In fact you will never find a clear-cut distinction between the original and the electoral people. For one thing, the constituant will appear or shine through in the work of the *constitué*. This happens when an existing constitution is amended through the procedure it has prescribed itself, filtering in an element of the 'original people' by referendum or elections.[10]

Still, this distinction, the one between electoral and original people, is a powerful one. It is a part of the Western constitutional tradition since it was conceived by Sieyès and activated by Marshall. Many constitutions formatting popular sovereignty express and practice the distinction, as will appear from a cursory glance at some of them.

The US constitution, as we have seen, has the original *We the people*, but it also has the people of the several states electing the members of the House every second year. The Swiss constitution has 'We the Swiss People and the Cantons' which is said to have adopted the constitution and it has the voters, exercising their rights in elections and in referendums. In Switzerland, often using direct democracy, the distinction between constituant and constitué is even less clear cut than elsewhere, but it is maintained. The Russian Constitution has 'We the multinational people of the Russian Federation' adopting the Constitution and, on the other hand it has the voters electing the Duma. So the distinction is often explicitly found in the written or formal constitution.

In the current French Constitution there is no mention of the original people as such. There are references to the French people in the preambles to the Declaration of the Rights of Man and the Citizen of 1789 and in that to the Constitution of 1946 ('… the French people proclaim anew …'). The French constitution is one that both historically and doctrinally has held the original people (*la nation*) in high esteem. The arch-distinction between constituant and constitué, as noticed above, goes back to abbé Sieyès, who was among many other things a specialist in questions of both theory and practice of constitutional origins. He himself invented the French people conceptually by enrolling everyone in the 'third estate' as the 'nation' and bringing this new people to power practically. He was also

strate, represents only one of the misunderstandings which are due to this gravitational pull. Of course it helps to have some sociological unity or coherence in a nation, but this is no precondition. One might even say that too much sociological unity may stifle a state, as internal conflict and emancipation among different groups is one of the sources of life and change. In any way, there is no single and compelling relationship between such sociological and constitutional categories as is asked for in the demand for the demos.

[10] In the Netherlands, amendment of the Constitution requires two readings in both houses of parliament, the second reading to be concluded by 2/3 majorities and, more importantly, an election in between the two readings.

involved in at least one coup d'état, Napoleon's, of 1799. So he had a few things in common with John Marshall.

Some constitutions, such as the British and the Dutch ones do not include the distinction between the two personae of the political people, the original and the electoral. This is so simply because they do not organise a form of popular sovereignty and do not need the people as originator.

The German constitution is overtly one of popular sovereignty. The preamble reads that ' … the German People has given itself, by virtue of its constituent power, this Basic Law.' This is a clear reference to the *original* people, as the prime mover, presented in a pure (and fictitious) form, like the American We the People. Interestingly, something like the original people is also projected into the future. Article 146 provides for the German people by a free decision to end the provisional Basic Law (*Grundgesetz*) and adopt a real Constitution (*Verfassung*). The provision in 1949 expressed the hope of Germany's unification.

Next to this original people we find the *electoral* people, in an almost equally pure form, in the *Grundgesetz*. Article 38: 'The deputies to the German Bundestag … shall be representatives of the whole people.' This electoral people acts and exists through elections and through action and activity of its representatives.

Now it is interesting to notice that the split between the original people and the electoral people, even if manifest in the German Basic Law, does not seem to be cultivated in German constitutional doctrine. More interestingly, it is downplayed or even reasoned away by the Constitutional Court. Before landing at this crucial point, however, let me develop the duality in the political people as a matter of principle.

The duality as a matter of doctrine, theory and principle

From the above examples it appears that a constitution based on some form of popular sovereignty will normally have a built-in split between the *original* (or constituting) people and the *electoral* (or constituted) people. How to conceive of this split? What is its nature, what its importance, what its utility, what its normative value?

