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**Political Rights of Foreigners:
An Issue to be Tackled on the Basis
of Human Dignity?**

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Political Rights of Foreigners: An Issue to be Tackled on the Basis of Human Dignity?

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I. Introduction

Human dignity's fundamental importance in the modern legal systems has become undeniable. Whether it is a discussion about the central pillar of the international law, the *jus cogens* norms, or about specific legal systems of individual states, at some point the question of the equal respect for human dignity of every human being will play a decisive role in determining the legitimacy of the given order. Norms regarding human dignity occupy central places in modern constitutions, be it as a key principle of the entire legal order,¹ or as a central and fundamental right within the catalogue of basic rights.² Yet even when dignity fails to be explicitly mentioned in the constitutional text³ or in the fundamental international human rights treaties,⁴ its underlying value remains unquestionable. Its manifestations within the legal sphere, besides the already mentioned *jus cogens* norms, are usually seen in the guarantees regarding the principle of equality before the law, the autonomy of the individual, prohibition of discrimination and social rights.⁵ However, it is less

1 Art. 1 para. 1 of the German Basic Law reads: "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority." Translation found at: Deutscher Bundestag, *Basic Law for the Federal Republic of Germany*. Human dignity has been described as "the highest value" and the "supreme constitutional principle" of the German legal order, cf. GGK-HERDEGEN, in: Theodor Maunz / Günter Dürig / Matthias Herdegen (eds.), *Grundgesetz-Kommentar*, 87. Ergänzungslieferung März 2019, art. 1 para. 1 no. 4.

2 Human dignity stands at the forefront of the Chapter on fundamental rights in the Swiss Federal Constitution (art. 7). It is also used as the benchmark for determining if a limitation of another fundamental right is legitimate, as art. 36 para. 4 stipulates that the essence of fundamental rights is sacrosanct and this essence is identified with the content of human dignity, cf. BSK BV-WALDMANN, in: Bernhard Waldmann / Eva Maria Belser / Astrid Epiney (eds.), *Basler Kommentar Bundesverfassung*, Basel 2015 (CIT. BSK BV-BELSER/MOLINARI), art. 7 no. 27.

3 The US Constitution makes no explicit mention of the guarantee of human dignity; however, the US Supreme Court held as early as 1943 in *McNabb v. U.S.* that the respect for the dignity of man is central in a democratic society: "The purpose of this impressively pervasive requirement of criminal procedure is plain. *A democratic society, in which respect for the dignity of all men is central*, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment." *McNabb v. United States*, 318 U.S. 332 at 343 (1943) (emphasis added).

4 Though dignity is not explicitly mentioned in the ECHR, the ECtHR has ruled on multiple occasions that the respect for human dignity constitutes "the very essence" of the objectives of the Convention, cf. *S.W. v. The United Kingdom*, Application No. 20166/92, 22 November 1995, para. 44 and *Pretty v. The United Kingdom*, Application No. 2346/02, 29 April 2002, para. 65.

5 The right to assistance when in need (art. 12) in the Swiss Federal Constitution for example has its origins in the jurisprudence of the Federal Supreme Court based on the, at the time, implicit constitutional right to human dignity, cf. BSK BV-BELSER/MOLINARI (n. 2), art. 7 no. 28.

frequently associated with the classic rights to freedom and the political rights. The purpose of this paper will be to examine the connection between human dignity and the democratic form of governance on the one hand and the lack of consequent implementation of principles of human dignity in the domain of political rights when it comes to foreigners on the other. This is of particular importance in the context of contemporary conflicts, be it in the case of migration or the rise of nationalist and populist political movements around the world and in Europe in particular. It will be shown that the existing legal frameworks of chosen countries contradict themselves and that the courts when they decide to tackle the matter only further contribute to the confusion in this field instead of taking a clear position on the issue. The argument will be made that the definition of the scope of political rights ought to be made on the basis of considerations on aspects of human dignity and that such a definition would help evade the contradictions present in the constitutional texts and their justifications.

