



FACULTY OF LAW
University of Lund

Malin Karvonen

The “Gibraltar case”
A critical test of rules concerning
EU citizenship and franchise in
elections to the European
Parliament

Master thesis
20 points

Hans-Heinrich Vogel

European Community Law

Autumn semester 2005

Contents

SUMMARY	1
PREFACE	3
ABBREVIATIONS	4
1 INTRODUCTION	5
1.1 Background	5
1.2 Purpose and basic question	6
1.3 Method and material	6
1.4 Outline	7
1.5 Delimitations	7
2 EUROPEAN CITIZENSHIP	9
2.1 Citizenship	9
2.2 EU Citizenship	13
2.3 Who is a citizen of the Union?	16
2.4 Principles on EU citizenship established by the ECJ	23
3 ELECTIONS TO THE EUROPEAN PARLIAMENT	27
3.1 The right to vote in European Parliamentary elections	27
3.2 The organisation of European elections	30
3.3 The significance of European elections	31
3.4 A uniform electoral procedure for the European elections	32
4 EU AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS	34
4.1 Electoral rights in the European Convention	34
4.1.1 Article 3 of Protocol No.1 to the European Convention	34
4.1.2 Electoral rights for foreigners	37
4.2 The position of the European Convention in EU law	41

4.3	Should the EU accede to the European Convention?	44
5	GIBRALTAR	46
5.1	Gibraltar: historical outline	46
5.1.1	Prior to the Treaty of Utrecht	46
5.1.1.1	Moslem period: 711 to 1462	46
5.1.1.2	Spanish period: 1462 to 1704	47
5.1.1.3	Gibraltar during the War of the Spanish Succession (1702 – 1713)	47
5.1.2	Following the Treaty of Utrecht	48
5.2	Gibraltar: legal status	49
5.3	The Gibraltar case	51
5.3.1	The <i>Matthews</i> judgment	51
5.3.2	EPRA 2003	53
5.3.3	C-145/04 Espagne/Royame-Uni	54
5.3.3.1	Pre-litigation	54
5.3.3.2	The action	55
5.3.3.3	The oral hearing of 5 July 2005	61
5.3.4	Adjacent case C-300/04 Eman & Sevinger	64
5.3.5	Questions referred to the Court of Justice of the European Communities	64
5.3.6	Background	65
5.3.7	Arguments discussed at the oral hearing of 5 July 2005	65
5.3.7.1	The relevant legal entity.	65
5.3.7.2	A unitary concept of citizenship?	65
5.3.7.3	The European Parliament—a legislator for Aruba?	66
5.3.7.4	Does the Dutch legislation exceed Member State discretion?	67
6	CONCLUSION	69
SUPPLEMENT		75
BIBLIOGRAPHY		77
TABLE OF CASES		83

Summary

This study explores the link between EU citizenship and the right to vote in elections to the European Parliament. It does so through the so-called “Gibraltar-case”, C-145/04, at the time of writing still pending before the European Court of Justice.

Spain alleges that the United Kingdom has infringed EC law through enacting the European Parliament (Representation) Act 2003 in which the right to vote in European Parliamentary elections is granted to the people of Gibraltar. The United Kingdom electoral legislation grants franchise to Commonwealth citizens, even if they are not nationals of the United Kingdom. This means that non-EU citizens living in Gibraltar can vote in EP elections, as long as they qualify as Commonwealth citizens. Spain is of the opinion that franchise cannot be given to individuals who lack EU-citizenship without a decision on Community level. The traditional approach is to leave problems regarding who is to be considered a citizen of a Member State completely to the discretion of that Member State. Citizenship is an issue that seem to lie close to the very core of state sovereignty and talk about harmonisation of legislation in the area of citizenship is politically sensitive.

Every person who is a national of a Member State is a citizen of the Union, according to EC law. It is however not always clear who is to be considered a national or a citizen of a Member State. The many different layers of British and Commonwealth citizenship paint a complex picture.

