

Was denn ist ein Volk?

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In its Judgment on the Lisbon Treaty,¹ the Bundesverfassungsgericht wrote:

“Die demokratische Grundregel der wahlrechtlichen Erfolgchancengleichheit (‘one man one vote’) gilt nur innerhalb eines Volkes, nicht in einem Vertretungsorgan, das – wenn gleich nunmehr unter besonderer Betonung der Unionsbürgerschaft – eine Vertretung der miteinander vertraglich verbundenen Völker bleibt.”²

The theme that *das Volk* is the sole source of democratic legitimacy recurs throughout the Court’s reasoning in Section C of the Judgment. So, for example, the Court speaks of “*die Einhaltung des Demokratiegebots einschließlich der Achtung der verfassungsgebenden Gewalt des Volkes*”³ and “*die Grundlage der Selbstbestimmung des Volkes*”.⁴ This theory is relied upon to affirm that the democratic legitimacy of the European Union derives only from the will of the Member States:

“Die Unionsbürgerschaft ist allein von dem Willen der Mitgliedstaaten abgeleitet und konstituiert kein Unionsvolk, das als sich selbst verfassendes Rechtssubjekt zur eigenen Selbstbestimmung berufen wäre.”⁵

The purpose of this brief article is not to discuss the Court’s reasoning, but rather to point out that it offers no answer to the underlying question, “*Was denn ist ein Volk?*”.

1 BVerfG, 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09 of 30 June 2009.

2 In the English translation published by the Court, *ibid.*, para. 279: “The democratic basic rule of equal opportunities of success (‘one man, one vote’) only applies within a people, not within a supranational representative body, which remains a representation of the peoples linked to each other by the treaties albeit now with special emphasis on citizenship of the Union.”

3 *Ibid.*, para. 208: “the principle of democracy including respect for the constituent power of the people”.

4 *Ibid.*, para. 212: “the rule of law founded on the self-determination of the people”.

5 *Ibid.*, para. 346: “The citizenship of the Union is solely derived from the will of the Member States and does not constitute a people of the Union, which could exercise self-determination as a legal entity giving itself a constitution.”

Langenscheidt's *Handwörterbuch Englisch* offers the following, amongst other, translations of the German word *Volk*: "people", "nation", "race", "mob" and "rabble". Disregarding the last three, it seems that the English word "nation" is closest to what the Court had in mind – not least because *die Selbstbestimmung des Volkes* is an echo of the "self-determination of nations" in President *Woodrow Wilson's* Fourteen Points.

It is perhaps worth noting in passing that none of President *Wilson's* Fourteen Points affirms unequivocally the right to self-determination of all those who "self-determine" themselves as "nations". He concentrated on the right to self-determination of specific European nations including Turkey. But Mrs *Thatcher* is reported as saying that:

"Self-determination is a principle wholly malign for the peace of the world. States just cannot be made to coincide with nations. It is Woodrow Wilson, of course, who is ultimately responsible for the damaging myth of the single-nation state. He is the one to put in the dock of history."⁶

In spite of this vigorous condemnation, national identity and self-determination are recurring themes in modern politics – for example in the search by British politicians for something called "Britishness".⁷ And these ideas are alive and well in modern constitutional parlance. In its recent judgement on the Catalan Statute of Autonomy, the Spanish Constitutional Court observed:

The word 'nation' can be used to speak of something that is cultural, historical, linguistic, sociological or even religious. What matters here is solely and exclusively the word in its juridical-constitutional sense. In this sense the Constitution knows nothing other than the Spanish Nation on which the Constitution is based.⁸

Similarly, Art. 1 of the Irish Constitution says:

The Irish nation hereby affirms its inalienable inalienable and sovereign right to choose its own Government, to determine its relations with other nations, and to develop its life, political, economic and cultural, in accordance with its own genius and traditions.