II. Human dignity and the democratic form of governance

Prior to addressing this topic, however, one question has to be answered: How is a link between human dignity and democracy to be justified? Democracy can in short be identified as an idea of popular self-government whereby people of a country decide for themselves the contents of the laws that organise and regulate their political association.⁶ The concept that the people rather than a supreme authority represented either by an individual entity in the shape of God or by an absolute monarch, as was the practice in the continental Europe of the 17th and 18th century, where the source of state power was developed by James Wilson, one of the framers of the US Constitution of 1787. Wilson realised the crucial importance of popular participation in government and rejected Sir William Blackstone's notion that the absolute authority in a state resides in its legislature as ultimately the binding power of the law was not rooted in the superiority of the legislature, which compelled people to obey its commands, but in the consent of the governed people.⁷ For Wilson therefore,

6 ROBERT POST, *Democracy, Popular Sovereignty and Judicial Review*, California Law Review 86 (1998), 429-443, p. 430 with further reference to Frank Michelman.

7 JEREMY M. SHER, *A Question of Dignity: The Renewed Significance of James Wilson's Writings on Popular Sovereignty in the Wake of Alden v. Maine*, NYU Annual Survey of American Law 61 (2005-2006), 591-627, pp. 597 f. commenting on Wilson's Lectures on Law; for a short overview of the English concept of parliamentary sovereignty, cf. MICHAEL SANT'AMBROGIO, *Standing in the Shadow of Popular Sovereignty*, Boston University Law Review 95 (2015), 1869-1936, pp. 1879 ff.

the true source of sovereignty was the free and independent man and through direct representation the people could actively manifest their consent to the laws imposed upon them.⁸ Wilson would go on to consequently defend this position at the Constitutional Convention in 1787, however with mixed success, especially regarding the elections of the executive branch of the government.⁹

The idea that the free and independent human being is the source of political power in a state is inherently connected to the notion of the equality of all humans and their ability to autonomously make decisions and choices. This independence of the humans is also prominently featured in the works of Immanuel Kant who is considered a leading figure in the development of the modern understanding of the concept of human dignity.¹⁰ Kant's ideas concerning the moral autonomy, self-legislation and categorical imperative as the basis of human dignity¹¹ are very much reminiscent of Wilson's notion of a free and independent man who is the source of state power. As a consequence, a claim can be made that the popular sovereignty (and by extension the democratic model of governance in general) has its roots in the concept of human dignity (both the philosophical and the legal one, the latter one being the basis for the political rights of the citizens).¹² This idea has found acceptance in the literature. The relationship between human dignity and popular sovereignty has been described as close and democratic equality has been found to possess a dignity-based character.¹³ Further, it has been argued that the "dignity argument" is used to justify the participation of individuals in the

8 SHER (n. 7), p. 600.

9 Cf. for more details IAN C. BARTRUM, James Wilson and the Moral Foundations of Popular Sovereignty, *Buffalo Law Review* 64 (2016), 225-296, pp. 260 ff.

10 Cf. among others: GKG-HERDEGEN (n. 1), art. 1 para. 1 no. 13; YEHOASHUA ARIELI, On the Necessary and Sufficient Conditions for the Emergence of the Doctrine of the Dignity of Man and his Rights, in: David Kretzmer / Eckart Klein (eds.), *The Concept of Human Dignity in Human Rights Discourse*, The Hague 2002, 1-18, p. 7.

11 Cf. GKG-DREIER, in: Horst Dreier (ed.), *Grundgesetz: Kommentar*, 3rd ed., Tübingen 2013, art. 1 para. 1 no. 14.

12 Cf. CATHERINE DUPRÉ, *The Age of Dignity: Human Rights and Constitutionalism in Europe*, Oxford/Portland 2015, p. 72 who also assesses that the capacity to set one's own ends (as defined by Kant's *Selbstgesetzgebung*) became both the definition of human dignity and a philosophical foundation for the right to vote.