Also regarding franchise in European Parliamentary elections there is a lack of harmonisation of legislation. The electoral procedure for the EP elections are governed by national provisions in each Member State, and Spain and the United Kingdom argue about however it is already regulated, on Community level, who can be granted the right to vote in the elections. How wide is the discretion of the Member States in this area? Has the United Kingdom exceeded the boundaries of this discretion through giving the right to vote in elections for the European Parliament to non-EU citizens?

The Council of Europe takes electoral rights seriously, and the minimum requirement is that foreign nationals permanently living in another country ought to have rights of political participation at least on the local level. It was a judgement of the European Court of Human Rights that forced the United Kingdom to enact the contested statute.

The Gibraltar-case cannot be examined without taking into consideration the territorial conflict between Spain and the United Kingdom. It is my opinion that this legal action would probably not have taken place had it not been for the politically sensitive status of Gibraltar and that the United

Kingdom has organised the extension of voting rights to Gibraltarians within the margin of discretion given to Member States by present EC law.

Preface

I would like to express my gratitude towards those who have assisted me through the process of writing this thesis. First of all, I would like to thank my supervisor, professor Hans-Heinrich Vogel, for his guidance. I would also like to thank the honourable Allan Rosas, judge at the Court of Justice of the European Communities, who first draw my attention to the Gibraltar-case and its problematic issues, and who helped me to get started by allowing me to look through his collection of material related to the citizenship of the Union in Luxemburg. Lastly, I would like to thank my parents for their support.

Abbreviations

BNA	British Nationality Act 1981
COE	Council of Europe
EC	European Community
EEC	European Economic Community
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice/The Court of Justice of the European Communities
ECR	European Court Reports
ECSC	European Coal and Steel Community
EC Treaty	European Community Treaty
EP	European Parliament
EPRA	European Parliament (Representation) Act 2003
Euratom	European Atomic Energy Community
EU	European Union
OCTs	Overseas Countries and Territories
OJ	Official Journal of the European Communities
QCC	Qualifying Commonwealth Citizen
Summit	European Council Meeting
VAT	Value Added Tax

1 Introduction

1.1 Background

Citizenship of the European Union was created and introduced into the EC Treaty through the Maastricht Treaty of 1993. “The relationship of citizenship to participation in the exercise of public authority has become the focus of citizenship rights. As other rights of participation in economic and social life on an equal footing with nationals of the state have been secured for an increasing number of immigrants in Member States, political rights have taken on an increasingly symbolic meaning as the dividing line between insiders and outsiders.”¹

The electoral legislation of the United Kingdom grants franchise to people defined as “Commonwealth citizens”, even if they are not nationals of the UK. Non-EU citizens living in Gibraltar who qualify as “Commonwealth citizens” are entitled to vote in elections to the European Parliament. This was not always the case, as Gibraltar used to be excluded from franchise to the European parliamentary elections. This was changed after the *Matthews v UK*-ruling² in which the European Court of Human Rights (ECtHR) found the United Kingdom to be in breach of the European Convention of Human Rights by not allowing Gibraltarians to vote in European parliamentary elections. In order to comply with the ECtHR-judgment, the United Kingdom changed its voting rules. Gibraltar was combined with the United Kingdom South West constituency and franchise in the elections to the European Parliament was extended to European and Commonwealth citizens legally resident in Gibraltar. This has been challenged by Spain, who has brought the United Kingdom before the Court of Justice of the European Communities (ECJ). Spain claims that the United Kingdom infringes Community law by allowing individuals that are not citizens of the EU to vote in European elections. Spain also objects to the creation of a combined electoral region in which Gibraltar is united with an already existing United Kingdom constituency.

Article 17 of the EC Treaty establishes a citizenship of the Union. According to the wording of the same article, EU citizens shall enjoy the rights conferred by the EC Treaty. Article 19(2) EC provides that a citizen of the Union has the right to vote and stand as a candidate in European Parliament elections in any Member State in which he or she resides other than that of his or her nationality. Article 189(1) EC establishes that the European Parliament shall consist of representatives of the peoples of the States, elected by direct universal suffrage in accordance with Article 190

¹ _____

¹ Guild E, Citizens, Immigrants, Terrorist and Others, p 241.

