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ALIEN DISENFRANCHISEMENT AND THE VALUE OF THE VOTE

The Notion of the Value of the Vote in the Constitutional Debate on Alien Suffrage in the Federal Republic of Germany

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1. Introduction

The disenfranchisement of resident aliens is increasingly felt to be at odds with the principle of democracy that those who are subject to a certain state's authority must have a say in the decisions about the exercise of that authority. In general, resident aliens are not quite without opportunity to exert influence on the political process in the state of residence as many countries have initially reacted to the problem of resident aliens' exclusion from the process of political decision-making by enlarging the scope of political activities resident aliens are allowed to engage in and by creating special channels for consultative participation.[1] Yet, such avenues of political participation as resident aliens may have at their disposal typically aim at enabling their involvement in decisions on

1 *See e.g.* Mark Miller, *Political Participation and Representation of Noncitizens, in* Immigration and the Politics of Citizenship in Europe and North America 129 (William Rogers Brubaker ed., 1989) [hereinafter Immigration and the Politics of Citizenship] ; Yasemin Nuhoglu Soysal, Limits of Citizenship - Migrants and Postnational Membership in Europe 65-83 (82).

specific matters, i.e. matters concerning their interests as aliens, but they do not guarantee their participation in decisions concerning more general policies which affect resident aliens as well as nationals. The fact that the exclusion of a part of a state's long-term residents from full and equal participation in the political process tends to be permanent as a significant number of resident aliens fails to obtain the nationality of the state of residence[2] further contributes to questioning the appropriateness of the restriction of the right to vote to nationals.

The denial of voting rights to resident aliens, then, is no longer accepted as a matter-of-course, it increasingly requires justification. Why is it still predominantly thought that the right to vote particularly in national elections should be restricted to nationals? Some have looked to political theory for clues to the answer to this question.[3] In political theory membership in the political community is

2 In classical non-immigration countries due to the conferral of nationality on the basis of descent and the traditionally restrictive policies of naturalization the legal status of alien may continue across generations, a phenomenon unknown to traditional immigration countries where nationality is automatically conferred on birth in the territory and naturalization is easily available. But a state's rules governing the acquisition of its nationality are not the only cause for resident aliens' failure to obtain the state of residence's nationality. A tendency among resident aliens to refrain from naturalization even when easy to obtain can be discerned in both type of countries. *See e.g.* Peter H. Schuck, *Membership in the Liberal Polity : the Devaluation of American Citizenship, in* Immigration and the Politics of Citizenship 51, 57-58 ; Soysal, supra note 1, at 27.

3 *See* Heather Lardy, *Citizenship and the Right to Vote,* 17 Oxford Journal of Legal Studies 75 (1997).

usually presupposed, and the question how political membership is to be determined is largely neglected. Nevertheless, it was thought that political theory could help to assess whether the restriction of the right to vote to nationals is justified through an examination of the consistency of the denial of voting rights to resident aliens with the accounts of the value of political participation offered by the different types of political theory. The denial of voting rights would be consistent with the value attached to political participation, if political participation and exclusion of resident aliens from the right to vote would both serve the end which a particular political theory finds important to promote. Eventually, such consistency could not be easily found to exist, as the different conceptions of the significance of political participation provided no obvious foundation for the denial of the right to vote to resident aliens.[4]

In this article, I will attempt something similar but from a different angle : I will examine whether the substantial arguments for the justification of the denial of voting rights offered in a concrete legal debate on alien suffrage can be linked to particular notions of the value of political participation, and, if so, whether they reconcile alien disenfranchisement with the value attached to political participation. Substantial arguments are arguments which justify resident aliens' disenfranchisement on the basis of a substantial difference claimed to exist between nationals and resident aliens which would allow for the latter's exclusion from the right to vote. If substantial arguments can be linked to particular notions of the value of political participation, then the substantial difference

4 *Id.* at 97-98.

claimed is expected to explain how the denial of voting rights assists in realizing the end served by political participation. Yet, alien disenfranchisement is only consistent with the value attached to political participation, if the substantial difference claimed really exists and, moreover, exists only between nationals (those who hold the right to vote) and resident aliens.

I will look at the substantial arguments which were formulated in the German constitutional debate on the admissibility of the introduction of alien suffrage under the Basic Law, and will attempt to discover the notion of the value of political participation held by the various opponents of alien suffrage through an examination of their conceptions of democracy as recorded in their more general writings, to see whether a connection exists between the various substantial arguments and notions. Finally, I will evaluate whether the substantial arguments offered are convincing.

In few countries yet has there been conducted as an extensive debate on alien suffrage and have so many scholars documented their opinions on the constitutionality of the extension of the right to vote to resident aliens as in the Federal Republic of Germany. Moreover, in few debates have opponents of (a form of) alien suffrage supplied substantial arguments justifying alien disenfranchisement, which makes an examination of the German debate well suited to my purpose.

2. The juristic debate on the constitutionality of alien suffrage

Before sketching the outline of the constitutional debate, the legal terms of *alien* and *German* require some explanation. The ali-

ens on behalf of whom the extension of the right to vote was proposed are different from aliens in general in terms of residence 'rights'. In contrast to general aliens, so-called resident aliens hold the right to permanent residence in the FRG, if not on the strength of an unrestricted residence permit or residence entitlement, then under protection of the constitutional principle of good faith ("Vertrauensschutz") which restrains administrative discretion in decisions concerning an application for the renewal of a residence permit by an alien who has already established long-term legal residence in the FRG.[5] Notwithstanding this difference, legally, a resident alien falls in the category alien, that is a person "who is not a German in the meaning of Article 116(1) of the Basic Law."[6] Article 116(1) stipulates that "German within the meaning of this Basic Law is unless otherwise provided by law [a person] who possesses German nationality or who has been admitted to the territory of the German Reich [within the frontiers] of 31 December 1937 as a refugee or expellee of German stock or as the spouse or descendant of such person."[7] As is clear from this provision, "German" is a comprehensive category which not only includes German nationals[8] but also certain types of ethnic Germans ("deutsche Volkszuge-

5 Helmut Rittstieg, *Juniorwahlrecht für Inländer fremder Staatsangehörigkeit,* 16 Neue Juristische Woche [NJW] 1018 (1989).

6 Ausländergesetz [Aliens Law] [hereinafter AuslG] § 1(2) (1965).

7 Grundgesetz [Constitution] [hereinafter GG] art. 116(1).

8 Under the German Nationality Law, the attribution of nationality at birth is based exclusively on bilineal descent, following the principle of *ius sanguinis.* § 4(1) Reichs- und Staatsangehörigkeitsgesetz [hereinafter RuStAngG].

hörige"). The category of German was defined this broadly to swiftly accomodate the masses of ethnic Germans who were driven out of the formerly occupied territories in Eastern Europe in the years immediately after Germany's defeat in World War II.[9] Germans without German nationality, status Germans for short, virtually enjoy the same constitutional rights as German nationals: where the addressee of the guarantee of a constitutional right is not every person ("Jedermann"), the constitutional right is guaranteed to all Germans, i.e. Germans in the meaning of the Basic Law.[10]

The peculiar condition of German nationality before the German reunification was another factor which contributed further to the complexity of the notion of German. Under the identity theory, the state Germany as subject of international law had not ceased to exist upon the imposed division of state territory after the war - which is also reflected in the expression "the territory of the German Reich [within the frontiers] of 31 December 1937" - and the de facto existence of two German states was denied legal effect at least in relation to nationality law. The FRG recognized only the Nationality Law of the German Reich of 1913 which applied to the territo-

9 *See, e.g.,* Kay Hailbronner, *Citizenship and Nationhood in Germany, in* Immigration and the Politics of Citizenship 67, 73.

10 The main legal difference between the two categories of Germans is that status Germans do not enjoy the protection of Article 16(1) which prohibits the deprivation of German nationality and thus of the rights of citizenship. Rolf Grawert, *Staatsvolk und Staatsangehörigkeit, in* 1 Handbuch des Staatsrechts der Bundesrepublik Deutschland 663, 675-77 (Josef Isensee & Paul Kirchhof eds., 1987) [hereinafter Handbuch des Staatsrechts].

ries of the Federal Republic and the German Democratic Republic (GDR) combined.[11] Consequentially, Germans in the GDR were considered as German nationals with all the constitutional rights enjoyed by other nationals, although they were prevented from actually enjoying these rights while outside the territority of the Federal Republic. Upon entry in the FRG, however, East Germans immediately enjoyed full political, social and economic rights. In brief, Germans within the meaning of Article 116(1) consisted of persons with German nationality many millions of whom lived outside the FRG and persons without German nationality.[12]

Alien suffrage as a constitutional issue arose from the fact that the Basic Law does not contain any article explicitly reserving the right to vote for Germans.[13] The various positions taken in the ju-

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11 Hailbronner, *supra* note 9, at 72-73. Klaus Stern, 1 Staatsrecht der Bundesrepublik Deutschland, 261, 264-67 (1984).

12 In English language publications the German term "Staatsangehörigkeit" is often translated with citizenship in stead of nationality because of the ethnical connotation of the latter term. However, it is more accurate to translate "Staatsangehörigkeit" with nationality, which denotes the legal membership of a person in a territorial corporation, and to reserve 'citizenship' for the English translation of "Staatsbürgerschaft", signifying full membership in a political community. Although the two terms usually are interchangeable, in the FRG citizenship is a broader category than nationality as the existence of status Germans shows.

