

'A European Constitution implies a European people' from the Frankfurter Allgemeine Zeitung (24 November 2004)

Caption: On 24 November 2004, the German daily newspaper Frankfurter Allgemeine Zeitung analyses the idea of a European people and considers the question of holding a European referendum on the European Constitution.

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A European Constitution implies a European people

by Dr Thomas Schmitz

Since the Intergovernmental Conference in June, the way has been cleared for Europe's first Constitution. As a project, it has been the subject of wrangling for decades. In the 1990s, experts in constitutional law such as Josef Isensee, Paul Kirchhof and Dieter Grimm were still arguing about the theoretical possibility of a European Constitution. Constitutions were supposed to be the preserve of the state — the nation state, even — and European legal theorists shrank from challenging that perception in any serious way. The alternative approach, on the basis of certain parallels, was simply to regard the EU's founding treaties as a constitution in themselves. But the treaties do not set out to be a constitution. They do not include the terms 'constitution' or 'constitutional order', and they actually avoid any form of words that might imply ambitions in that direction. That is no accident: hitherto, the Member States have consciously denied the Union the enhanced political status that comes from a constitutional treaty. It was not until the establishment of the European Convention that the project became feasible.

Many Europeans now want to see the Constitutional Treaty ratified as quickly and straightforwardly as possible, and they therefore reject the idea of a referendum. Under the law of most Member States, only the approval of the national parliament is required. Even though the Constitutional Treaty will solemnly establish the European Union's first Constitution, its legal nature is that of an international agreement, and it is therefore subject to the normal ratification procedure, just like the Treaties of Maastricht, Amsterdam and Nice.

Here, however, a core issue of constitutional theory in free democratic societies comes into play: constitutions should be based upon the constituent power of the people. That implies, and recent practice has generally confirmed, that the people themselves should decide upon the Constitution. The same principle should surely also apply Europe-wide. But the question then arises: who are 'the people' in the European Union?

The general assumption is that a European people has not yet emerged, and, for that reason, a Europe-wide referendum has not been considered. Even today, the concept of a transnational people is widely regarded as implausible — unless, that is, Europe declares itself a nation (thus reverting to a traditional concept of organisation) or develops into a federal state. Our conventional state-centred approach leads us to focus unduly on the sovereign state as a structure. We have, moreover, internalised the notion that the Union derives its legitimacy from the peoples of the Member States — thereby leaving little scope for the concept of a European people. Sceptics also point to the multiplicity of cultures, national traditions and languages in the enlarged European Union.

Against the backdrop of globalisation, however, jurisprudence needs to shake off the prejudices that come with the nation-state approach. From a legal perspective, ethnological, cultural-anthropological and historical definitions of a 'people' are not the important ones: what matters is a definition based in law and in the theory of government. A 'people' is what we call a community of human beings who belong within a specific unit of government. Conventionally, they are the people of a country, the community of citizens that supports and is responsible for a state. As we are aware, many such communities do not need to be ethnically or culturally homogenous or to share the same history or language. What unites the nationals of the state and makes of them a people is the formal bond of common citizenship within the same unit of government — their government.

A similar bond — citizenship of the Union — unites the people of the EU. They demonstrated their will to live together as a community by democratically ratifying the founding of the Union or their respective countries' accession to it. So we do not have to enlist the Classical World or Christendom, the Enlightenment or Western culture in order to prove that there is a European people. From a legal theorist's point of view, indeed, there is no European people as such but simply the people belonging to the unit of government that is the European Union. And here we can see the difference between that concept and the ethnological, cultural-anthropological or historical definitions of a people: the Swiss, for example,

indisputably share a great deal with the people of the EU, yet they are not part of that people.

The people of the European Union, as an entity, has not replaced the peoples of the Member States: rather, it exists alongside them. The traditional notion that there can be only one ‘people’ on a single territory does not adequately reflect the multilayered nature of public authority in the 21st century. Different units of government — Union, state, federal state and, in some cases, region and municipality — function in a geographical cascade structure on the same territory, and only collectively do they perform the entire range of public tasks. Accordingly, people develop multiple identities — they have a sense of belonging not only to their country but also to their local, regional and European units of government.