13 SGK-EHRENZELLER, in: B. Ehrenzeller (ed.), *Die schweizerische Bundesverfassung: St. Galler Kommentar*, 3rd ed., Zurich 2014, (zit. SGK-MASTRONARDI), art. 7 no. 35; dissenting GKG-HERDEGEN (n. 1), art. 1 para. 1 no. 27, who calls for a more careful and cautious approach and doubts that in every state with proven democratic deficits there are systematic violations of human dignity. Democratic deficits are however by themselves already violations of human dignity because the correct interpretation of the legal content of the concept of human dignity necessarily leads to the conclusion that its proper protection can only be guaranteed in a state with a democratic form of government.

democratic decision-making process¹⁴ and that democracy postulates the political freedom and equality of the citizens.¹⁵ Kant's idea of self-legislation is said to represent in the current context more than just a thought experiment and should therefore much rather entail an institutionalised possibility of participation in the political decision-making processes of the state.¹⁶

The conclusion then may be drawn that human dignity is indeed the foundation of both the democratic form of governance and the participation rights (or political rights) within the territories in which such governance is practiced. As human dignity is an inherent attribute of every human being, the logical extension of the argument may seem that every person inhabiting such a territory ought to possess such rights. Since human dignity implies equality of all people, and popular sovereignty expressed in the form of democratic forms of governance seems to be based on the ideas of dignity, dignity therefore ought to imply equal citizenship for everyone and thus the right of every individual to participate in processes of collective deliberation and decision-making.¹⁷ Yet in most countries this is not the case and it seems that very rarely are there complaints about the lack of possibility for foreigners to participate in democratic decision-making in the country of their residence.¹⁸ How can this be explained from the point of view of human dignity? As the violation of human dignity consists in degrading treatment¹⁹ and an objectification of the person,²⁰ there are convincing arguments that the fact that foreigners cannot decide upon circumstances which concern them as much as the citizens of the state they reside in represents such a treatment. They have to obey the decisions made by others which may have the same if not an

14 TATJANA GEDDERT-STEINACHER, *Menschenwürde als Verfassungsbegriff: Aspekte der Rechtsprechung des Bundesverfassungsgerichts zu Art. 1 Abs. 1 Grundgesetz*, Berlin 1990, p. 177.

15 GKG-GRZESZICK (n. 1), art. 20 no. 15.

16 LUKAS SCHAUB, *Die Finanzierung von Wahl- und Abstimmungskämpfen: Ein Beitrag zum demokratischen Diskurs und zur politischen Chancengleichheit*, Zurich 2012, p. 225.

17 HENK BOTHA, *Human Dignity in Comparative Perspective*, Stellenbosch Law Review 20 (2009), 171-220, p. 193.

18 Some remarks on this are made by SGK-MASTRONARDI (n. 13), art. 7 no. 35 claiming that the dignity-based character of democratic equality has legal policy consequences for the political rights of foreigners, without specifying what these consequences may be.

19 DAVID KRETZMER, *Human Dignity in Israeli Jurisprudence*, in: David Kretzmer / Eckart Klein (eds.), *The Concept of Human Dignity in Human Rights Discourse*, The Hague 2002, 161-178, p. 174.

20 BOTHA (n. 17), p. 204; cf. also EVADNÉ GRANT, *Dignity and Equality*, Human Rights Law Review 7 (2007) 299-329, p. 312 stating that dignity "requires that persons should not be demeaned or treated as if they have no value".

even more severe impact on them without being able to have a say on those matters themselves.²¹ Are there any justifications for the unequal treatment and the differentiation based on a formal criterion such as citizenship? And what do the relevant constitutional norms, if there are such, and the national jurisprudences stipulate about this discrepancy? The next section will try to show that there are inconsistencies and gaps in constitutional frameworks of Switzerland and Germany and that when courts do consider the issue the results are inconsistent.

III. The analysis of constitutional frameworks and jurisprudence

The connection between human dignity and political rights seems to pass under the radar when considering the concrete legal manifestations of the former. Though there is little doubt about the link between the concept and norms of human dignity and the principle of equality before the law, little attention is given to the issue of respect for human dignity in *making* the law. To illustrate this claim, a legal analysis of the Swiss and German constitutional provisions and jurisprudence will follow.