13 GG arts. 28(1)2 (concerning state and local elections) and 38(1) (concerning federal elections) only stipulate that the people should have electoral representation, while GG art. 38(2) only contains a minimum age requirement for the right to vote and the right to be elected. The legal status of German is an ex-

ristic debate basically depended upon the interpretation of two articles, Article 20(2) and Article 28(2). Article 20(2) begins with declaring the principle of popular sovereignty : "All state authority emanates from the people." The provision then continues : "It shall be exercised by the people by means of elections and voting and by specific legislative, executive and judicial organs." Art. 28(1) GG provides : "The constitutional order in the states must conform to the principles of republican, democratic and social government based on the rule of law, within the meaning of this Basic Law. The people must have electoral representation in the states, counties and communes, which follows from universal, direct, free, equal and secret elections."

The legal dispute on alien suffrage centered on the meaning of "the people" in both provisions. It was generally agreed that "the people" as the source of legitimation of state authority originally did refer to Germans only, but a minority contended that a reinterpretation of the traditional understanding of "the people", as extending beyond Germans to resident aliens, was either a matter of legislative discretion or even a constitutional command. The overwhelming majority, however, found that the people who legitimize and exercise state authority by means of elections and voting consisted exclusively of Germans, and thus opposed the permissibility of national alien suffrage. Yet it was divided over the question whether the people who must have electoral representation in the

press constitutional prerequisite for the right to be elected for the office of Federal President (GG art. 54(1)) and the rights of assembly (GG art. 8(1)) and association (GG art. 9(1)).

counties and communes had to be understood as being restricted to Germans too.

The main arguments in support of the various positions are listed below.

2-1 The admissibility of national alien suffrage[14]

(1). Opponents of national alien suffrage offered a wide variety of arguments for the restriction of the right to vote in national elections to Germans.

Many opponents observed that the interpretation of "the people" in Article 20(2) as the living 'substratum' of the state, including Germans and resident aliens, reflected a sociological notion of the people alien to political theory ("Staatstheorie"). Political the-

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14 National elections in the proper sense consist only of elections to the lower house of the West German federal parliament ("Bundestag"), but for convenience's sake I shall use the term as if including elections to the parliaments of the associating states (Länder). It has been generally accepted that the personnel composition of the electorate at both the federal and the state level is the same. This is either concluded from Article 50 which stipulates that through the representation of the state parliament and state government in the Federal Council, the state people ("Landesvolk") participate in the legislation and administration of the federation, or from the homogeneity principle in Article 28(1)1 which transfers the idea and institution of parliamentary representative democracy to the states. *See, e.g.,* Ulrich Karpen, *Kommunalwahlrecht für Ausländer,* 16 NJW 1012, 1014 (1989); Karl A. Lamers, Repräsentation und Integration der Ausländer in der Bundesrepublik Deutschland unter besonderer Berücksichtigung des Wahlrechts 49-50 (Schriften zum öffentlichen Recht Band 328, 1977).

ory conceived of the people as the totality of nationals which in the modern constitutional state were both the object of the state's personal jurisdiction, and as such constitutive of the archetype state, and the subject of state authority.[15] In contrast to the legal notion of the people as demarcated by nationality, the sociological description of the people as a fluid group could not provide for the unequivocally fixed group of persons which Article 20(2) required to trace the exercise of all state authority back to.[16]

The inclusion of resident aliens in "the people" rested on the mistaken idea that the principle of democracy in Article 20(2) simply implied that state decisions should be legitimized by those individuals affected by them. The principle of democracy in the Basic Law did not signify a theoretical universal principle of participation, but signified a principle for the organisation of rule in a particular state.[17] Democracy as a form of state presupposed the existence of a people : the people create their democracy, not democracy

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15 *See, e.g.,* Grawert, *supra* note 10, at 664-65 ; Josef Isensee, *Staat und Verfassung, in* 1 Handbuch des Staatrechts 591, 605 ; Peter M. Huber, Das "Volk" des Grundgesetzes, 12 Die öffentliche Verwaltung [DÖV] 531, 535 (1989).

16 Dietmar Breer, Die Mitwirkung von Ausländern an der politischen Willensbildung in der Bundesrepublik Deutschland durch Gewährung des Wahlrechts 66 (Schriften zum öffentlichen Recht Band 422, 1982).

17 *See, e.g.,* Manfred Birkenheier, Wahlrecht für Ausländer : Zugleich ein Beitrag zum Volksbegriff des Grundgesetzes 135 (Schriften zum öffentlichen Recht 287, 1976) ; Ernst-Wolfgang Böckenförde, *Demokratie als Verfassungsprinzip, in* 1 Handbuch des Staatsrechts 887, 892, 904 ; Isensee, *supra* note 15, at 655 ; Karpen, *supra* note 14, at 1013 ; Helmut Quaritsch, *Staatsangehörigkeit und Wahlrecht,* 1 DÖV 1, 9.

the people.[18] From the preamble, it clearly followed that the FRG was constituted as the "framework which the German people had given themselves for their organisation as a state and in which they wanted to preserve and restore their national unity".[19] The organs of the FRG, then, were the organs of the German people. Therefore, the people who through these organs exercise all state authority, could be none but the German people.[20]

Emphasis was laid on the historical development of the principle of democracy which refuted the conception of democracy as a demand for identity between ruler and ruled. The essence of the principle of democracy was formed by the principle of popular sovereignty addressed in Article 20(2)1 : all state authority emanates from the people. Historically, the theoretical foundation of popular sovereignty on the European continent developed under the influence of the idea of the nation as the subject of sovereignty.[21] As the consequential realization of popular sovereignty, democracy signified the collective self-determination of the people in the sense of the nation.[22] The self-evidence with which the exclusion of resident

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18 *See* Breer, *supra* note 16, at 57-58 ; Karpen, *supra* note 14, at 1014 ; Quaritsch, *supra* note 17, at 9.

19 Huber, *supra* note 15, at 535.

20 *Id.*

21 Böckenförde, *supra* note 17, at 889-90 ; *Cf.* Albert Bleckmann, *Das Nationaalstaatsprinzip im Grundgesetz,* 11/12 DÖV 437, 438 (1988) (the principle of democracy in itself demanded participation to state decisions of those affected by them, but was absorbed in the nation-state principle in Art. 20(2)1 GG) ; Huber, *supra* note 15, at 534 ; Quaritsch, *supra* note 17, at 9.

22 Böckenförde, *supra* note 17, at 911-12 ; Grawert, *supra* note 10, at 685-86 ; Quaritsch, *supra* note 17, at 9.

aliens from the right to vote was derived from the principle of popular sovereignty, often without further elaboration[23], proved that the assumption that the norm in Article 20(2)1 reflects the tradition of the nation-state was still widespread.[24] That the idea of the nation-state was not a mere historical theoretical argument to interpret "the people" restrictively as the totality of nationals, was also evident from various provisions throughout the Basic Law,[25] such as from the reference in the preamble to the will of the German people "to preserve its national and state unity", from which a constitutional command for the preservation and protection of the nation[26] was derived. Furthermore, the insertion in 1968 of a right to resis-

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23 *See* Otto Behrend, *Kommunalwahlrecht für Ausländer in der Bundesrepublik,* 11/12 DÖV 376 (1973); Klaus-Peter Dolde, *Zur Beteiligung von Ausländern am politischen Willensbildungsprozess,* 11/12 DÖV 370, 372; Hilbert Freiherr von Löhneysen, *Kommunalwahlrecht für Ausländer,* 9 DÖV 330, 331.

24 *Cf.* Breer, *supra* note 16, at 64-66; Bleckmann, *supra* note 21, at 437.

25 Bleckmann, *supra* note 21, at 440.

26 *Id.* at 440-43. This 'command' for national unity was particularly inspired by the circumstances of a divided state -when national unity had to complement the deficit in state unity-, but the author does not consider its meaning to be limited to the question of reunification. In an article written in 1990, the year of the reunification, the author maintains that, "If the emphasis on the national unity next to the state unity ... should have its own significance, then this must be in the embedding of the nation-state principle". Albert Bleckmann, *Anwartschaft auf die deutsche Staatsangehörigkeit,* 22 NJW 1397, 1398-99 (1990). The author read in this constitutional command also important implications for the legislator's discretion with regard to nationality legislation.

tence ("Widerstandsrecht") for Germans in Article 20[27], at a time when already large numbers of aliens resided within the territory of the Federal Republic, showed that the idea of the nation-state and its consequent understanding of the people as consisting of Germans were considered far from anachronistic[28] and refuted the possibility of a change in the constitutional notion of the people without amendment (a so-called "Verfassungswandel").[29]

Opponents of national alien suffrage also offered several substantial arguments for the justification of the exclusion of resident aliens from the right to vote. The exclusion was generally justified with reference to the principle of democratic equality which, from the aspect of the general and equal right to vote, demanded that those equally affected by state authority hold the equal right to vote as a means to influence state authority.[30] An equal right to vote for unequally affected would violate this principle as much as an unequal right to vote for equally affected. Resident aliens were considered to be less subject to German state authority because of their different status of duties, which reflected the personal jurisdiction of their state of nationality. As examples of duties which

27 GG art. 20(4) provides : "Against everyone, who attempts to overthrow this constitutional order, all Germans have the right to resist..."

28 Karpen, *supra* note 14, at 1014 ; Quaritsch, *supra* note 17, at 4.

29 A "Verfassungswandel" denotes the phenomenon of a change in the meaning of a norm of the constitution without its text being changed too. Stern, *supra* note 11, at 161.