² Matthews v. The United Kingdom, Judgment of the European Court of Human Rights of 18 February, 1999.

EC. Articles 17 and 19 talk about “citizens” while Article 189 mentions “peoples of the States”. If, and in that case, to what extent, this difference in wording has practical consequences is open to debate, as will be described below.

1.2 Purpose and basic question

The purpose of this thesis is to examine the link between citizenship of a Member State and the right to vote in elections to the European Parliament, through the “Gibraltar-case”, C-145/04, *Espagne/Royame-Uni*, at the time of writing pending before the ECJ. It is also of interest to the thesis to consider, in the context of the Gibraltar-case, the question whether it is necessary that the concept of citizenship is perceived as unitary, or if different types of citizenship of the European Union exist, entitling its holders to different rights. The basic question of the thesis is: Must a person be a citizen of a Member State of the European Union in order to have the right to vote in elections to the European Parliament?

1.3 Method and material

To be able to answer the question outlined above, I survey the existing sources of law in order to determine the current state of law and to propose how current rules are to be applied, in line with traditional legal method. This presupposes a conceptual analysis and an examination of the debate on legal policy in this area.

The relevant provisions of EC law and the European Convention of Human Rights and Fundamental Freedoms (hereinafter abbreviated ECHR) are examined. In contrast to conventional legal analysis dealing with national law, the present task cannot to any large extent rely on documents from the various parts of a regular legislative process. Consequently there is less in the way of sources describing the intentions of legislators than in a case of national law.

The point of departure for this research is the Gibraltar-case. The material I acquired during my visit at the ECJ in Luxemburg on 5 July 2005, the day the hearing was held in the case C-145/04, *Espagne/Royame-Uni*, has been of fundamental importance for the understanding of the issues debated during the hearing. The case-law of the ECJ and of the ECtHR relevant to the subject matter of the thesis has been examined.

In sum, the present study deals with an area in which legal regulation is still very much in the making. Consequently an analysis of the arguments advanced for various positions are at the core of this thesis.

1.4 Outline

The thesis is divided into four main parts. The first deals with citizenship in general and the European citizenship in particular. It gives an introduction to the concept of citizenship and a brief historical background. The focus of the chapter is on who is considered to be a citizen of a Member State for the purposes of the European Union.

The second chapter deals with elections to the European Parliament. The focus is on franchise, but also the organisation and significance of the elections to the European Parliament are examined.

In chapter four, the position of the European Convention on Human Rights and Fundamental Freedoms (hereinafter the ECHR) on electoral rights is analysed. The core of this analysis is Article 3 of Protocol 1. The case-law of the European Court of Human Rights regarding this article is of importance in order to understand the scope of, and the importance given to, franchise in the system of the Convention. The European Council's standpoint on electoral rights for foreigners is also highlighted. The relationship between the ECHR and EC law is described.

The main part of the thesis is chapter five which deals with the particular case of Gibraltar. In the beginning, some historical information is given in order to explain the politically sensitive status of Gibraltar. Then the *Matthews*-ruling of the European Court of Human Rights is presented, as well as developments after the judgement, such as the United Kingdom legislation enacted to comply with it, and the Spanish reaction to the British legislation which eventually lead to the Gibraltar case currently pending before the ECJ.

The last section contains an analysis of what has been presented in the thesis, aiming to answer the question: Can a non-citizen of the European Union be granted the right to vote in European Parliamentary elections?