21 One popular argument in the debate on why not to grant the foreigners the same political rights as the citizens is the contention that it is often not clear which issues are of concern to the foreigners and that letting them decide on such matters which practically do not have any relevance for them would distort the democratic principle. This argument is not convincing. Firstly, it is very hard to distinguish between those matters that concern the foreigners and those which do not: Even those matters which concern only the citizens of a specific country, e.g. the debates on military service, are of at least potential importance to those foreign nationals who are in the process of becoming the citizens of the given state, or have a desire to become one. Secondly, the criterion of citizenship does not necessarily imply that all citizens are equally concerned by every decision made by the democratic sovereign either. A good example for this is the popular initiative passed in Switzerland in 2012 concerning the limitation of construction of secondary and seasonal residences which required the percentage of such residencies to be no higher than 20% in any given municipality. Such a regulation greatly affects the economic prospects of tourism destinations, especially in the Alps, which depend on such residencies and the income they generate much more than the large population centres in the flatter parts of the country in which such residencies are of little importance. Yet it is precisely because of the votes of people living in these urban areas that the initiative was passed—despite the dominant majority of the people living in municipalities which would be affected by this norm rejecting it. For a more detailed account, cf. JONAS ALIG, *Das Zweitwohnungsgesetz*, ZBL 117 (2016), 227–252.

1. Switzerland

The Swiss Federal Constitution contains multiple provisions dealing with political rights and the scope of their application. The federal structure of the state and the bi-cameral composition of the parliament²² lead to a differentiated approach towards the definition of the democratic sovereign which, however, proves inconsistent both with respect to other constitutional norms themselves and when the connection between human dignity and political rights is taken into account. Political rights themselves are guaranteed by art. 34 BV and art. 39 para. 1 BV divides the competence to regulate the scope of political rights: Federal law ought to define their application in federal matters and the cantonal law in the fields pertaining to cantonal and communal legislation. The Federal Constitution specifies this task in art. 136: Para. 1 of the provision stipulates that only Swiss citizens are granted political rights on the federal level and para. 2 lists the concrete rights entailed, among which are the elections for one of the two chambers of the Federal Parliament, the National Council.

At the same time however, art. 150 para. 3 reaffirms that cantons determine the rules for the election of the representatives to the Council of States, the second chamber of the federal parliament. As there are no limits placed by federal law on the possible extension of political rights, this means that, at least in theory, cantons may extend the suffrage to foreigners as well.²³ This creates a contradiction within the constitutional framework, as art. 136 clearly stipulates that it is only Swiss citizens who may decide upon political matters on the federal level. Yet, the elections for the Council of States are also a federal matter insofar as that chamber enjoys the same rights as the National Council in regards to enacting federal legislation. Hence, foreigners would be able to influence federal legislation through their choice, despite the explicit wording of art. 136 para. 1. It is unclear how this contradiction is to be solved as the constitution itself gives no answer to the question²⁴

22 Art. 148 para. 2 BV states: "The Federal Assembly comprises two chambers, the National Council and the Council of States; both chambers shall be of equal standing." All translations of the articles are taken from the official webpage of the Federal Council: *The Federal Council, Federal Constitution of the Swiss Confederation*.

23 Cf. ANINA WEBER, *Schweizerisches Wahlrecht und die Garantie der politischen Rechte: Eine Untersuchung ausgewählter praktischer Probleme mit Schwerpunkt Proporzahlen und ihre Vereinbarkeit mit der Bundesverfassung*, Zürich 2016, no. 72.

24 One opinion is that as a practical consequence of such a differentiated regulation, the cantons could through their legal solutions initiate a debate which may finally lead to a change of premises on the federal level with regard to the political rights of foreigners, cf. BSK BV-THURNHERR (n. 2), art. 150 no. 6.

and the Federal Supreme Court up to this point has not dealt with the issue either.²⁵

The connection between human dignity and political rights can provide a plausible solution in this case. From this perspective, it is unclear why the possibility of democratic participation of foreigners should be left open to foreigners on the cantonal, yet prohibited on the federal level, especially given the above-mentioned contradiction between art. 136 para. 1 and art. 150 para. 3.²⁶ The argument that matters on local or cantonal level affect the lives of people more than those decided on the federal level and that as a result it is plausible to grant foreigners participation rights in the former but not in the latter case is unconvincing because very important issues such as various taxations, immigration law and employment conditions are decided on federal level.²⁷ These topics concern foreign nationals as much as Swiss citizens thereby rendering such argumentation pointless.²⁸ And it also does not rebut the argument for political rights from human dignity, as was explained in Section II. Yet, despite this normative gateway, there is more than little political discomfort when it comes to actually amending the legal order and implementing the already existing guarantees at the cantonal level. So far only two cantons have introduced some kind of political rights for foreigners in cantonal matters and eight have done so at the municipal level,²⁹ which indicates that legitimacy and legally coherent argumentation are not always sufficient to bring about political change. The situation at the federal level is not more