30 Breer, *supra* note 16, at 66 ; Lamers, *supra* note 14, at 38.

only Germans had to fulfil, most often the duty of military service[31] and occasionally the duty to accept an appointment to honorary office[32] were mentioned. More importantly, resident aliens were not subject to the same extent as Germans to German state authority, because they were free to leave the country at any time and return to their state of nationality, and therefore could elude the territorial jurisdiction of the FRG at their own discretion. In contrast, nationals were inescapably connected with the state.[33] It was conceded that nationals too had the right to leave.[34] Nevertheless, differences between the right to leave of aliens and Germans remained due to the fact that the Basic Law could not guarantee the latter the right to enter another country.

> Unlike a resident alien, the national is continuously and in principle indissolubly connected through a personal-legal tie with the danger and fate community ("Gefahren- und Schick-

31 Birkenheier, *supra* note 17, at 64 ; Bleckmann, *supra* note 21, at 438. Breer, *supra* note 16, at 53 ; Lamers, *supra* note 14, at 39. The prohibition of the extension of the duty of military service to aliens is generally considered as a general rule of international law (i.e. from the duty to respect a foreign state's personal jurisdiction) made binding by GG art. 25. *See* Stern, *supra* note 11, at 272, 324.

32 Breer, *supra* note 16, at 53. But see v. Löhneysen, *supra* note 23, at 333 (no compelled exclusion from (honorary) office under the Basic Law, without even mentioning possible compulsory exclusion under international law).

33 *See, e.g.,* Lamers, *supra* note 14, at 39 ; Quaritsch, *supra* note 17, at 12.

34 The right to leave is not explicitly guaranteed under the Basic Law but inferred from Article 2(1) (the right to free development of the personality).

salgemeinschaft") and therefore in the democratic constitution also entitled, to co-decide in elections and voting the fate of the people in which he is inescapably involved ; he also could not elude the consequences of the political decisions in which he participates.[35]

By means of the vote, the people collectively determined their own political fate. It was presumed that those who were personally connected with the fate of the state had a different sense of responsibility than those who were not, implying that alien voters would make unresponsible or otherwise disloyal use of the vote, potentially dragging the FRG against her interest into international disputes.[36]

(2). Proponents of alien suffrage, on the other hand, rejected the idea that the text of the Basic Law did contain a clearly circumscribed notion of the people as in principle the totality of German nationals. That nationality could not be the decisive criterion for determining the circle of persons belonging to "the people" was particularly evident from Article 116(1) which stipulated that nationality, and descent, were criteria to establish the status of German "*unless otherwise provided by law*".[37] The introduction of alien suf-

35 Isensee, *supra* note 15, at 634-35. *See* also Böckenförde, *supra* note 17, at 903, 905 ; Stern, *supra* note 11, at 324.

36 *See* Bleckmann, *supra* note 21, at 438, 444 ; Lamers, *supra* note 14, at 39-40 ; Quaritsch, *supra* note 17, at 12-13 ; Stern, *supra* note 11, at 323-4.

37 Helmut Rittstieg, Wahlrecht für Ausländer-Verfassungsfragen der Teilnahme Von Ausländer an der Wahl in der Wohngemeinde 62-63 (1981).

frage at the national level would amount to the recognition of a so-called "little nationality", which required no formal naturalization and was lost again upon prolonged absence from the FRG.[38] The prior decisions of the Federal Constitutional Court, in which the constitutionality of the denial of the right to vote of non-resident Germans under the Federal Election Law was upheld[39], further strengthened the claim that "the people" who legitimize state authority are not the German nationals per se.[40] In particular, the Court's justification of the disenfranchisement of non-resident Germans by reason of the latter's connections to the FRG having weakenend due to residence abroad, proved the diminished importance of the nationality principle in favour of the domicile principle.[41]

Seen from the historical perspective, the principle of popular sovereignty essentially signified the denial of pre-democratic justifications of ruling power. Previously, the postulate that state authority emanates from the people was found, in almost identical formulation, in the Weimar Constitution, which marked the end of the

38 *Id.* at 58.

39 For an analysis of the decisions, *see* Robert Dilworth & Frank Montag, *The Right to Vote of Non-Resident Citizens : A Comparative Study of the Federal Republic of Germany and the United States of America,* 12 Georgia Journal of International & Comparative Law [Ga. J. Int'l & Comp. L.] 269, (1982). Note, however, that the authors found that the Court suggested the statute to be of dubious constitutionality. *Id.* at 270.

40 *See* Rittstieg, *supra* note 37, at 61 ; Manfred Zuleeg, Einwanderungsland Bundesrepublik Deutschland, 13 Juristenzeitung [JZ] 425, 430 (1980).

41 Zuleeg, *supra* note 40, at 430.

monarchic legitimation of state authority.[42] Article 20(2)1 was not a legal clause ("Rechtssatz") from which a prohibition of alien suffrage could be inferred, but a general constitutional principle which needed further concretization in special legal rules in as far as the Basic Law did not provide for more detailed regulation.[43] The question of alien suffrage was a question of "politische Gestaltung" which was, in accordance with Article 38(3)[44], a matter primarily of parliament and government, not of constitutional experts. "Politische Gestaltung" involved the interpretation and further development of the constitution by the legislator within the limitations set by the constitution.[45] It was conceded that at the time of the creation of the Basic Law, solely the political participation of Germans was considered, however, without a conscious and permanent exclusion of aliens from the franchise having been aimed at. While Germans were guaranteed the right to vote, the legislator was left discretion to decide about a further improvement of democracy in the light of new developments not yet foreseen at the time of the creation of the Basic Law.[46]

A decision of the legislator in favour of alien suffrage would signify the transformation of the traditional understanding of the

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42 "The German Reich is a republic. State authority emanates from the people." Article 1 of the Weimar Constitution [WRV]. *Quoted in* Rittstieg, *supra* note 37, at 59.

43 *Id.* at 44, 60 ; Zuleeg, *supra* note 40, at 431.

44 GG art. 38(3) : "A federal law determines in detail [concerning the election of the representatives of the Bundestag]".

45 Rittstieg, *supra* note 37, at 42, 44.

46 *Id.* at 61.

constitutional norm of democratic legitimation -namely, that state authority derived its legitimation by means of elections and voting from Germans only-, into an understanding more in conformity with the new conditions in society : the people as the source of legitimation extended beyond the Germans to resident aliens. A "Verfassungswandel" would have taken place[47] in keeping with the essence of the principle of democracy as rule by the governed.[48]

The re-interpretation of the notion of the people in the sense of Article 20(2)1 and the corresponding enfranchisement of resident aliens was even argued to be not merely a matter of legislative discretion, but to follow directly from the Basic Law itself, namely from the principle of democracy and the principle of the social state.[49] The principle of democracy essentially commanded that those subjected to rule, should participate in rule.[50] Resident aliens who were permanently subject to German state authority could not be excluded from democratic participation solely by reason of their not having German nationality considering the element of coincidence which played a considerable role in the creation of nationality regulations.[51] Furthermore, the arguments supposedly upholding the legitimacy of the traditional notion of the people as the totality of nationals rested on over-simplifications of reality. Ger-

47 *Id.* at 47.

48 *Id.* at 60.

49 Manfred Zuleeg, Grundrechte für Ausländer : Bewahrungsprobe des Verfassungsrechts, 89 Deutsches Verwaltungsblatt [DVBl] 341, 349 (1974).

50 Zuleeg, *supra* note 40, at 430.

51 Manfred Zuleeg, Zur staatsrechtlichen Stellung der Ausländer in der Bundesrepublik Deutschland, 11/12 DÖV 361, 370 (1973)

mans, too, possessed the right to leave the country and to renounce their nationality. An increasing number of Germans had dual nationality. Moreover, alien suffrage in fact already existed since status Germans too possessed the right to vote[52]. In contrast, resident aliens in practice often had no choice of returning to the home state, due to the economic or (in the case of recognized refugees) political prospects awaiting them there. Or they were stateless and had nowhere to go.[53] The sole civic duty which differentiated between Germans and aliens was the duty of military service of men. The linkage of the right to vote with conscription could not explain why women, who did not perform military service, were nonetheless included in "the people" while resident aliens were not, or why only the former held the right to vote.[54] More importantly, democratic participatory rights were not a compensation for some duties.[55] Remained only affectedness as the criterion for belonging to the people in the meaning of Article 20(2)1. "The people" were the "Lebens - und Schicksalgemeinschaft"[56] on German territory to which Germans and resident aliens alike belonged on the basis of their both being similarly affected by political decisions. Consequentially, resident aliens should be conferred the right to vote.

The demand for the enfranchisement of resident aliens was further reinforced by the principle of the social state, or the principle

52 Rittstieg, *supra* note 37, at 53-54.
53 Zuleeg, *supra* note 49, at 348 ; Zuleeg, *supra* note 40, at 430.
54 Zuleeg, *supra* note 49, at 348 ; Zuleeg, *supra* note 40, at 430.
55 Zuleeg, *supra* note 49, at 348.
56 Zuleeg, *supra* note 40, at 430.

of social justice[57] which required that the interests of underpriviliged groups are taken into consideration.[58] Participation in the political decision-making process by these underpriviliged groups was an important means to ensure government attention to their interests. Confronted with serious disadvantages caused by their legal and social position in all areas of life - ranging from discrimination in the areas of employment, housing, education and social care to the insecurity concerning the right to remain in the FRG- resident aliens, in particular former 'guestworkers' and their families, constituted such an underpriviliged class of people who should be guaranteed the opportunity to influence the political process to their advantage by means of the vote.