When Marshall referred to the American original people, he used the distinction created by abbé Sieyès between the constituant and the constitué, between the original and the derivative power. But while the Frenchman considered that the first would cede its place to the second and fade away, Marshall understood it was convenient to keep the two side by side. Picking up the Frenchman's temporal switch, he turned it into a structural and live duality.

In this he followed a recipe known of old to the priests of power and explained brilliantly in Ernst Kantorowicz's classic *The King's Two Bodies* (1957). Kantorowicz

demonstrates how the medieval king existed under two distinct personae: the living king and the immortal one. The living king was the authority that could act and stake his fate on the action, so he could die; the eternal king could not be affected by the action and, hence, could neither act nor die. He was kept and sometimes shown around in the form of an avatar. The show happened especially at the death and burial of the mortal king. Hence also the adage *The King is dead, long live the King*. One might rephrase, in less symbolic terms: The King is dead, long live Kingship.

This ancient duality, once conceived, has never quite left us. In modern democratic monarchies such as the UK and the Netherlands it has often migrated to that between the symbolic king(ship) on the one hand, and the politically responsible government on the other. The king can do no wrong and is inviolable; the person has become an avatar. The government or cabinet, on the other hand, is the successor to the acting king and the one which is allowed to stake its fate on and to go down in action, if inevitable. Government depends on parliament, which is elected. The last element reconciles the ancient duality with modern democracy. Thus migrated and transformed, the old duality is alive and kicking.

There are many different manifestations of the duality in modern government. In a presidential system, such as the US, for example, it turns into a recurring fraction. The electoral people is further split into two: one electing the president and one electing the legislature. The presidency itself contains a further interesting duality: as elected political leader the president is fully a representative of the electoral people and his office is inherently personal and terminal. As head of state, on the other hand, the president represents the permanence of the political system and his action is on the side of the symbolic.

In constitutional states under the doctrine of popular sovereignty, the subject of this essay, the old royal twins have made the most interesting journey. They have been helped by abbé Sieyès and John Marshall to migrate to the *people*.[11] This is the evolution behind the duality just noticed in constitutions: there is an original people, in principle inviolable, permanent and unable to act; and there is an electoral people, responsible and endowed with the capacity of action, of evolution, of change, of failure.

Before dealing further with this 'popular duality', which is at the heart of the present essay, I need to make a small excursion and discuss some of the properties

[11] It is a simplification to ascribe the invention to Sieyès and Marshall. There are several precursors. We should not forget Alexander Hamilton, who in *Federalist* 78 claimed constitutional review as a matter of logic. '... that the power of the people is superior to both [judicial and legislative power], and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than by the former.'

and qualities of the dualities presented above in a general constitutional context. This shall be done following a series of questions: a) what is the nature of the dualities?; b) what is their function?; c) What is the reality of each?; d) how do the two personae relate to each other?; e) how do they interact in times of change? The purpose of this excursion is not to treat the subject exhaustively but to demonstrate the use of an analysis such as this. It also serves to prepare the ground for the main argument to be resumed.

Nature of the dualities and of their component parts: impure and complex

As the above examples demonstrate, one should not assume that the dualities in practice are pure or follow a single or simple logic. In the UK, as in the Netherlands, the king is also head of state and performs essential, albeit residual, political functions. In the Netherlands the king is even formally part of the government. And the King does not have the monopoly of the avatar: there are now national hymns and flags to share his functions of national symbol; there is the national currency.

These impurities and complexities, however, do not basically affect the dualities themselves. They merely testify to the fact that we are not dealing with analytical units but with actual forms of life. Even in the Middle Ages, the duality between the king and the avatar was never a pure dichotomy. The king as a person was not a champion of action only but was also himself full of symbol and his existence full of pageantry; the avatar on the other hand was never fully permanent, but could ultimately be destroyed or even exchanged.

Likewise the two personae of the political or acting people are not completely separate or distinct, as we have seen above: the constituant filters into the constitué and vice versa. Still, the personae are of an essentially different nature.