25 Eva Maria Molinari gives a comprehensive overview of the Court's jurisprudence about art. 7 BV, however it contains no cases which deal with the questions of political rights and principles of democratic governance, cf. EVA MARIA MOLINARI, *Die Menschenwürde in der schweizerischen Bundesverfassung: Eine rechtsdogmatische und rechtsvergleichende Untersuchung der subjektiv-rechtlichen Grundrechtsfunktion*, Zürich 2018, no. 111 ff.

26 This is also recognised in the literature. The strictly formal criterion of citizenship required for granting political rights on federal level has been questioned and there are assertions that such a limitation leads to contradictions with basic principles of democracy and political equality, cf. BSK BV-TSCHANNEN (n. 2), art. 136 no. 7 and SGK-KLEY (n. 13), art. 136 no. 3.

27 Direct taxation is defined by art. 128 BV; art. 121 gives the Confederation the power to enact legislation regarding foreign nationals; art. 110 regulates the competences in the field of employment.

28 For the argument that democratic rights should be granted according to the principal of impact of decisions and not on the basis of the formal criterion of citizenship, cf. PATTI TAMARA LENARD, *Residence and the Right to Vote*, *Journal of International Migration and Integration* 16 (2015) 119-132, pp. 125 ff. and MICHEL DORMAL, *Wählen ohne Staatsbürgerschaft? Das Ausländerwahlrecht in der demokratietheoretischen Diskussion*, *Politische Vierteljahresschrift* 57 (2016) 378-402, pp. 382 ff.

29 For a detailed statistical overview, cf. ANDREAS MÜLLER / TOBIAS SCHLEGEL, *Passives Wahlrecht für aktive Ausländer*, in: Andreas Glaser (ed.), *Politische Rechte für Ausländerinnen und Ausländer?*, Zürich 2017 31-55, pp. 33-41.

promising either. There have been multiple attempts to bring the topic of the extension of suffrage to debate in the federal parliament, however virtually every one of them has been rejected, usually on the basis of the lack of popular support for such initiatives and the corresponding small chance of success, should such a notion be put to vote.³⁰

2. Germany

Much like the Swiss Federal Constitution, the German Basic Law (BL) contains multiple provisions dealing with the definition and the scope of political rights. However, since these provisions alternately speak of either the “people” (art. 20 para. 2, art. 28 para. 1, art. 38 para. 1) or the “German people” (the Preamble, art. 146), there is an uncertainty regarding the answer to the question whether the exercise of the sovereign power applies solely to the German citizens or whether the BL has left the possibility for the foreign nationals to be included in the process of political decision-making. Unlike the Swiss Federal Court, the German Federal Constitutional Court had the opportunity to decide on the matter in a case from 1990 regarding a statute of the state Schleswig-Holstein, which intended to introduce a right to vote for certain categories of foreign nationals on the municipal level.³¹ The Court ruled that such an act would be unconstitutional and based its decision on the necessary uniformity of the democratic basis of legitimation on all levels of public authority, be it municipal, state-based or federal, arguing that the concept of the people is singular in the BL.³² The notion that all authority is derived from the people in art. 20 para. 2 BL not only stipulates the principle of popular sovereignty, but also defines the scope of the people itself.³³ This “people” is made up of the German citizens and persons of equal status as defined by art. 116 para. 1 BL.³⁴ Practically, this means that political rights are an attribute only of those people who possess German citizenship. As a consequence of the necessary uniformity of the democratic sovereign, when the representatives of the “people” are mentioned in art. 28 para. 1 sentence 2 BL concerning the

30 Postulate of the National Council No. 00.3512 (“Stimmrecht für Ausländerinnen und Ausländer auf Bundesebene”) which was brought before the Federal Parliament in 2000 with the demand to examine conditions for a possible introduction of political rights for foreigners on the federal level has been rejected, the reasoning being that the reluctance of citizens to introduce these rights at the cantonal level meant that the chance of a popular vote passing on the federal level would be even smaller.