2-2 The admissibility of local alien suffrage[59]

(1). To support the claim of the unconstitutionality of local alien

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57 The Basic Law demands that the Federal Republic is a social state (GG art. 20(1)). This demand, the so-called principle of the social state, commits the legislature to socio-political activity, with the aim to establish social justice and security, to reduce social antagonism and social inequality in society. *See, e.g.,* Klaus Stern, 2 Das Staatsrecht der Bundesrepubik Deutschland, 911-15 (1984). In addition, it may enforce individual human rights. *Id.* at 924-31.

58 Zuleeg, *supra* note 51, at 364 ; Zuleeg, *supra* note 40, at 430. (However, Zuleeg later abandoned this argument. *See* Breer, *supra* note 16, at 57.)

59 'Local elections' as the translation of "Kommunalwahlen" refers to the elections at the level of the communes. Strictly speaking, elections at the level of the counties should be included since I have defined the counterpart of local elections, national

suffrage reference was made to the so-called homogeneity principle and the textual position of the "states" and "communes" in Article 28(1)2. The principle of homogeneity, predominantly laid down in Article 28(1)1 GG, signifies the command for a minimum of homogeneity among the states, and between the states and the federation, for the purpose of preventing internal conflict.[60] In the first sentence, Article 28(1) prescribes the fundamental arrangement of the constitutional order in the states which limits the states' autonomy in establishing their own constitutions. Accordingly, the constitutional order in the states must be in conformity with the principle of democracy in Article 20(2). With the second sentence, requiring that "[t]he people must have electoral representation in the states, counties and communes, which follows from universal, direct, free, equal and secret elections", homogeneity in the implementation of representative democracy is demanded. Opponents of local alien suffrage argued that the prescription of homogeneity in Article 28(1) with regard to the democratic legitimation of state authority required homogeneity in the bearers of state authority.[61] The guarantee of local autonomy in Article 28(2) of the Basic Law -" [t]he communes must be guaranteed the right to dispose of all the

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elections, as elections at the state and federal level. However, since the right to vote in county elections is not at issue in the debate, I will confine 'local elections' to the elections in the communes.

60 Stern, *supra* note 11, at 704-5.

61 *See, e.g.,* Behrend, *supra* note 23, at 377 ; Huber, *supra* note 15, at 533 ; Karpen, *supra* note 14, at 1015 ; Lamers, *supra* note 14, at 56 ; Quaritsch, *supra* note 17, at 2-3.

affairs of the local community within the scope of the law on their own responsibility"[62] - did not change the nature of local government authority as being (derivative or indirect) state authority[63] and therefore the participation in local elections by which the local people give legitimation to the local electoral representation must be exclusively reserved to those German nationals who reside in the territory of the local government. In addition, the textual position of the "communes" as enumerated next to "states" indicated that the respective 'peoples' who were to be represented were identical[64], differentiated only in territorial aspect[65], and since the people in the states had to be interpreted as the German nationals residing in the states[66] the people in the communes too consisted solely of the local German residents.

Opponents of local alien suffrage when justitying local disenfranchisement, in general, relied more on the argument of resident aliens' 'escapability', than on the argument of their different status of duties. Recognizing that the idea of inescapability sounded as an exaggeration in the context of local elections, some authors emphasized that local alien suffrage would force political parties to adjust their programs at the national level in order to attract alien votes in local elections in which indirect way resident aliens, if enfran-

62 GG art. 28(2).

63 *See* Bleckmann, *supra* note 21, at 439-40 ; Böckenförde, *supra* note 17, at 904 ; Huber, *supra* note 15, at 533 ; Karpen, *supra* note 14, at 1015; Quaritsch, *supra* note 17, at 3.

64 *See* Bleckmann, *supra* note 21, at 439.

65 *See* Birkenheier, *supra* note 17, at 135-36.

66 *See supra* text accompanying note 14.

chised, could influence national political decisions.[67] Moreover, it was pointed out, the restriction to local alien suffrage would in the long run be a politically untenable position and inevitably lead to demands for national alien suffrage, inviting the potential danger of political conflicts among groups of resident aliens being fought out in German local and national politics.[68] As a more immediate danger of resident aliens' local enfranchisement opponents mentioned the potential outvoting of Germans in local elections, especially in the big cities where the population of resident aliens tended to concentrate.[69]

(2). Naturally, those who argued that the introduction of national alien suffrage was constitutionally admissible found no objection to the conferment of a local right to vote to resident aliens. A limited alien suffrage was nevertheless favoured, even when the conferment of the right to vote in elections at either level was thought to be a constitutional requirement, because of the need for making allowances for political reality.[70] Local alien suffrage then was proposed as a gradual transition towards full alien suffrage.[71]

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67 *See* Bleckmann, *supra* note 21, at 438 ; Quaritsch, *supra* note 17, at 12.

68 *See* Karpen, *supra* note 14, at 1017 ; Quaritsch, *supra* note 17, at 12-13.

69 *See* Quaritsch, *supra* note 17, at 13.

70 Zuleeg, *supra* note 40, at 430.

71 *Id.* at 431 (local suffrage was still very valuable for the same reasons as opponents objected to its introduction, i.e. that through the local vote national politics could be influenced as well).

However, quite a few among the opponents of national alien suffrage as well argued in favour of the constitutionality of local alien suffrage. To some the homogeneity principle did not preclude an extension of local voting rights on the basis of reciprocity. A European solution, in the form of the eventual development of a European citizenship[72] or else the reciprocal creation of a 'functional' nationality for Community nationals (restricted to certain political rights and lost upon termination of residence)[73], was highly favoured.[74] Yet, such a solution would be partial at best considering that the overwhelming majority of resident aliens originated from outside the Community[75], which caused fears that such a priviliged treatment of Community nationals would become a source of friction among resident aliens.[76]

Others completely rejected the argument based on the homogeneity principle, and argued that Article 28(1) must be understood

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72 *See* Birkenheier, *supra* note 17, at 134 ; Böckenförde, *supra* note 17, at 905 (tentatively) ; Lamers, *supra* note 14, at 135.

73 Lamers, *supra* note 14, at 140-42.

74 But *see* for doubts concerning the possibility of such a solution avoiding the neccessity of a constitutional amendment, Bleckmann, *supra* note 21, at 444 ; Breer, *supra* note 16, at 76 ; Huber, *supra* note 15, at 536 ; Karpen, *supra* note 14, at 1016.

75 Turkey, the country of origin of the overwhelming majority of resident aliens in the FRG-numbering over 2 million by 1976-, applied fo EC membership in 1987, but its application was rejected in 1989 and there are no prospects that it will obtain membership soon. *See* Neill Nugent, The Government and Politics of the European Community 403-405 (1991).

76 *See* Karpen, *supra* note 14, at 1016 ; Quaritsh, *supra* note 17, at 10.

as a demand for homogeneity of the election procedure, not of the electorate.[77] The nature of local elections was different from that of national elections, which allowed for a more inclusive interpretation of the local electorate.

A slight variation existed in the reasoning behind this conclusion due to differences in the interpretation of the meaning of local autonomy. The constitutional guarantee of local autonomy in Article 28(2) could be interpreted as indicating that local governments were not mere units of the state administration, but in essence constituted "an institutionalized form of self-organization of society" founded on autonomous democratic legitimation by the local community, in principle independent from the legitimation of the state adminstration by the state people.[78] In as far as local governments took care of affairs of local autonomy, they received their legitimation from local elections ; on the other hand, local governments partook in the legitimation of the state through national elections in as far as local governments executed affairs on behalf of the state under the latter's supervision (the idea of the "double aspect" of local legitimation).[79] In local elections, then, the vote was not a means by which the local people participated in the legitimation of state authority but by which they exercised influence on the local affairs of the communes. Consequently, resident aliens did not need to be excluded from the local right to vote.

77 Breer, *supra* note 16, at 120-21 ; v. Löhneysen, *supra* note 23, at 332.

78 Sasse & Kempen *quoted in* Breer, *supra* note 16, at 79.

79 *Id.* at 81.

However, objections were made to this characterization of local governments as basically autonomous corporate bodies. Local self-governing bodies exercised indirect state authority and therefore needed legitimation by the German people. According to a more sophisticated version of the argument of "double legitimation"[80], the difference between local and national elections was not a reflection of seperate objects of legitimation (original autonomous local government authority vs delegated state authority), but of the difference in legitimation-power of the respective electing "peoples"[81]. Whereas through national elections the state people legitimized the delegation of authority to the local government - and through state organs supervised its exercise -, local elections provided merely supplementary legitimation of local government authority. Indirect legitimation of local government authority from above followed from the principle of popular sovereignty in Article 20(2)1 - demanding that all state authority in the sense of all public authority emanates from the people -, direct supplementary legitimation from below, on the other hand, was the corollary of the guarantee of local autonomy in Article 28(2) which required the activation of the affected to take care of their own affairs within the scope of the law.[82] The inclusion of resident aliens in the local electorate would not break the chain of democratic legitimation required by Article 20(2), but would be in accordance with the essence of local autonomy

80 *Id.* at 104-09.
81 *Id.* at 105.
82 *Id.* at 105-09.

which rested on the idea of "neighbourly solidarity".[83] Solidarity could only exist among people with equal rights and duties. Since at the local level, no substantial difference in the status of duties existed between German residents and resident aliens, and membership in the communes rested exclusively on residence in the absence of a local personal jurisdiction[84], local alien disenfranchisement was becoming increasingly untenable.[85] Local alien suffrage would naturally result in a diminishing of the right to representation of local Germans. However, this would be relativated by the fact that local Germans could participate in the determination of the scope of local state authority and its supervision through national elections and state organs.[86]

3. The substantial arguments against alien suffrage and the value of the vote

Thus the majority of the participants in the debate found a reinterpretation of the traditional understanding of the constitutional notion of the people and the norm of democratic legitimation was

83 *Id.* at 111. But *see* Böckenförde, *supra* note 17, at 903 (also distinguishing two levels of legitimation of local self-government, with the legitimation emanating from the local people as supplementary to that emanating from the national people ; however, conceiving of supplementary legitimation as a necessary consequence of the 'deficit' of national democratic legitimation in areas where local government authority is not bound by law, which therefore needs to emanate from the local German nationals).