1.5 Delimitations

Researchers have a choice between an extensive or intensive research strategy. The former involves a general survey of relevant cases in order to create an overview of the research area. The latter pertains to studies which probe deeper into the details of individual cases. The present thesis follows the latter strategy. It is my belief that by examining the details of a critical

case I am more likely to arrive at a correct assessment of the arguments advanced for the various legal positions concerning EU citizenship and rights to political participation. Moreover, there are recent studies offering extensive surveys in this area.³

1 _____

³ Lokrantz Bernitz H, *Medborgarskapet i Sverige och Europa: Räckvidd och rättigheter.*

2 European Citizenship

2.1 Citizenship

Being a citizen equals being a member of a group. This is the primary meaning of the concept. In a more specific sense, being a citizen means being a member of a specific kind of group, the political community. For a long time, citizenship was considered to involve only a political membership. It was not before the time of the French revolution that the notion was expanded to embrace the position that gives access to citizen rights and duties. However, these two meanings of citizenship are closely connected to each other. “To possess particular rights and duties by virtue of being a citizen and to be a citizen by virtue of being a member of a particular political community are two sides of one and the same coin whose message is: citizenship is an exclusive status, the status of the ‘we’ which delimits ‘the others’.”⁴

The Romans developed the conception of citizenship as a legal status, but it has its roots in Greek philosophy and customs. The Greeks did not make a neat distinction between morality and legality or between citizenship and democracy. A citizen was mainly a “political creature”. A “political creature” was considered a moral being as well as a legal person. Citizenship was a hereditary privilege and was from the very beginning connected to exclusion, because not every person could be a citizen. This exclusion could consist in expulsion from the geopolitical territory or in a subordinated status of non-citizen, which was the case for slaves, women and children. A very extensive and inclusive citizenship has less to offer the citizen. Therefore, citizenship has to be restricted. The Greek conception of citizenship had nothing to do with equality. Citizenship was a privilege. No account of the concept of citizenship can omit to mention that it was originally constructed with the purpose to exclude and subordinate people.⁵

The Roman citizenship was established as a strict legal status that defined the Roman political idea of *res publica*. The conception of citizenship as a legal category came from the separation between the state and the society. The rights and duties of the individual were codified. Politics was no longer something that took place between citizens, face to face. More and more, citizenship became a question of equality in the public sphere. The connection between citizenship and democracy was broken. *Ius civile* in the strictest sense of the concept was the law of the citizens (*cives*) of Rome. Possession of the Roman *civitas*, which stands for the position and rights of a citizen, was one of the conditions for full capacity for private and public law purposes. Only a free man could be *civis* since the *status civitatis*

1 _____

⁴ Preuss U K, Citizenship and Identity: Aspects of a Political Theory of Citizenship p. 107.

⁵ Delanty G, Medborgarskap i globaliseringens tid p. 32.

presupposed the *status libertatis*. A Roman citizen who was forced into slavery lost his Roman citizenship. One could be born or become a Roman citizen. Opposed to the Roman *cives*, there were the *peregrini*, free persons that were not Roman citizens. To everything that took place strictly between *peregrini*, their own laws were applied. For relationships between a Roman citizen and a free person without Roman citizenship, *ius gentium* was applied. *Ius gentium* was a legal system created to fill the needs arising from the commercial relations between Romans and foreigners. It was based upon the fiction that certain legal institutions were common to all the peoples of the world and could therefore be extended also to non-citizens. The *ius gentium* was based on Roman law, and was ruled by the principle of *bona fides*, unlike the stricter *ius civile*.⁶ *Bona fides*, good faith, “is a concept primarily based on the normal way people act.”⁷

The words “citizen” and “citizenship” originate from the Latin *civis*, which mean citizens of a state. European languages seem to connect citizenship to membership in the “ancient *polis*”, like the English “citizenship”, the French “*citoyenneté*” and the Italian “*cittadinanza*” or in the medieval town, as in the German “*Bürgerschaft*” and the Swedish “*medborgarskap*”. However, not every person who resided in an ancient *polis* or a medieval town acquired the status of a citizen. “Citizenship is a privileged membership which is not determined — at least not exclusively — by the territorial principle. It can preliminarily be defined as a specific relationship between individual and a polity.”⁸