6 Reported by *Urban*, *Diplomacy and Disillusion at the Court of Mrs Thatcher*, p. 201.

7 A Google search for „Britishness“ will offer many examples.

8 Sentencia 31/2010, de 28 de junio de 2010 (BOE núm. 172, de 16 de julio de 2010), II "Fundamentos Jurídicos", § 12: "*De la nación puede, en efecto, hablarse como una realidad cultural, histórica, lingüística, sociológica y hasta religiosa. Pero la nación que aquí importa es única y exclusivamente la nación en sentido jurídico-constitucional. Y en ese específico sentido la Constitución no conoce otra que la Nación española, con cuya mención arranca su preámbulo, en la que la Constitución se fundamenta (art. 2 CE) y con la que se cualifica expresamente la soberanía que, ejercida por el pueblo español como su único titular reconocido (art. 1.2), se ha manifestado como voluntad constituyente en los preceptos positivos de la Constitución Española.*"

A sceptical lawyer may nevertheless be surprised, in the twenty-first century, to find the concept of *das Volk* being adopted by a court of law as a legal criterion by which to determine the democratic legitimacy of the institutions of the European Union. After all, the words *Volk*, “people” and “nation” carry with them a vast burden of intellectual baggage that might best be left behind, with “sovereignty”, in “that dusty desert of abstractions through which successive generations of political philosophers have thought it necessary to lead their disciples”.⁹

If the concept of the nation or *das Volk* is to be used meaningfully in a legal sense, it is surely necessary to be more precise as to what it means. A working definition was suggested by *Joseph Stalin*, writing in his days as a political scientist before he turned to more sanguinary pursuits. He defined a “nation” as:

“a historically evolved, stable community of language, territory, economic life and psychological make-up manifested in a community of culture”.¹⁰

To these criteria some would add religion, race or ethnicity (though these would probably not have been thought relevant by *Stalin*). From this point of view, a “nation” is some sort of entity that has come into being through historical evolution.

The problem about these and similar definitions is that they offer no answer to Mrs *Thatcher’s* point that “States just cannot be made to coincide with nations”. In Europe there are many “stateless nations” in the sense that the Basques, the Catalans, the Scots and many others regard themselves as nations without, in the case of every individual, wishing to become a separate nation-state. The Prussian state was declared “dissolved” by Decree of 25 February 1947, but did a Prussian *Volk* thereby cease to exist? At what point, indeed, was Prussia subsumed in Germany, and how does modern Germany relate to the Holy Roman Empire of the German Nation?¹¹ And what about the Sámi people of northern Scandinavia – unquestionably *ein Volk* – who herd reindeer over vast tracts of wilderness

9 *Bryce* introducing his discussion of “The Nature of Sovereignty” in: *Studies in History and Jurisprudence*, 1901, Vol. II, p. 504.

10 *Stalin*, *Marxism and the National and Colonial Question*, p. 8, cited in: *Hobsbawm*, *Nations and Nationalism since 1780*, 1990, p. 5, fn. 11.

11 For discussions of these and similar questions see, for example, *von Thadden*, *Prussia: the History of a Lost State, 1987* – a translation of *Fragen an Preussen*, 1981; *Colley*, *Britons: Forging the Nation 1707-1837*, 1999; *Jones*, *The English Nation: the Great Myth*, 1998; *Snyder*, *The Reconstruction of Nations: Poland, Ukraine, Lithuania and Belarus 1569-1999*, 2003.

without visible frontiers and are themselves herded into four nationalities (Norwegian, Swedish, Finnish and Russian) in the name of territorial democracy?¹²

Yet another unanswered question is whether, and if so in what respects and for what purposes, do immigrants become part of the *Volk* or nation. Is nationality or (if there be a difference) is citizenship the test? The Bundesverfassungsgericht seems to be unsure:

*“In modernen Territorialstaaten verwirklicht sich die Selbstbestimmung eines Volkes hauptsächlich in der Wahl von Organen eines Herrschaftsverbandes, die die öffentliche Gewalt ausüben. Die Organe müssen durch Mehrheitsentscheidung der Bürger gebildet werden.”*¹³

A quite different approach to our question “*Was denn ist ein Volk?*” was suggested by the French philosopher *Ernest Renan* in a lecture delivered in the Sorbonne on 11 March 1882 entitled “*Qu’est-ce qu’une Nation?*”¹⁴ He first analysed and rejected as insufficient and inappropriate criteria race (ethnicity), language, religious affinity, community of interest and geography. He concluded, in words that have a particular resonance after the horrors of the two World Wars and the more recent horrors in the Balkans:

“Une nation est une âme, un principe spirituel. Deux choses qui, à vrai dire, n’en font qu’une, constituent cette âme, ce principe spirituel. L’une est dans le passé, l’autre dans le présent. L’une est la possession en commun d’un riche legs de souvenirs; l’autre est le consentement actuel, le désir de vivre ensemble, la volonté de continuer à faire valoir l’héritage qu’on a reçu indivis. [...] Dans le passé, un héritage de gloire et de regrets à partager, dans l’avenir un même programme à réaliser; avoir souffert, joui, espéré ensemble, voilà ce qui vaut mieux que les douanes communes et des frontières conformes aux idées stratégiques; voilà ce que l’on comprend malgré les diversités de race et de langue. Je disais tout à l’heure: «avoir souffert ensemble»; oui, la souffrance en commun unit plus que la joie. En fait de souvenirs nationaux, les deuils valent mieux que les triomphes, car ils imposent des devoirs, ils commandent l’effort en commun”.¹⁵

12 *Mulk*, The Sámi: People of the Sun and Wind, 2009.

13 BVerfG, (fn. 1), para. 268 (emphasis added): “In modern territorial states, the self-determination of a people is mainly realised in the election of bodies of a sovereign association, which exercise public authority. The bodies must be created by the majority decision of the citizens.”

14 Available now in *Renan*, *Qu’est-ce qu’une Nation et autres écrits politiques*, Imprimerie Nationale 1996, pp. 223-243.

15 *Ibid.*, p. 240 et seq.: “A nation is a soul, a spiritual principle. Two things, which are really only one, make up this soul, this spiritual principle: one in the past, the other in the present. One is the possession in common of a rich legacy of memories; the other is consent here and now, the desire to live together, the will to continue to uphold undivided the heritage we have received. [...] In the past, a shared heritage of glory and regrets, in the future a common programme of achievement; to have suffered, rejoiced, hoped together, that is of greater value than customs unions and frontiers fixed according to notions of

In the same spirit, Justice *Oliver Wendell Holmes* said of the US Constitution:

“When we are dealing with words that are also a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism: it has taken a century, and has cost their successors much sweat and blood, to prove that they created a nation.”¹⁶

In short, the common suffering and common effort of real people have more to do with a sense of “nationhood” than the abstractions of political or legal science. It is true that there is, at present, *kein Unionsvolk* and perhaps there never will be. But the message of the *Schuman* Declaration was in this respect entirely realistic:

*“L’Europe ne se fera pas d’un coup, ni dans une construction d’ensemble: elle se fera par des réalisations concrètes, créant d’abord une solidarité de fait.”*¹⁷

Europe today has many nation-states where once there were empires. Eastern Europe in particular has fragmented into “self-determined” nation-states, while Western Europe is characterised by larger states, some of which contain within them “stateless nations”. In this confused context the value of legal constitutionalism offers a solution to the upheavals of the twentieth and twenty-first centuries. But constitutionalism needs a firmer basis than reiteration of the questionable prescriptions of national self-determination. After all, as *Renan* also said:

“Getting history wrong is part of being a nation”.¹⁸

strategy; that is what people understand in spite of differences of race and language. I said just now ‘to have suffered together’; yes, common suffering unites more than rejoicing. Amongst the national memories, the bereavements are of greater value than the triumphs, for they impose obligations, they require effort in common.”

16 *Missouri v. Holland*, 252 US 416 (1920).

17 Europe will not be conjured up at a stroke, or by some master plan. It will be attained through concrete achievements that lead in practice to a community of interest.

18 *Hobsbawm*, (fn. 11), p. 12, paraphrasing *Renan*, (fn. 14), p. 227: *L’oubli, et je dirai même l’erreur historique, sont un facteur essentiel de la création d’une nation, et c’est ainsi que le progrès des études historiques est souvent pour la nationalité un danger.*