84 Breer, *supra* note 16, at 124-25.

85 *Id.* at 112-114.

86 *Id.* at 120. *See also* v. Löhneysen, *supra* note 23, at 530.

not to be within legislative discretion. Substantial arguments reinforced the continuing validity of the idea of the nation-state, with implications for the desirability, or even permissibility[87], of a constitutional amendment for the introduction of national alien suffrage.

Two different substantial arguments were derived from the principle of democratic equality : resident aliens were less subject to German state authority because they could return at any time to the state of nationality and because they could not incur certain obligations. If we look at how these arguments are distributed among the various opponents, we then find that opponents either predominantly justified national alien disenfranchisement by means of the argument of 'inescapability', or relied solely on the argument of the differential status of duties. The generally exclusive use of one substantial argument for the justification of resident aliens' exclusion from the (national) right to vote suggests that opponents hold different conceptions of democracy. One group of opponents conceives

87 Article 79(3) of the Basic Law forbids amendments "affecting the division of the Federation into states, the participation on principle of the states in legislation, or the basic principles laid down in Articles 1 [concerning human dignity and human rights] and 20." The entrenchment against a constitutional amendment of the principles laid down in Articles 1 and 20 is generally interpreted as prohibiting interventions with the substance of either provision Stern, *supra* note 11, at 173-74. The principle of democratic equality now was argued to belong to the essence of democracy and thus an amendment of the Basic Law in order to enable the legislator to grant resident aliens the right to vote constituted an inadmissible intervention with the substance ("Wesensgehalt") of the principle of democracy in Article 20. *See, e.g.* Lamers, *supra* note 14, at 47.

of democracy as rule by the people characterized as a political community bound by fate, the other as rule by the people characterized as a political community based on equality in rights and duties. I will now turn to the central questions of this article :

(1) Can the various substantial arguments offered for the justification of the denial of voting rights be linked to particular notions of the value of political participation?

(2) If so, do the substantial arguments reconcile alien disenfranchisement with the particular values attached to political participation?

In order to answer the first question mentioned above, I will look at the conception of the value of political participation held by the various opponents. This is to some extent a speculative exercise. In order to discover how the various opponents of alien suffrage conceive of the value of voting, an examination of their other publications containing more general statements with regard to the concept of democracy is necessary. Yet, not all opponents have written in more general terms on the concept of democracy. On the other hand, I will sometimes make use of conceptions of democracy and the value of the vote by authors who have not recorded their opinion on the admissibility of alien suffrage, let alone given reasons for the justification of its inadmissibility.[88] For an answer to

88 Among the opponents were many scholars of constitutional law, which makes it relatively easy to discover how many opponents conceive of the value of voting. I assume that those who have not written about the concepts of democracy and popular sovereignty in general, hold the same conception of democracy and attach the same value to the right to vote as those opponents

the second question, I will examine whether all who are entitled to vote at present actually share in the substance claimed to distinguish nationals from resident aliens and to justify the latter's disenfranchisement.

3-1 The idea of inescapability and the value of the vote

(1) What meaning do the opponents who relied on the argument of inescapability to justify alien disenfranchisement attribute to political participation? How does the argument of inescapability fit in with this notion?

Democracy, in the publications of these opponents, is conceived as the consequence and realization of popular sovereignty, as a form of state and government.[89] Central to this conception of democracy is the notion of state sovereignty, generally considered to be the main feature of the modern state which it distinguishes from pre-modern forms of political ruling power.[90] Being conceived as in-

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who have, if they have the same substantial argument against alien suffrage in common. But if they do not, I will also make use of the writings of scholars of constitutional law, non-participants in the debate, who propose alternative concepts of democracy and popular sovereignty to those formulated by the scholars of constitutional law participating in the debate, and assume that the opponents in question would prefer these alternative concepts of democracy and popular sovereigty if there are no indications to the contrary.

89 *See* Böckenförde, *supra* note 17, at 888,892 ; Stern, *supra* note 11, at 593-94. This conception of democracy is a traditional conception in German constitutional theory. *See* Carl Schmitt, Verfassungslehre 223 (Duncker & Humblot 1993) (1924).

90 *See* Isensee, *supra* note 15, at 592.

divisible, sovereignty requires a single subject as its locus and acts of sovereignty, i.e. acts of the state organization, require a "single will-centre"[91] to emanate from. Democracy, as the consequential realization of popular sovereignty, can then be described as the form of government which accomplishes that all manifestations of state authority emanate from "the one, if manyfold mediated will" of the sovereign people (the nation).[92]

The will of the people which through a chain of democratic legitimation continuously legitimizes the exercise of state authority is described as "a normative entity",[93] "a seizable real entity, which manifests itself e.g. in the will living among an indefinite multitude of individual people to be one people, to be a political community".[94] Being no empirical, quantifiable entity, the will of the people cannot of itself determine the contents or direction of the exercise of state authority, it needs to be formed and articulated in a procedure. Acts of state, political decisions, reflect the will of the people when in the process of political decision-making the individuals can recognize themselves, not as merely an aggregation of private persons divided by various interests, but as members in the political

91 *Id.* at 619.

92 *Id. See also* Böckenförde, *supra* note 17, at 894.

93 Josef Isensee, *Gemeinwohl und Staatsaufgaben im* Verfassungsstaat, in 3 Handbuch des Staatsrechts der Bundesrepublik Deutschland 3, 42 (Josef Isensee & Paul Kirchhof eds., 1988) [hereinafter 3 Handbuch des Staatsrechts].

94 Ernst-Wolfgang Böckenförde, *Demokratische Willensbildung und Repräsentation, in* 2 Handbuch des Staatsrechts der Bundesrepublik Deutschland 29, 31 (Josef Isensee & Paul Kirchhof eds., 1987) [hereinafter 2 Handbuch des Staatsrechts].

community unified by the existence of common interests. Primary responsibility for the articulation of the will of the people lies with the representatives :

> The leading organs should act in such a way, that the individuals and the citizens all together (the people) can find themselves therein, in their various opinions as much as in what they together believe is right and want.
>
> This includes, that the individuals ... find the questions of social life which concern all argued and delivered in a way, which regardless of differences of opinion and distinctions in belief enables and calls forth an identification with this kind of treatment and decision.[95]
>
> It is ... crucial, that the issues to be treated are discussed and decided in a way, which especially in case of existing differences of opinion allows and reconfirms the belief that it concerns affairs concerning all and that a mediation at the public interest is taking place.[96]

Representatives must have an ethical republican disposition - in their actions they must orientate themselves at the public interest -, and the ability to create the necessary conditions appealing to the individual to make responsible decisions and understand himself as a member of the political community responsible for the common interests of all.[97] Whether representatives succeed in the articula-

95 *Id.* at 40.

96 *Id.* at 44.

97 Böckenförde, *supra* note 17, at 940 ; Böckenförde, *supra* note 94, at 43.

tion of the will of the people depends on whether they are disposed of these qualities.[98]

On the side of the individuals, it is necessary that they should hold at least the potential for spontaneous normative orientation at the common interests of all in the exercise of their political rights, while dependent on the representatives to provide them with the conditions for its actualization.

> [I]t is important that [the citizens] orientate themselves in their decisions in elections and voting at the ... normative point of reference, through which they involve themselves [in the decision-making process] as "bearers of interests" ("Interessenbürger"), while at the same time transcending [themselves as bearers of interests], when they out of responsibility for the needs of the whole, as they see them, act, and in this way activate the "citoyen" and not alone the "homme" in themselves.[99]

Unlike the representatives, for whom the orientation at the common good is an (ethical) obligation, the individual citizen is free, not obliged, "to dedicate himself spontaneously to the pursuit of the common good ... and to look beyond his own private interest".[100] The right to vote is not an ethical obligation but an ethical opportunity to act on behalf of the community.

Nevertheless, the possible absence of normative orientation in citizens' exercise of political rights is cause of much concern. The

98 *See* Böckenförde, *supra* note 94, at 45.

99 Böckenförde, *supra* note 17, at 940.

100 Isensee, *supra* note 93, at 38 ("The liberal state does not demand virtue, but guarantees freedom.").

fact that, in practice, the individual citizen is most often tempted to manifest himself solely as bearer of interests is not only disappointing,[101] but is thought to potentially destroy democracy. The lack of orientation at the public interest in the exercise of the right to vote, as in the case of the instrumental use of the right to vote to promote individual interests only, implies that the individual citizen does not identify with the idea of the common good behind which the citizens may unite and transcend their various dividing interests. The outcome of the political decision-making process, then, is merely obeyed (because it is democratically legitimized), not accepted. A situation in which political decisions rest only on formal democratic legitimation cannot endure:[102] the readiness to accept burdens disappears and in case of strongly conflicting interests the political community dissolves and democracy ceases to exist.