This shows best in the way they each act and draw upon the rich well of meanings in the people generally.

The electoral people

The electoral people we know best. It is seen in action at the time of elections. It acts by proxy through its representatives, when these act by way of legislation or executive action. It is always present in the background, as the delegates tend to appeal to it in their conduct of politics even apart from legislation and executive action. In their attempt to represent the people, delegates may give expression to the people's interests, its ideals, its fears, emotions, etc. The delegates also represent the people in its internal antagonisms, by acting out its differences in political conflict.

The original people

The original people, on the other hand, is less well-known; it is not seen in action save in exceptional situations. It is somewhat like a brooding legendary grandfather, whose acts lie in the past and whose power, although acknowledged and potential, is mostly dormant. There is something silent and mysterious about such a figure. It draws on the past rather than on the future; on fears rather than on hopes; on legend rather than on plans, on nostalgia rather than on enterprise, on the ethnic rather than on the cultural; on the masses rather than on politically articulated structure. This is no problem, normally, but it is one good reason to leave this original people mostly dormant.

Function of the dualities: temporal and logical plurality

What such dualities invariably do is to adopt, acknowledge and reconcile various temporal and logical modes of existence and action in a modern society or, in more directly accessible terms: *change* (over time) and *diversity* (across space). They also express the acceptance of plurality and the refusal of the ideal of a society's or a community's single ultimate identity.

One of the most obvious and powerful specimens of such plurality is that contained in the arch-couple of permanence and change. The duality allows for a community to represent itself both as remaining intact (literally: untouched) and as engaging in decisive action and change. These two representations are essentially different. Together they are necessary to pull the community away from an archaic or nostalgic reliance on itself for permanence, in combination with a reliance on external forces for change. They open up the capacity of political action, which is about taking change and evolution upon yourself. I shall not go further than this; no more is needed to prepare the ground for later development of the present argument.

Reality and fiction, or convention, in the two components of a duality

When a king, or a people for that matter, is conceived as two distinct personae, this conceptual act concerns the reality on both sides of the duality. It would be easy to say that one part of the duality is wholly fictitious and the other is wholly real. But the case of kingship serves to demonstrate that this is not so. Both the avatar and the champion king are each one part raw or unmediated reality and one part fiction or conventional reality. The avatar represents, as we noticed, the kingship's (and the state's) permanence. Insofar as the state is in reality more permanent than the actual king, the avatar is has greater reality than that king. On the other hand, the champion-king is not wholly a matter of unmediated reality even in his action, but is amply clothed in convention.

The people's two bodies likewise each have a degree of direct reality and a degree of fiction or convention.[12] In the *original* people the element of myth is most obvious and that of direct reality, while less obvious, is mostly a potentiality; think of the Leipzig people of 1989. In the *electoral* people, on the other hand, the element of reality is obvious: the people acts in elections and votes. Equally obvious is the element of fiction or convention in elections. Bill Clinton gave telling evidence of his understanding this when, after the vote between Bush and Gore in 2000, he said: 'Well, the people has spoken; it only may take a while to figure out what it has said.' The conventional nature of the vote appears in the procedures and formalities embedding an election and, further, it is unmistakable when the people acts through its representatives in parliament.

What this shows is that each of the two personae of the people, like the two kings, is a mix of artifice (including myth and convention) and reality (including fact, action and undeniable empirical fact). This allows us to evade the sterile extreme positions of those on the one hand who take the people for granted as a simple reality and those on the other, who deny the people any form of reality.

How do the two personae relate to each other?

This aspect is one of the most interesting and rich; it can only be summarily discussed. Let us take the two versions of the people and consider the two under populism and in evolution.