31 BverfGE 83, 37 (Foreign Voters Case I).

32 CRISTINA M. RODRIGUEZ, Noncitizen voting and the extraconstitutional construction of the polity, *International Journal of Constitutional Law* 8 (2010), 30–49, p. 34.

33 BverfGE 83, 37 (50).

34 BverfGE 83, 37 (51).

municipal and state level, no other people than the German people, meaning voting age individuals with German citizenship, can be meant.³⁵ This jurisprudence has remained consistent ever since and has most recently been confirmed by a decision of a State Court in Bremen in 2014, which similarly dealt with the question of the extension of suffrage to foreign nationals on the municipal and state level.³⁶

The rationale of the Court seems *prima facie* reasonable. Despite a somewhat unclear wording of art.20 para.2 and art.28 para.1, which only refer to the “people”, the argumentation appears insofar plausible as the systematic interpretation and the comparison with other provisions of the BL, especially art.146 granting the power to adopt a new constitution only to the German people, may lead to the conclusion that there is no discrepancy between the terms. By this logic, if the power to proclaim the new constitution rests solely with the German people, it would be illogical to extend the power to substantiate it through adoption of laws to a wider range of persons. The foundations of such reasoning are to be found in the concept of homogeneity, which is considered by some prominent scholars as one of the fundamental principles upon which the legal order of the BL was established. It implies a people which is defined extra-legally by a combination of historical, cultural, lingual and religious traits to form a compact and clearly identifiable unit which grants itself the competence to collectively decide on the matters affecting it and to which no outsiders can belong. What follows from such an account of popular sovereignty is clear: Anyone who is not a part of the unit—and this by definition applies to foreign nationals residing in Germany—is denied the possibility of participation rights on the basis that any such decision would violate the concept of homogeneity, which permeates the BL.³⁷ The Court therefore saw it fit to strike down the statute in question, though there are convincing arguments that its decision was wrong.

The text of the BL itself contradicts this argumentation and the idea of the necessity of a homogenous people as a basis of democratic legitimation on all levels of state authority. Two years after the Court’s decision, the Treaty of Maastricht was signed. The Court approved the Treaty in its leading case

35 BverfGE 83, 37 (53).

36 Staatsgerichtshof der Freien Hansestadt Bremen (St 1/13), 31 January 2014.

37 For a classic defence of this argument, cf. JOSEF ISENSEE, Abschied der Demokratie vom Demos: Ausländerwahlrecht als Identitätsfrage für Volk, Demokratie und Verfassung, in: Dieter Schwab/Dieter Giesen/Joseph Listl/Hans-Wolfgang Strätz (eds.), Staat, Kirche, Wissenschaft in einer pluralistischen Gesellschaft: Festschrift zum 65. Geburtstag von Paul Mikat, Berlin 1989, 705–740, especially p. 708; for a contemporary account, cf. KYRILL-A. SCHWARZ, Erweiterungen des Kreises der Wahlberechtigten für Ausländer auf Landes- und Kommunalebene?, AöR 138 (2013), 411–434, pp. 422–424.