Thus the significance attributed to the right to vote lies primarily in the opportunity for the discovery of one's self as a responsible member of the political community, who is dedicated to the pursuit of the common interests of all. In the proper exercise of the right to vote, the citizens in addition contribute to the invigoration of the political community. The right to vote is admitted to have instrumental value too, as it provides the opportunity to bring in one's own interests in the process of mediation at the public interest. But this instrumental characterization of the vote is only secondary; emphasis on the franchise as a means to voice one's inter-

101 *See* Böckenförde, *supra* note 17, at 940 n. 142; Böckenförde, *supra* note 94, at 45; Isensee, *supra* note 93, at 35, 46.

102 Isensee, *supra* note 93, at 26-27.

ests is thought to be improper.

Opponents who justified alien disenfranchisement with the argument of inescapability then subscribed to a *republican* notion of the value of political participation. Traditional republican theory founds democratic politics on virtue and love of the common good. While accepting that the liberal state no longer demands virtue, contemporary republicans still believe that citizens' commitment to the political community and its interests is indispensable to democracy. To republicans, the central question is how naturally selfish individuals can be transformed into responsible citizens.

As mentioned above, the actual existence of commitment in the exercise of political rights is not a-matter-of-course, but depends on various factors such as on the quality of the process of deliberation and decision-making. But before anything else, it depends on the potential for commitment.

The argument of inescapability, now, served to found a presumption of resident aliens' failing potential for commitment. According to this argument, nationality forges an inescapable bond between the individual citizen and the political community, fostering a sense of a shared fate among nationals, a consciousness of fatally belonging to the political community, which will induce nationals to be committed and to take responsible decisions. Resident aliens' foreign nationality, on the other hand, indicates that they do not feel part of the community, and thus lack the potential for commitment : foreign nationality represents failure to naturalize, which is to enter the inescapable bond between the individual citizen and

the political fate community, and thus constitutes evidence of their unwillingness to be one with the German people and to tie their personal fate with that of Germany.[103]

Resident aliens thus have no stimulus to commit themselves to the pursuit of the common good as they do not identify with the German nation, nor do they have to face the consequences of ill-considered decisions. The appeal for alien suffrage with the argument that resident aliens' interests are affected by political decisions as well, and that they should be conferred the right to vote to voice their interests in the political arena, dismissed as reflecting "the privatistic misunderstanding"[104] of the right to vote, only further strengthened republican opponents' belief that resident aliens cannot be presumed to be able to consider the interests of all, and that therefore they may be justly excluded from the franchise.

(2) But apart from the question whether it is correct to infer from the foreign nationality of resident aliens a conscious rejection of naturalization[105], can it be maintained, inversely, that all who actually hold the right to vote in the FRG at present are 'inescapably' tied to the Federal Republic?

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103 *E.g.*, Böckenförde, *supra* note 17, at 905 ; Quaritsh, *supra* note 17, at 14.

104 Quaritsch, *supra* note 17, at 12.

105 German official policy has long discouraged naturalization - in 1979, administrative guidelines for naturalization pointed out that the Federal Republic "does not strive for a deliberate increase in the number of nationals by naturalization" and demanded restraint to be exercised with regard to the grant of German nationality. Einbürgerungs-richtlinien. [Guidelines for

Obviously, the argument of inescapability is seriously weakened by the fact that status Germans who do not possess German nationality are nonetheless entitled to vote. A status German can, at least theoretically, return to the state of nationality, which in general will be the state from which territory he was exiled (but not necessarily),[106] although frequently he will not do so even after the situation in the home state has changed, like so many other aliens who sought refuge in the FRG. When a status German does decide to return and transfer his permanent residence to the state from which refuge or expulsion had taken place (or any of the other states designated as "Vertreibungsstaat"), he loses the legal status

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Naturalization] [hereinafter EinbRL] 2. 3, *reprinted in* Kay Hailbronner & Günter Renner, Staatsangehörigkeitsrecht : Kommentar 626 (1991). Only recently, in 1990, has the naturalization policy changed. The 1990 Aliens Law introduced a regular claim ("Regelanspsuch") to naturalization for aliens born and educated at least until secondary school level in the FRG. Aliens resident in the FRG for more than 15 years and who meet several formal requirements are assigned as a special, and temporary,category for regular naturalization. Both categories are to be naturalized under condition of renunciation of original nationality. Bertold Huber, *Das neue Ausländerrecht*, 12 Neue Zeitschrift für Verwaltungsrecht [NVwZ] 1113, 1121 (1990).

106 In pursuance of Article 116(1) of the Basic Law the spouse or descendant of a refugee or expellee of German stock, who is admitted to the territory of the German Reich, is included in the category of German within the meaning of the Basic Law. Spouses may hold different nationalities and descendants may be dual nationals. *See* Hailbronner & Renner, *supra* note 105, at 347.

of German in the meaning of the Basic Law[107] and thereby the fundamental right to residence in the FRG,[108] unlike a German national who emigrates without giving up German nationality. In comparison to Germans with German nationality, the link of status Germans to the Federal Republic is thus precarious.

The category of status Germans is often disposed of simply as evidence "of the special problems of the situation of Germany at [the time of] the creation of the Basic Law",[109] "a post war-conditioned peculiarity, which is not of any fundamental importance".[110] It cannot be disputed that the regulation of the position of ethnic German refugees and expellees in Article 116(1) has to be understood primarily in the context of the political constellation after World War II. However, from the point of view of systematic consistency, it would have been better if instead of their current constitutional priviliged position status Germans' preferential treatment, at least with regard to political participatory rights, had been restricted to the statutory right to naturalization and to have made the enjoyment of the right to vote conditional on the exercise of that right.[111] As it is, the enfranchisement of persons without Ger-

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107 § 7(1) Gesetz zur Regelung von Fragen der Staatsangehörigkeit [Law for the Regulation of Questions of Nationality] [hereinafter StAngRegG].

108 *See* Hailbronner & Renner, *supra* note 105, at 410.

109 Stern, *supra* note 11, at 262 (otherwise paying little attention to this category).

110 Birkenheier, *supra* note 17, at 137.

111 Status Germans hold a statutory right to naturalization. § 6 (1) StAngRegG provides that a person who is a German on the basis of Art. 116(1) GG without possessing German nationality

man nationality is a problematic exception especially, as some opponents of (national) alien suffrage frankly admitted,[112] since the regulation under Article 116(1) is not limited to a few individual cases. Despite the fact that the comprehensive category "German" was originally intended to be transitional,[113] the number of status Germans is still considerable today. One of the reasons why, in the end, status Germans are not a temporary phenomenon lies in the recognition of the derivative acquisition of the quality of status German ("Statusdeutscheneigenschaft"), analogous to rules of acquisition under nationality law.[114] The status as "German" can, besides by original admission, be acquired by birth, legitimation or adoption. In addition, the number of status Germans also increased with the influx of new groups of ethnic German immigrants from various Eastern European countries.[115]

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must be naturalized upon application, unless there are facts which justify the assumption that he will endanger the internal or external security of the Federal Republic or a state. A proposal of the Bundesrat to make the legal status of German conditional upon the application for naturalization was rejected, with the argument that refugees and expellees desiring to return should not be pushed towards naturalization which would endanger their rights in the home state. *See* Hailbronner & Renner, *supra* note 105, at 405.

112 *See* Breer, *supra* note 16, at 73 ; Karpen, *supra* note 14, at 1014 n. 23.

113 *See* Hailbronner, *supra* note 9, at 73.

114 *See* Hailbronner & Renner, *supra* note 105, at 352.

115 *See* Hailbronner, *supra* note 9, at 73 ; Karpen, *supra* note 14, at 1014 n 23. The extension of the area from which expulsion has had to have taken place beyond the formerly occupied territories in the East, e.g. to the Soviet Union, and the prolongation

Attempts to justify the franchise of status Germans either flatly contradict the idea of inescapability or part with the idea's seemingly objective understanding of the connection between the individual and the state by the legal link of nationality. When resident German nationals and status Germans have the right to vote because they have "their regular residence in the Federal Republic and thus have founded a permanent relation",[116] and in addition, the disenfranchisement of Germans residing abroad is justified because, due to their regular residence abroad, their ties to the FRG are considerably weakened,[117] the inescapability-argument is most effectively undermined. On the other hand, when it is remarked that, though a contingent exception to the rule that the people con-

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of the period of application for admission under the Bundes Vertriebene und Flüchtlinge Gesetz [Federal Exiled and Refugees Law] [hereinafter BVFG] reflected the consideration that the pressure on ethnic German minorities in Eastern Europe due to the war had remained during the era of the Cold War. As such, the continued admission of new ethnic Germans was in accordance with the spirit of Art. 116 GG. *See* Hailbronner & Renner, *supra* note 105, at 334-35.

116 Stern, *supra* note 57, at 25. Status Germans' connection with the FRG is admittedly more loose than in the case of German nationals, but still sufficiently present because of their admission in the territory of the German Reich. *See* Klaus Stern, 3 Das Staatsrecht der Bundesrepublik Deutschland, 1011 (1988).

117 Stern, *supra* note 57, at 25. Disenfranchisement of non-resident Germans was originally influenced by the fact, that given the division of the German state, it was impossible to limit the conditions for the entitlement to the right to vote to the possession of German nationality as this would extend the franchise to Germans living in the GDR as well.

sist of nationals, the existence of status Germans is not problematic, because the ethnic-cultural notion of the people implied in "the belonging to German stock" (Article 116(1)) "co-delineates the unified personnel component of the notion of the people" in the Basic Law,[118] then political rights are made conditional, not upon inescapability, but upon ethnicity.