The complex reality of the 21st century necessarily demands a differentiated approach that properly appreciates the citizen as belonging to more than one people. Each territorial unit that represents citizens generally on its own geographical level has its own people — and that includes municipalities, federal states and the supranational European Union. Peoples, just like the units that represent them, are nested within one another. Accordingly, the Catalan people are part of (and not an alternative to) the Spanish people, and the Bavarian people are part of the German people, and these national peoples are, in turn, part of the European people. In Bavaria, the plurality of peoples was, in fact, recognised at an early stage: the Preamble to the 1946 Constitution explicitly identifies the ‘Bavarian people’ as the constituent body.

Not only the peoples of states or nations but all peoples are capable of giving themselves democratic legitimacy. Bavarian law therefore derives its legitimacy — as the Preamble to the Constitution correctly indicates — from the Bavarian people and not, for example, from the ‘Bavarian part of the German people’. The European Union may therefore base the legitimacy of its decisions directly on its own European people. The fact of their speaking different languages is not a problem in this respect, for modern technology, including the Internet, facilitates democratic debate, even in a multilingual arena. Only when the position of a state under international law is changed must the change be legitimised by the people of that state. This means that the European people alone could not legitimise the transfer of new responsibilities to the Union or the transformation of the Union into a federal state.

Another significant aspect of democracy is the strength of democratic legitimation, and that depends on the level of mediation and the proximity of the people providing the legitimation. A decision taken by a government is less strongly legitimised than one taken by a directly elected parliament or by the people themselves. Similarly, the level at which citizens legitimise decisions is important. Following the principle that a unit of government derives its prime legitimacy from its own people, the people of a state should legitimise the state’s decisions, and the people of the Union should legitimise Union decisions. Since the interests of a particular community have to be defended, universally appropriate solutions are most readily found within that community, and it is that community which must ensure that the solutions are acceptable.

The enactment of a European Constitution will, however, have a lasting effect on the position of sovereign states and, for that reason, must also be supported by the peoples of those states. Moreover, certain requirements of international law constitute insuperable obstacles to the proposition that authority to enact the constitution should rest with the people of the Union. The European Constitution will come into being by means of a treaty under international law. This is an act concluded between states, and only the states are legally accountable for it because, under international law, only states — and not the peoples of those states or the people of the Union — enjoy legal capacity to act. This excludes the concept of sovereignty of the people within the European Union, in the sense that the people should be the highest, and an entirely independent, decision-making authority. Until the day that a European federal state is founded, if it ever is, the Member States remain ‘masters of the treaties’ and consequently retain the authority to enact a constitution.

Nevertheless, in order to enjoy the constitutional status that derives from the free exercise of democracy, the European Constitutional Treaty must, in so far as possible, be legitimised in the same way as a Constitution enacted by the people. Additional procedural steps are therefore needed so that the people can be directly involved. The leading role here should fall to the people of the unit of government that is receiving the Constitution, in other words the people of the European Union. The entity being constituted will act in the

name of this community of people; this community depends upon the Constitution's integrating effect; and it is this community that will suffer most from a bad Constitution.

A single, Union-wide referendum is needed to ensure that the Constitutional Treaty, although in law an act of the states, derives politically from the will of the European people in a clear and direct way. National referendums alone could not suffice, for they would legitimise only the individual states' participation in the constitutional project. On the other hand, under constitutional law, the agreement of each state is a pre-requisite. The Europe-wide referendum may therefore be organised only as an additional requirement for the entry into force of the Constitutional Treaty. Those Member States that wish to do so should have the option of linking the Europe-wide vote to the national ratification process. Voters would thus take part in a double referendum, deciding as citizens of the Union on the Constitution of the Union and as citizens of a state on the ratification of that Constitution by the Member State. Such a procedure would respect the role of the European people while, at the same time, giving due weight to the impact of this major European project on the peoples of the Member States.

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