Populism

When elections and their institutions, including the political parties, are perceived to fail in providing the opportunity and structure to allow the electoral people to express itself, part of the electoral people will become attracted to ideas of shunning its parties, politicians and political institutions in favor of more immediate popular rule. This is the appeal of populism. It holds the promise of avoiding the institutions and of giving back authority to the original people, or to the man in the street, as holders of more authentic judgment than the dull and absent political elite. Populism harkens to the original people, unfettered and unspoilt by the institutions, more direct and more real. It is an attempt directly to mobilise the powers, the authority and the properties of the original people inside the electoral situation. In substance, populism will seek to find the supposed harmony and the emotion characteristic of the single people under a charismatic leader. It will almost inevitably, in order for the harmony to be kept, start exorcising some exter-

[12] I shall not go into the concepts of convention and of direct reality. Suffice it to say that direct reality is that which exists or happens in some measure independently from our representation, while convention and fiction exist and function in some measure independently from direct reality.

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nal evil against which internal differences fade. In form, populism will seek the more immediate forms of expression of popular emotions through direct democracy, notably referendum, including the strong leader who will implement the people's will.

Evolution

A clear difference between the original and the electoral people is that concerning change and evolution. The electoral people is organised from top to toe in view of compromise, evolution, change over time. This can only be sustained within the stability of the existing institutions and through an awareness of the gulf between any representations of reality and reality itself. The original people, on the other hand, will only conceive wholesale, sudden, immediate change. It has no agent representing it in action. It lacks the imagination of gradual evolution, the ideas of halfway solutions, of compromise. It lacks an advanced idea of time allowing to combine the sudden and the gradual. In its own imagination of itself, it is complete.[13]

To conclude: it is good to distinguish different constitutional personae of the people, even though in constitutional practice they may partially overlap. There are practical and principled reasons. The practical reason is to understand and be aware that different and even contradictory appeals to the people are part of the game. The principled reason is to defeat the illusion of a single original, authentic and preconceptual people, to which all other authorities must ultimately bow.

The *Bundesverfassungsgericht* and the people

Let us now return to the mainstream of the argument in order to understand the specific way of the German constitutional court with its people. Can one perceive the above duality or diversity in notions of the people in the Court's reasoning? How does it deal with them? What are the steps taken? To what effect? These are the questions to be answered successively. Each time, the Marbury ruling can be used as a comparative help to understanding.

First, can one perceive the duality? Certainly. Most of the numerous references to the People in the Lissabon Urteil can be easily differentiated as to be either to the electoral authority or to the original authority.

The *original* People is found in several places; characteristically, in marginal 216:

[13] In the notion of the 'constitutional moment', such full and sudden change is theorized and appreciated, by Bruce Ackerman amongst others, but in a different sense from the one here used.

> The constituent power of the Germans which gave itself the Basic Law wanted to set an insurmountable boundary to any future political development.

In marginal 218, the relationship between the original people and the Court is mentioned:

> From the perspective of the principle of democracy, the violation of the constitutional identity codified in Article 79.3 of the Basic Law is at the same time an infringement of the constituent power of the people. *No constitutional body* (italics added) has been accorded the competence to amend the constitutional principles which are essential pursuant to Article 79.3 of the Basic Law. The Constitutional Court watches over this.

This is nearly the same relationship between the court and the (original) people as the one activated by Marshall in *Marbury* v. *Madison*. There are some striking differences, however.

When under the pressure of events the basic structure must be amended anyway, to go beyond the limits of Article 79.3, the original German people, as *not a constitutional* body, can be called on to decide. Read marginal 228:

> The Basic Law does not grant the bodies acting on behalf of Germany powers to abandon the right to self-determination of the German people in the form of Germany's sovereignty under international law by joining a federal state. Due to the irrevocable transfer of sovereignty to a new subject of legitimisation that goes with it, this step is reserved to the *directly declared will* of the German people alone. (italics added)

In references such as these the German people is put forward in its original, extra-constitutional status. It is, however, not presented as the sleeping beauty but as a body having a 'directly declared will'. The people's directly declared will is based on a (general) pre-constitutional right and is activated when the constitution has lost or is losing its grasp of the situation.