from 1993³⁸ and this led to the introduction of art. 28 para. 1 sentence 3 BL which guarantees the right of citizens of the member states of European Community (EC) to vote on the local and municipal level on the basis of the EC law. Despite its argumentation, the Court explicitly left the door open for an exceptional introduction of such a norm in its decision from 1990³⁹ and the Bremen Court dismissed the alleged discrepancy of this addition and the postulate that the term “people” in sentence 2 of the same provision could only mean the German people as a mere modification based on the EU law which had no actual impact on the scope and the definition of the “people” in art. 20 para. 2 and art. 28 para. 1 BL.⁴⁰ The “modification” was defended on the grounds of a necessary implementation of EC law which enjoys precedence over the German national law and because of its very limited scope of application.⁴¹ This may be so. However, it does not change the fact that both the Federal Constitutional Court and the Bremen Court have breached the supposedly fundamental homogeneity principle with their decisions and the necessary uniformity of the democratic sovereign on the municipal level, as in this case the Germans are not the exclusive bearers of political participation rights anymore but are instead supplemented by citizens of any and all member states of the EU.⁴² Regardless of how this is perceived in the scholarship or the jurisprudence, the required uniformity of the sovereign on all levels of public authority ceases to exist and the sole rule to decide upon the right to participate is the strictly formal criterion of EU citizenship. Hence, a paradoxical situation arises in which third country residents, who have lived in Germany for a substantial amount of time and who have accustomed themselves to the surroundings have no possibility to actively decide the outcome of political processes, whereas an EU citizen automatically receives this right by the mere fact of possessing a certain citizenship, irrespective of their actual knowledge of the local conditions and issues. Clearly, such a solution is unjust and cannot be justified on any substantial grounds, especially given the fundamental importance of human dignity in art. 1 BL which is considered as an underlying and most fundamental principle of the whole legal order⁴³ and should as such also apply in this context.

38 BVerfGE 89, 155 (Maastricht case).

39 BVerfGE 83, 37 (59).

40 Staatsgerichtshof der Freien Hansestadt Bremen (St 1/13), 31 January 2014, no. 49.

41 Staatsgerichtshof der Freien Hansestadt Bremen (St 1/13), 31. January 2014, no. 56 f.

42 SEBASTIAN EICKENJÄGER / ALEX VALLE FRANCO, Ausweitung des Wahlrechts für Migranten? Anmerkung zum Urteil des Bremischen Staatsgerichtshofes vom 31.1.2014, ZAR 35 (2015), 52–56, p. 54.

43 BVerfGE 45, 187 (223) (Lifelong prison sentence case); BVerfGE 72, 155 (170); BVerfGE 79, 256 (268) (Knowledge of one’s own descent case).

The breach of the uniformity requirement therefore disqualifies it as an argument against granting all foreign nationals political participations rights, not only on the municipal, but also on the state⁴⁴ and even federal level as well: Through the adoption of art. 28 para. 1 sentence 3 BL, the term “people” seems to have acquired a new, broader meaning and the interpretation of it being the German people justified on the basis of a common identity and the therefrom derived principle of homogeneity is no longer valid. As a result, it can be said that the argumentation of the courts is unconvincing and that the text of the BL is itself unclear and leaves room for multiple interpretations.

What, then, can be done to resolve this problem? One possible solution and the one advocated in this paper is the interpretation of political rights in light of human dignity. Art. 1 para. 1 BL is the central and the most fundamental norm of the whole Basic Law and as such needs to be considered in the context not only of other fundamental rights like the right to freedom of speech or freedom of religion, but also the political rights. From the perspective of human dignity, limiting the possibility of creating legally binding decisions for all persons living in a certain territory to only those who happen to fulfil a certain formal criterion like citizenship is untenable. The dissenting opinion of judge Sacksofsky in the Bremen Court decision confirms this by asserting that the claim to democratic participation is derived from human dignity and that the apportionment of political rights solely on the basis of citizenship is a limitation of this claim.⁴⁵ Therefore, the homogeneity principle is not a convincing tool for defining the scope of bearers of political rights⁴⁶ and the legitimacy of the idea behind it is also doubtful.⁴⁷ Human dignity requires a much broader and inclusive understanding of the

44 HANS MEYER, Grundgesetzliche Demokratie und Wahlrecht für ansässige Nicht-deutsche, Oder: Über die Wirkung fixer Ideen in der Verfassungsrechtsprechung, JZ 71 (2016), 121-127, p. 125.

45 Staatsgerichtshof der Freien Hansestadt Bremen (St 1/13), 31 January 2014, no. 95 f.

46 KLAUS SIEVEKING, Kommunalwahlrecht für Drittstaatsangehörige – «kosmopolitische Phantasterei» oder Integrationsrecht für Einwanderer?, ZAR 28 (2008), 121-126, p. 125.