An additional argument against the idea of Germans' inescapability lies in the fact that Germans within the context of the European Community (EC) have broad rights to settle abroad.[119] The right of Germans to settle outside of Germany within the EC is not as firm and absolute as the constitutional right to enter and reside in Germany, because the freedoms of movement and settlement under the EC-Treaty are subject to reasonable restrictions "on grounds of the public order, public security and public health."[120] Nevertheless, Germans possess greater mobility than resident aliens, who often do not originate from countries within the European Community and who have no right of (re-)entry within the territory of the FRG. Thus, Germans' right to leave the Federal Republic is

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118 Birkenheier, *supra* note 17, at 137.

119 *See* Birgit Laubach, *Die europäische Unionsbürgerschaft - vom Bourgeois zum Citoyen?, in* Vom Ausländer zum Bürger 472 (Klaus Barwig et al. eds., 1994) [hereinafter Vom Ausländer zum Bürger]. The freedom of movement and settlement within the territory of EC Member States is guaranteed by Article 48 (freedom of movement of employees) and Article 52 (freedom of commercial settlement) of the Treaty of Rome, Jan. 1, 1957 [hereinafter EC-Treaty.]

120 EC-Treaty art. 48(3). Its application, however, is extremely rare. *See* Laubach, *supra* note 119, at 462.

not substantially weaker than the often quoted privilege of aliens to freely leave the country. The suggestion that only resident aliens are able, and likely, to enjoy the fruits but shirk the necessary labour and flee the country when the belt has to be tightened, therefore, needs to be rejected as fiction. In conclusion, the idea of inescapability is "a piece of "Juristenmetaphysik"".[121]

3-2 The differential status of duties and the value of the vote

(1) What meaning do the opponents who relied on the argument of the differential status of duties to justify alien disenfranchisement attribute to political participation? And how does the substantial argument fit in with this notion?

In the conception of democracy of these opponents, the notion of state sovereignty does not play an important role and consequently their conception differs substantially from that of the other group of opponents described above. Central to their conception of democracy is the idea of individual autonomy[122] or human dignity[123] as the foundation of the constitutional state.

When the constitutional state is understood as founded on the principle of individual autonomy, then the unilaterally set legal order (the constitution) can be comprehended as providing the framework within which reciprocity between the citizens becomes possi-

121 Breer, *supra* note 16, at 125-26.

122 *See* Görg Haverkate, Verfassungslehre : Verfassung als Gegenseitigkeitsordnung 329-411 (1992).

123 *See* Peter Häberle, *Die Menschenwürde als Grundlage der staatlichen Gemeinschaft, in* 1 Handbuch des Staatsrechts 815, 845-49.

ble. The postulate that all state authority emanates from the people completes the system of reciprocity as it "demands the self-determination of the individuals, the decisiveness of their wills in affairs, which concern them",[124] and thus accomplishes that individual autonomy is realized, not only in the sphere of the social context of citizens among one another (through the guarantee of fundamental rights), but also in the political realm. Democracy is then defined as "the guarantee of reciprocity [among the citizens] in the formation and exercise of public authority".[125] With this completion of the realization of individual autonomy at every level of state life ("Staatlichkeit"), the constitutional state can be described as :

> ... a dispute-order ("Streitordnung"), which allows for the formulation of all opposing interests and to fight for them ; a dispute order, which excludes the over-powering by one side of the other - which would prevent a fair balancing of the various interests.[126]

The individual citizen's right to vote, here, signifies the opportunity for the realization of his autonomy in the sphere of politics in interaction with other voters. It provides him with the chance to bring in his own subjective interests in the political dispute-order, in the process of the balancing of conflicting interests with which the representatives are charged.

The idea of human dignity offers a slightly different perspective. The foundation of the state on human dignity by making the

124 Haverkate, *supra* note 122, at 334.
125 *Id.* at 340.
126 *Id.* at 339.

respect for and protection of human dignity the primary obligation of the State (Article 1 of the Basic Law) prohibits that "the concrete human is de-dignified to an object, a mere means, a replacable unit."[127] Humans are assumed to unfold their human dignity, to develop their identity as persons, through the totality of rights and duties through which they are embedded in a network of social relations.[128] To deprive humans of the opportunity for interaction with other people then means depriving them of the opportunity for personal development, de-personifying them. In the political realm, the fundamental principle of human dignity means that it does not suffice for the state to treat its citizens well, it must enable them to participate in the political decision-making process.

> It would be a violation of human dignity, if for example single groups of citizens ... would be excluded from their right to vote : they would become objects of state action (with effects in the social realm as well) and loose their identity as person (abstention too can be "Idenitätsfindung").[129]

From the point of view of the individual, human dignity thus contains a right to political participation. From the point of view of the people as the 'sum' of the individuals, human dignity constitutes a collective fundamental right to democracy.[130]

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127 To define human dignity, a highly complex notion, a negative definition is frequently employed, the so-called *Dürig object-formula :* "human dignity is affected when the concrete human is de-dignified to an object, a mere means, a replacable unit." *Quoted in* Häberle, *supra* note 123, at 836, nt. 200.

128 *Id.*, at 839.

129 *Id.*,at 847-48. Cf. Breer, *supra* note 16, at 53-54.

130 Häberle, *supra* note 123, at 846.

Here, the right to vote is understood as an opportunity for the individual citizen to express and develop his identity as a political being. The mutual recognition of each other's human dignity, to which the state should also educate the citizens, creates a sense of fraternal community in which all are responsible with regard to eachother as fellow humans,[131] which conveys an image of community very different from that of the fate-community held by the republican opponents of alien suffrage.

Thus the right to vote is valued as a means for the protection of individual interests in the political arena. It is also attributed significance as a vehicle for self-development, in which case the significance of voting lies not as much in the aim or result of voting (the protection of interests) as in the act of voting (or abstention) itself.

Opponents who justified alien disenfranchisement with the argument of the diffential status of duties then subscribed to a *liberal* notion of the value of political participation. In traditional liberal theory, democratic politics is founded on enlightened self-interest. Unlike republicans, who believe that democracy requires a certain degree of spiritual or emotional attachment if individual citizens are to be willing to agree with eachother on what the common interests of all are, liberals have faith in reason for enducing the desire for compromise in the political process. The foundation of democratic politics, nor the instrumental and symbolic characteriza-

131 *Cf.* id. at 843 ("Menschenwürde in Du-Bezug"), 852 ("Mitmenschen").

tion of the vote immediately explain why resident aliens' disenfranchisement is justified. Reason, the capacity for being reasonable, is presumed to be inherent in the individual, including resident aliens ; resident aliens, too, have interests to protect and they, too, are entitled to respect for their human dignity and thus possess the right to self-development. The reason for exclusion lies in how individual autonomy is accounted to be recreated in a liberal democratic polity.

The equal right to vote establishes equal individual autonomy in reciprocity between the citizens at the level of the state. But the state also imposes obligations (i.e. exacts necessary contributions towards maintaining the institutions of the state) through which imposition citizens "experience the loss of individual autonomy".[132] In order to guarantee reciprocity in the face of necessary burdens, all should share in the burdens. In the allocation of a burden citizens' capacities to contribute must be taken into consideration, the allocation must be fair. However, resident aliens would have to be exempted from some obligations (the duty of military service), it is claimed, not because of their capacities to contribute, but out of respect for the personal jurisdiction of the state of nationality. To confer the right to vote on those who do not incur all duties, for other reasons than of fairness, would disturb the reciprocity among the enfranchised (citizens) and would prevent the recreation of individual autonomy at the level of the political community. The disenfranchisement of resident aliens on the basis of their different status of duties thus serves to guarantee the reciprocical relation-

132 Rainer Bauböck, Transnational Citizenship : Membership and Rights in International Migration 301 (1994).

ships between the citizens.[133]

(2) What to think of the argument of the different status of duties for the justification of alien disenfranchisement? Do all who possess the right to vote at present also share, each according to his abilities, in the various obligations imposed by the state? What kind of a burden constitutes the imposition of the duty from which resident aliens are supposedly exempted, the duty of military service?

The actual allocation of the duty of military service apparently does not contradict the argument. The exemption of women from the duty of military service under the Basic Law may well be referred to to refute claims that the franchise is conditional on the duty of military service and that therefore resident aliens may be denied the right to vote,[134] but it cannot be used against the argu-

133 *See* Haverkate, *supra* note 122, at 247-48.

134 Some republican opponents used the argument of the different status of duties in this misconceived understanding of the relationship between rights and obligations, as one of rights being conditional upon obligations. So it is held that when the duty of military service cannot be exacted from resident aliens, they may not be conferred the franchise because they will not be confronted with the possible adverse effects of political decision -making, a problem especially since it is assumed that resident aliens' enfranchisement would increasingly embroil the FRG in international conflicts. *See* Bleckmann, *supra* note 21, at 438. However, a citizen's right to vote is not conditional upon meeting the obligation of military service, or any other obligation. Citizens may be punished for evading or refusing to fulfil an obligation, but this will not cause their disenfranchisement. The Basic Law also precludes indirect disenfranchisement by means of denaturalization as punishment for the evasion or re-

ment of the differential status of duties when it is understood in the way as described above. The constitutional prohibition to enroll women in the armed forces[135] is based on the reasonable grounds of existing differences between the sexes. This difference in duties, furthermore, results from a decision under the constitution, and by constitutional amendment could easily be removed. However, military service of resident aliens is argued to be, not a constitutional problem, but a problem of international law.[136]

The enfranchisement of status Germans does not contradict the justification of resident aliens' exclusion from the right to vote on the basis of this substantial argument either, as status Germans are equally subject to conscription. Their foreign nationality, on the other hand, would appear to contradict the assertion that international law prohibits the imposition of military service on resident aliens. However, under international law status Germans are recognized as German nationals.[137]

The argument, then, is apparently more consistent than that of inescapability. But does international law really prohibit the conscription of resident aliens? The obligation to exempt aliens from conscription under international law is by no means as strict as opponents of alien suffrage suggest. It is pointed out that

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fusal of military service, even in the case of desertion. *See* Hailbronner & Renner, *supra* note 105, at 326-27.