Inside the Basic Law there is a reference to this pre-constitutional right, in the special situation set out in Article 146. It 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.

It is the provision which was meant to allow a full Constitution (*Verfassung*) to replace the provisional Basic Law (*Grundgesetz*). When the occasion came, in 1990, it was ignored; the normal constitutional amendment procedure, together with a

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series of treaties, sufficed to process the transition and to cast the orphaned (East) German people into its new mould. Now it is used by the Court as the conceptual window for the whole German people to go liquid and be cast in a new and fully European mold.

How does this original body declare its will? Marginal 179 of the Lisbon ruling points it out. It is not about the people strictly, but about its individual members' right to vote. Together, however, the individual votes make up the above-mentioned 'directly declared will' of the people. It reads:

> According to the Basic Law, those entitled to vote have the right to decide 'by a free decision' on the change of identity of the Federal Republic of Germany that would be effected by its becoming a constituent state of an European federal state, and the replacement of the Basic Law which would go with it. Like article 38.1 sentence 1 of the Basic Law, Article 146 of the Basic Law creates a right of participation of the citizen entitled to vote. Article 146 of the Basic Law confirms the pre-constitutional right to give oneself a constitution from which the state authority founded on the constitution emerges and by which such authority is bound. Article 38.1 sentence 1 of the Basic Law guarantees the right to take part in the legitimization of the state authority founded on the constitution and to influence its exercise. Article 146 of the Basic Law sets out, in addition to the substantive requirements laid down in Article 23.1 sentence 1 of the Basic Law, the ultimate limit of the participation of the Federal Republic of Germany in European integration. It is the constituent power alone, and not the state authority founded on the constitution, which is entitled to release the state that is founded on the Basic Law as its constitution.

In simple terms: there is, in the context of European integration, only one way for the German people to be released from its constitution and merge into a European compound. It is by an explicit vote to this effect. In order to be admitted to this act, however, the German people must first go pre-constitutional or, in the imagery used for the Eastern Europeans, go 'liquid', so that it can vote away the current constitution including its eternity clause of Article 79.3 and deliver itself to Europe.

We shall return to this fascinating argument below.

The *electoral* people is equally found in the just quoted marginal 179, albeit, equally, not explicitly but in the form of its citizens entitled to vote. In an explicit form it can be found in numerous places also. Marginal 213 reads, as an example:

> For the state order which is founded on the Basic Law as its constitution, a self-determination of the people according to the majority principle, brought about by elections an other votes, is mandatory. …

Other such unmistakable references to the electoral people may be found in 210, 212 and 214. The most intriguing reference to the people's power, however, is in marginal 209. This reads in its concluding part:

> On the federal level of the state that is founded on the Basic Law as its constitution, the election of the Members of the German *Bundestag* is the source of state authority – with the periodically repeated elections, state authority time and again newly emanates from the people (Article 20.2 of the Basic Law).

This is a selective reading of the Basic Law. The latter's Article 20.2 reads in full:

> All state authority emanates from the people. It shall be exercised by the people through elections and other votes *and through specific legislative, executive and judicial bodies.* (italics added).

This people of Article 20.2 Basic Law is interesting. The first sentence of the provision does not clearly specify the nature of the people referred to. On the surface, it best reads as the original people, the fountain of all state authority, but in the second sentence it is more of the electoral kind. Not fully so, again, for how can the electoral people exercise authority through judicial bodies? The people in whose name the courts sit and judge cannot be the electoral people, as there is hardly a relation between elections and the court's judgments. This people must be closer to the original one. So all taken together, this People of Article 20.2 is of a mixed, undifferentiated nature.