Modern citizenship is a slippery concept. It is a flexible notion and its meaning will vary in different situations. As a main rule, one could say that “the concept of citizenship defines an individual’s legal status within a nation state.”⁹ The concept of citizenship will, however, not be the same in relation to a democratic western style society, as it would be concerning a totalitarian state. The notion of citizenship has always reflected the character of the state construction at hand. Citizenship is, according to Hedvig Lokrantz Bernitz, above all a way for the state to define itself and the persons that constitute the foundation for the society. One could therefore claim that there are as many notions of citizenship as there are states in the world.¹⁰

For Marshall, citizenship is a status that involves access to various rights and powers. He proposes dividing citizenship into three parts: civil, political and social. The civil aspects of citizenship involve “the rights necessary for individual freedom — liberty of the person, freedom of speech, thought and faith, the right to own property and to conclude valid contract, and the right to justice. The last is of a different order from the others, because it is the

1 _____

⁶ Marrone M, Istituzioni di diritto Romano p. 217.

⁷ Prichard A.M, Leage’s Roman Private Law p. 14.

⁸ Tuori K, The Many Senses of European Citizenship p. 59.

⁹ Preuss U K p. 107.

¹⁰ Lokrantz Bernitz H p. 44.

right to defend and assert all one's rights on terms of equality with others and by due process of law.”¹¹ Political rights consist in access to the decision-making process through participation in the choice of parliament by universal manhood suffrage. Social rights are for example welfare, security and education.¹²

According to Kaarlo Tuori, citizenship does include a legal aspect but it is not a “purely” legal concept. Citizenship involves other cultural and sociological aspects as well.¹³ As a legal status, modern citizenship consists in a collection of rights and duties. The emphasis is on the side of rights; citizenship is a qualified legal status in relation to the polity. Not all the rights that individuals enjoy in relation to the polity are relevant to citizenship. There are specific citizenship rights. This differentiation can be confirmed a glance at human rights documents. Human or fundamental rights emerged with modern law. They are important for the legitimacy basis of modern law and state. Most rights included in human rights instruments like the European Convention on Human Rights and the United Nations (UN) Covenant on Civil and Political Rights are guaranteed to everyone. These are human rights in the strict sense of the term. But there are exceptions. Article 16 of the European Convention establishes that the provisions on the rights to freedoms of expression, assembly and association or the prohibition of discrimination do not prevent the Parties to the Convention from limiting the political activities of non-citizens. Art 25 of the UN Covenant grants only citizens the right to “take part in the conduct of public affairs, directly or to freely chosen representatives”; “to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors”; and “to have access, on general terms of equality, to public service in his country”.

Today, being a citizen means to have certain rights and duties from which others, non-citizens, are excluded. “Viewed from this perspective, to be a citizen means to possess the qualifications which are necessary for the eligibility and the enjoyment of certain rights which are not bestowed on the individuals merely by virtue of being a member of humankind. Citizenship serves as a key of the door to valuable rights and burdensome, most noble, duties. Evidently the distribution of rights among members of humankind is extremely unequal, and it is no less obvious that citizenship has a major impact on the distributional pattern./.../This raises the question of whether one can justify the difference citizenship makes.”¹⁴

Citizenship rights are rights that allow for the participation in the opinion and will formation of the polity. “This is also in harmony with the ancient and medieval roots of the concept: as a citizen one was allowed — and

1

¹¹ Marshall T. H Citizenship and Social Class, p. 10.

¹² Marshall T. H Class, Citizenship and Social Development, p. ix.

¹³ Tuori K p. 59.

¹⁴ Preuss U K p. 107.

supposed — to participate in decisions on the common life in the ancient polis or the medieval town. From its very origins, citizenship has been an exclusive notion: not all of those who reside within the territory of the polity are assigned the status of a citizen. In the past especially, political participation has been seen to require qualifications which not all human beings possess, qualifications which have varied according to time and polity; they have been attached, for example, to socio-economic position, gender or age.”¹⁵ Today, the principle of democracy has increased the inclusiveness of citizenship. At least one qualification is still required. The individual has to be of a certain age to possess the right to vote and to be elected.