135 "Women may not in any case perform military service." GG art. 12 a(4)1.

136 *See, e.g.,* Breer, *supra* note 16, at 53 ; Lamers, *supra* note 14 at 39.

137 Hailbronner & Renner, *supra* note 105, at 29.

> state practice scarcily justifies any such absolute proposition, and rather suggests that conscription of a resident alien in the local state's military forces involves no violation of international law if the alien's national state consents, or even in other circumstances so long as the military service involves no question of service against the state of which the alien is a national.[138]

Even if alien conscription is more problematic and less self-evident than the conscription of nationals, it is not necessary that resident aliens should be totally exempted from the general obligation to cooperate in the defense of the state, as elaborated in Article 12(a) of the Basic Law which, in addition to the duty of military service, provides for the duty of civil service and for restrictions on the freedom of employment during a state of defense.[139] Without encroaching upon the personal jurisdiction of the state of nationality, resident aliens could, for example, be ordered to fill up the places of the men conscripted in various sectors of the economy, or foreign women could be required to assist in the medical care.

Moreover, is on the whole the argument not too schematic? Throughout Europe, under influence of the increase in internationally cooperated military tasks a tendency to rely increasingly on a professional army can be discerned. The Basic Law leaves the matter of the personnel composition of the military forces entirely to the discretion of the legislator according to the Federal Constitutional Court, which held that only the creation of an effective mili-

138 Oppenheim, 1 International Law 907-08 n. 12 (1992).
139 GG arts. 12 a(6)1, 12 a(4)1.

tary defense force, not the imposition of military service, is a constitutional requirement.[140] Under these cirumstances, the civic duty of military service will increasingly be exacted only in the extraordinary situation of a war of defense. To deny the conferment of the right to vote to resident aliens on the basis of the *perhaps* problematic conscription of foreign men in the *extraordinary* situation of an actual war of defense I find hard to reconcile with the primary significance attached to the franchise as an instrument to demand consideration of one's subjective interests and an opportunity for personal development.

It is argued that the right to vote is not a necessary attribute to political self-realization when other means of political participation are available, or, otherwise, that resident aliens' franchise in the state of nationality constitutes sufficient opportunity for political self-realization.[141] But it is rather doubtful whether an opportunity to make use of political rights in one's home state -if existing- is relevant,[142] and the existence of other forms of political participation can hardly be considered as sufficient considering that disenfranchisement "has effects in the social realm as well" (disenfranchisement conveying the image of second-class people). The argument that resident aliens may be able to vote in the home state cannot soothe their disenfranchisement in the state of residence, if

140 Stern, *supra* note 11, at 616 n. 559.

141 *See* Breer, *supra* note 16, at 54.

142 For example, Turkey, the state of origin of the majority of resident aliens requires its emigrants to return home to vote which will in all likelihood be a serious obstacle to making use of this opportunity. Miller, *supra* note 1, at 135.

one acknowledges that it is rather irrelevant to participate in a political system where the political decisions do not affect one's interests. Nor can existing opportunities for participation equal the right to vote as a means to demand consideration of one's interests.

In conclusion, while the argument of the differential status of duties cannot be simply rejected as fictional too, it does not wholly convince of the fairness of alien disenfranchisement.

4. Conclusion

Alien disenfranchisement is still a fact in most countries. Until now, the denial of voting rights was predominantly considered to be self-evident without the grounds for its justification being inquired into. Yet, justification of alien disenfranchisement is becoming increasingly crucial to preserve the claim to democratic legitimacy of the political community. Without justification, the growing pressure to re-interpret the traditional understanding of the norm of democratic legitimation, or to remove possible constitutional obstacles to the introduction of alien suffrage will be hard to withstand.

The German constitutional debate has shown that the traditional interpretation of the principle of democracy as 'national' democracy can be upheld from the point of view of either a liberal or republican conception of democracy.

However, it has become clear that neither of the substantial arguments which were offered by liberal and republican opponents of alien suffrage in the Federal Republic has provided conclusive or convincing reasons for why the right to vote should be restricted to nationals. Considering the inconsistency and the fictional character

of the idea of inescapability (current voters are not as inescapably connected to the FRG as suggested) and the increasingly exceptional imposition of the civic duty of military service (increasingly confined to the extraordinary situation of a war of defense), it is surprising to find how widespread and tenaciously national alien disenfranchisement was defended on the basis of these arguments. Only a small minority did not find any justification for persisting on the traditional understanding of the principle of democracy as national democracy, and consequently argued that the extension of the right to vote was predominantly a matter of legislative discretion, or else proposed to amend the Basic Law.

It is true that the exclusive effects of national democracy were softened under a liberal conception which, in general, allowed for legislative discretion concerning the determination of the scope of the people who must have electoral representation in the communes. Liberal opponents of national suffrage even positively supported the introduction of local alien suffrage.[143] The exclusion of resident aliens from the right to participation in the process of political decision-making was most rigorous under a republican conception of democracy. Republican opposition to alien suffrage need not preclude positive support for the conferment of local voting

143 A re-interpretation of the communal people in Article 28(1) had become inevitable, as local disenfranchisement could not be justified with reference to a difference in duties between nationals and resident aliens at the level of the communes, but, on the contrary, was in contradiction with the essence of local autonomy. *E.g.*, Breer, *supra* note 16, at 113.

rights upon constitutional amendment[144], yet republican opponents in Germany, in general, used the fiction of German voters' inescapability, not only to justify complete alien disenfranchisement and to denounce demands for a constitutional amendment, but also to deny even the permissibility of a constitutional amendment in favour of national alien suffrage. (In contrast, liberal opponents tended to be more receptive to the argument that the monopolization of the right to vote by the German nationals did not belong to the essence of democracy, and that amending the constitution in order to authorize the legislator to confer the right to vote at either level was a natural option which, under the changed demographic conditions, in due time would be taken.[145])

The categoric denial of (national) alien suffrage, especially by German republicans, leads one to suspect that the substantial arguments offered were not the only arguments for the justification of alien disenfranchisement. I will conclude this article with some preliminary remarks on possible other arguments.

The justification of status Germans' enfranchisement on the ground of shared ethnicity, for example, could hint at the existence

144 It was argued by one republican opponent that resident aliens should be extended the local right to vote upon constitutional amendment, because of its educative effect: participation in the local communes, characterized as "Urzelle der Demokratie", would foster civic sense and educate local nationals and resident aliens alike to be normatively oriented towards the state ("Staatsgesinnung"). *See* Lamers, *supra* note 14, at 59, 69.

145 Behrend, *supra* note 23, at 377. Showing tentative approval, Breer, *supra* note 16, at 71, 77.

of impermissible nationalistic arguments for the 'justification' of alien disenfranchisement. A denial based on resident aliens' different cultural norms or religious affiliations would amount to denying the most fundamental norms underlying liberal democracy. Yet, none of the opponents denied the plurality of society in fact or the legitimacy of its existence.[146]

The complaint of the privatistic misunderstanding of the right to vote, when read as a rejection of the instrumental use of the right to vote to protect either individual or group (collective) interests, sheds a different light on the motivation of republican opposition. It could be feared that resident aliens' different cultural norms would give rise to claims for the public recognition of their validity and that, if enfranchised resident aliens would effectively use their vote to demand collective rights vis-a-vis the state[147]. Republicans in general reject the idea of a divergence between emotional attachment and political unity, and abhor a more rational appreciation of the state as enabling the people to enjoy a secured life and rights while spiritual and emotional satisfaction is found within the many smaller communities in society. (But this idea is probably more in accordance with reality.)

German republicans in particular seem to fear that alien en-

146 *See, e.g.,* Isensee, *supra* note 15, at 634 ; Bleckmann, *supra* note 21, at 441.

147 Only later did this argument feature prominently, in the discussion on the extent of legislative discretion with regard to the determination of the conditions for the acquisition of German nationality. This discussion has only recently come to full bloom, after the German reunification in 1990.

franchisement would result in the emergence of multiculturalism at the level of the state as the FRG has no tradition of building a national identity uniting all more particularist identities, which they fear would endanger the functioning of democracy, with possibly in the end the dissolution of the state.

However, it is unrealistic to think that regardless of the permanent settlement of large numbers of people with a different cultural background nothing has changed, and that demands for the recognition of other norms and ways of life can be flatly rejected. Certainly, not every claim for the recognition of a particular aspect of a cultural ways of life can be accomodated. Besides the limits clearly set by the constitution, limits to cultural ways of life must be subject to public debate and deliberation among equals. Denial of the possibility even of alien suffrage for fear of demands for collective rights reflects in my opinion German republicans' unwillingness to accept a increasingly complex reality.