There is nothing wrong or problematic with this. Often, constitutional differentiations or divisions are rooted in and have their residues in some common undifferentiated source. The Bundesverfassungsgericht, however, gives Article 20.2 a radical reading in which, leaving out the exercise of authority *through specific legislative, executive and judicial bodies,* it turns the act of voting into the sole emanation of all state authority:

> the election of the Members of the German *Bundestag* is the source of state authority – with the periodically repeated elections, state authority time and again newly emanates from the people.

It is rewarding to take a closer look. What marginal 209 seems to do is to pull this mixed and innocuous provision of Article 20.2 Basic Law apart into two radical components. On the one hand it establishes the original people as the sole (pre-constitutional) source from which all authority emanates. On the other hand it turns the act of voting for the Bundestag into the only emanation of all constitutional authority, to the exclusion or submission of any other form and source of authority. This radicalisation and simplification of the electoral people's authority,

at the expense of all other authority, is drawn from the reference to the omnipotence ('all state authority') of the people in the first sentence of Article 20.2.

In a lucid piece on the Lisbon ruling, Daniel Thym notices that the Court does not activate the distinction between the two personae of the people but instead seems to conflate them. According to him the Court, following German constitutional doctrine,

> does not distinguish between the constituent power and the subject of democratic legitimacy. The Court rather presumes the substantive identity of the legitimizing subject of the constitutional order and democratic legitimacy – an equation which corresponds to German constitutional doctrine.[14]

We now come to the heart of the matter. The Court's identification or conflation of the two personae of the people is not a form of benign neglect. It contains two steps: first, a strong preference for the vote at the expense of all the other forms of authority emanating from the people. In this way the voting people inside the constitution, which wields all state authority, matches the original people that votes outside of the constitution. Both are drawn to exist and act in one preferred form of action, i.e., the voting. Other constitutional institutions, parliament, courts and the executive, are eliminated from the picture.

The second step is to subordinate the vote of the electoral people to that of the original people in existential questions of sovereignty and the country's future.

> It is the constituent power alone, and not the state authority founded on the constitution, which is entitled to release the state that is founded on the Basic Law as its constitution (marginal 179, in fine).

We are the People

As it appeared from Marshall's reasoning in *Marbury* v. *Madison*, constitutional logic will help a constitutional court to identify with the original people rather than with the electoral people and the political institutions. As a heeder of the original people and its 'original exertion', the constitutional Court has a natural wariness of actual politics while idealising democracy in the abstract. There is nothing wrong with it; it is in the logic of a constitution. As Marshall demonstrates, a court of law which is well aware of its logical predicament may even use its position slyly for the benefit of constitutional evolution and, hence, for the sake of enhancing the checks and balances and the authority of the political institutions.

[14] Daniel Thym, 'In the Name of Sovereign Statehood: A Critical Introduction to the *Lisbon* Judgment of the German Constitutional Court', *CMLRev* 2009, p. 1795-1822 at p. 1819.

To do this well, however, you need to take your own position as a court with a grain of salt and even when acting boldly, do it as a player, not as the holder of the truth of last resort. Marshall knew that the original people he spoke for was mostly a fiction and he knew exactly what he did in invoking it nevertheless. Above all, his interest was in strengthening the constitution instead of exposing it. He did this in several ways: first by avoiding the creation of a situation in which Madison could simply refuse to execute a ruling and thus could deny the Court's authority; second, by enhancing the checks and balances and the possibility of constitutional evolution. In Bruce Ackerman's sophisticated reading (as presented above), *Marbury* was part of a subtle and important manoeuvering between the political institutions and the court which allowed the young republic to expose its institutions, avert civil war and keep on evolving.

The German constitutional court, conversely, seems to be unaware of its own contextual predisposition. It takes itself fully seriously in idealising its original people as the more authentic, the better authorised, the one from whose vantage difficult and even extreme situations need to be understood. Proceeding from the same starting point as Marshall, it acts in the opposite way. It takes a confrontational stance and it denies constitutional evolution.