47 The roots of the principle are found in the writings of Carl Schmitt who championed the idea of a strong popular sovereignty based on the common identity of a specific group and its hostility towards all the outsiders not belonging to it. Schmitt would go on to become one of the great supporters of the National Socialist regime, as for him it represented the realisation of the idea of a homogeneous people in its purest form. For criticism of Schmitt's idea of homogeneity and strong popular sovereignty cf. GERTRUDE LÜBBE-WOLFF, Homogenes Volk: Über Homogenitätspostulate und Integration, in: Klaus Barwig/Stephan Beichel-Benedetti/Gisbert Brinkmann (eds.), Hohenheimer Tage zum Ausländerrecht 2010, Baden-Baden 2011, 19-30, pp. 28-30 and LARS VINX, The incoherence of strong popular sovereignty, International Journal of Constitutional Law 11 (2013), 101-124, pp. 104-114.

“people”.⁴⁸ However, much like the Swiss case, the great challenge is not the lack of a legal framework but the willingness and the courage to politically walk the path. Whether and when this could change remains to be seen.

IV. Conclusion

Are there any conclusions that can be drawn from the above considerations? If anything, it is that the legal frameworks of Switzerland and the EU prove that the notion of foreign voting rights is not one which is unknown. The fact that the Swiss Federal Constitution leaves it up to each individual Canton to decide whether or not to grant specific political rights to non-citizens proves that there is no general disinclination towards the idea of extending these rights beyond what has historically been understood to be their scope of application.⁴⁹ The same can be said for the regulations at the level of the EU, where it is explicitly stated in art. 20 para. 2 lit. b TFEU that nationals of the Union have the right to vote at the municipal level if they reside in some other Member State.⁵⁰ Considering these already well-established mechanisms, there can be no argument that a consistent extension of these rights would fundamentally alter the *legal* landscape of the said entities. Yet it is precisely not the law which is the problem but the *political will* of the said subjects to implement these changes. The mistrust towards the “other” is unfortunately as strong as it has ever been currently. Trends can be observed that instead of open-mindedness and acceptance of differences, upon which the current

48 Elaborating on the criteria which would clear the threshold set by the requirements of human dignity goes beyond the framework of this paper. However, it is clear that due to the considerations of justice, not all foreign nationals present in a territory of a state would enjoy the political rights. Those who are not permanently based in that country and do not fulfil certain substantial criteria (e.g. language skills) would remain excluded from their scope.

49 However, even this claim is only partially correct when it is taken into account that certain countries have at different points in their history made the right to vote dependent on factors other than the citizenship. For the example of the United States and the right of foreign nationals to vote in the early years of the republic, cf. DAVID M. HOWARD, Potential Citizens’ Rights: The Case for Permanent Resident voting, *Texas Law Review* 95 (2017), 1393-1424, pp. 1396 f. and RON HAYDUK, Political Rights in the Age of Migration: Lessons from the United States, *Journal of International Migration and Integration* 16 (2015), 99-118, pp. 102 ff.

50 The full provision reads as follows: “Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia: (b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State.”

system in what is generally perceived as “the West” is built, isolation and accentuation of particular features, be it national, religious, political or some other, is gaining momentum and threatens to annul the achievements of the past decades. It is because of these developments that it is important, more than perhaps ever before in the past 70 years, to point out the common features of every human being. And in doing so, draw the appropriate conclusions, not only when it comes to living a decent life in an economic sense, but also when it comes to the possibility of deciding for oneself whether one finds certain political decisions convincing or not.

APARIUZ XXII UNTER GLEICHEN

Die diesjährige XXII. Ausgabe der Schriftenreihe APARIUZ greift mit ihrem Titel «Unter Gleichen» programmatisch das 2021 anzusetzende fünfzigste Jubiläum eines der bedeutendsten rechtshistorischen und politischen Ereignisse der Schweiz auf: die Einführung des allgemeinen Frauenwahl- und Stimmrechts.

Ausgehend von diesem in seiner gesellschaftlichen und juristischen Tragweite kaum zu übertreffenden Meilenstein untersuchen die dreizehn Beiträge dieses Sammelbandes, verfasst von Nachwuchswissenschaftlerinnen aus allen juristischen Fachbereichen, verschiedenste Fragen zum komplexen und vielschichtigem Verhältnis von Recht, Gleichheit und Gerechtigkeit.