As with other forms of populism, there is nothing necessarily damaging in appeals to the original *Volk* against an overconfident political elite. They may help the electoral institutions to keep in touch with the street, as the *Lissabon-Urteil* will probably do. There are some objections, however, to this approach. It feeds illusions of a remaining democratic autarky of the country in a time when there is no question that some (however little and however slowly) of the democratic foundations of Germany and its evolution are moving to the European level. It cultivates a state of denial. At a more fundamental level it feeds illusions about the single and immediate reality of a *Volk* as the ultimate origin and touchstone of political development. It denies the minimal duality of the concept of people which is part of the tradition of popular sovereignty, a duality which both empowers and relativises the people in its different states of being on the basis of procedural and normative conventions embedding it.

Fundamentally also, the court constantly risks exposing the constitutional institutions to conflicts which they cannot contain. It may be seen as one ground rule implicit in any constitution that its institutions, including the people under its different personae, not be exposed. This Marshall understood perfectly. An institution is exposed, or embarrassed, when the vestiment of convention clothing its authority falls away and authority shows its naked face, or bluff, of power.

One way to see through the Court's dealing with the people is to imagine what happens when the line governed by Article 146 is about to be crossed.

Pushing the logic into motion

As explained in the above, the *Bundesverfassungsgericht* entrusts the people, in whose name it decides, with guarding the evolution of Germany in the European Union. To enable it to do so, the Court has created an Archimedean position for itself and for its people outside and above the constitution, from which final decisions may be taken. This superior position will allow the people to act by way of voting as the final arbiter of political decisions concerning Germany's position and function in European Union. Now let us push this logic into motion.

Suppose the German government in 2020 has concluded another European treaty which Parliament has approved. The Court is seized by a constitutional objector and finds that the Treaty indeed crosses the line. It will then need to force the government to put to matter to the voter, to the Germans, to the people. Let us ignore the fact that this people, in order to vote under Article 146 of the Basic Law, needs first to be transformed into its pre-constitutional state. What can this voting people do? There are two possibilities.

First, the people can agree to the Treaty and, in the eyes of the Court, to its own dissolution and absorption into a European federation, in the way of the *Ossis* in 1989. Other than the East Germans in 1989, however, the Germans will not find a European people fully ready to absorb them. In the eyes of the court itself there even can be no such people, for one thing because the EU lacks a representative organ based on 'one man, one vote'. So this eventuality produces a non sequitur in the logic of the *Bundesverfassungsgericht* itself.

One may ask if it is also a non sequitur in the eyes or logic of the voters? Would they not be relieved or even happy finally to be given the option to surrender their sovereignty to Europe in a free vote, instead of gradually losing substance and fading away, as some (including members of the Court) regret to see it happening now?

One cannot see this as a realistic option. Voters do not act out of their own initiative, but upon a summons to choose, coming from political authority. They would only surrender sovereignty if summoned to do so by a political authority in whom they trust. How can they trust a national authority which promises to dissolve itself? How can they trust a new authority ready to welcome them but which is merely nascent?

There are more ways to unveil the lack of realism. All attempts at pushing its logic into motion run into the binary nature of the Court's scenarios. It is all or nothing. The scenario betrays, conclusively, both the Court's ultimate affinity with the original people, which imposes a full and sudden temporal switch, and its disaffinity with the electoral people, which is all organised towards evolution.

In the alternative, of course, the people, when placed before the choice by the government at the orders of the Court, can refuse to dissolve itself, by voting

down the new treaty. This boils down to what happened in earlier popular refusals of the Danes, French, the Dutch, the Irish. We are on familiar grounds. The refusal will lead to new negotiations.

In fact, of the two options for the people to act, this is the only real one. But the fact that it is the only real option implies that, both in the opinion of the court itself and in practice, when put before the choice, the people have no logical choice but to follow the Court and refuse the change proposed. And it proves that behind the Court's revered *Volk* we find nothing but the Court itself.

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