The modern notion of citizenship is linked to the evolution of citizen rights and freedoms. Through the new ideas of citizenship, the relationship between State and individual was thoroughly changed. Instead of residence, other ways of acquiring and losing citizenship were created. Two principles emerged: *jus soli* and *jus sanguinis*. These principles are still universally applied. According to the *jus soli* principle, or the territorial principle, citizenship will follow from the place an individual is born; he or she will therefore acquire citizenship of the country in which he or she is born. The decisive factor according to the *jus sanguinis* principle is the citizenship of the parents (originally the father), regardless of where the individual is born.¹⁶ How an individual can acquire the attractive status of citizenship is an interesting issue. Is there a right to citizenship? And if such a right exists, is it a human right? Does citizenship presuppose the community, or does it create it?¹⁷ If citizenship presupposes the community, those who do not belong to it cannot, legitimately, claim to be granted citizenship. On the other hand, if we presume that citizenship creates the political community, acquiring citizenship should be much easier. “The decision about an individual’s admission to citizenship would be taken according to criteria of justice, i.e., it would be based on the applicant’s quality as a holder of universally valid human rights, not on his or her ascriptive attributes like descent, ethnicity and so on.”¹⁸

A distinction has to be made between citizenship and nationality. In the early days of the modern constitutional state there was a huge discrepancy between the two concepts. Nationality meant being subject to the government of a particular state and the term citizen referred to the social status within the polity. “While nationality conveyed a position of passive submission, citizenship included the active status of participating in the shaping of the polity.”¹⁹ Today this division has almost completely lost its practical significance, but it is of considerable conceptual relevance. Not all European languages recognise this difference. In Finnish, there is only one

1

¹⁵ Tuori K p. 61.

¹⁶ Lokrantz Bernitz H p. 71.

¹⁷ Preuss U K p. 108.

¹⁸ Preuss U K p. 108.

¹⁹ Preuss U K p. 109.

term, *kansalaisuus*, for both of these concepts. Both citizenship and nationality are concepts that deal with the relationship between a state and an individual. The word nationality originates from the Latin *natio*, which means birth, family, people. Originally, the concept of nationality indicated only the origins of a person and information about where the person came from. The concept was developed to stand for also a connection between an individual and a society. The notion still connotes to the origins and geographical belonging of a person. If two individuals have the same nationality, they have a common identity of some kind. Nationality is normally acquired at birth.²⁰ Nationality denotes the connection between a person and a state belongs, as a legal concept, mainly to international law, while the concept of citizenship has its main domicile in constitutional law.

2.2 EU Citizenship

Bringing the European peoples closer to each other is one of the pillars of the European co-operation. The rhetoric of a “People’s Europe” has been in circulation for a long time, and the introduction of a Union citizenship had been discussed in this context since the 1970ies.²¹

On 4 May 1990 the Spanish Prime Minister, Felipe González, introduced his idea of European citizenship. The Spanish document, “Towards European Citizenship”, urged a major qualitative step towards European citizenship, since, up till then, nationals of other Member States had been little more than privileged foreigners.²²

The Member States signed the Treaty on the European Union in Maastricht the 7 February 1992. Amongst other innovations, it created a European citizenship. Article 8 (1) declared:

“Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union.”

This represented the first formal constitutionalisation of European citizenship. The provision set up a contrast between an individual’s relationship with the Union and with her Member State. The individual was a citizen of Europe, but her link to her State was couched in terms of national attachment. It can be noted that this contrast is not to be found in the Italian version of the Treaty, which does not speak of nationality at all.²³ It uses only *cittadinanza*. The word *nazionalità* could not be used because of its obvious ethnic connotation.

1 _____

²⁰ Lokrantz Bernitz H, *Medborgarskapet i Sverige och Europa*, p. 37.

²¹ Lokrantz Bernitz H, p. 94.

²² D’Oliviera H U J, *Union Citizenship: Pie in the sky?*, p. 59

²³ Barber N W, *Citizenship, Nationalism and the European Union*, p. 201.

The EU is not granting citizenship independently. Union citizenship has a dependent status; it is left to the discretion of the Member States to decide upon nationality.

According to Epaminondas A. Marias, European Citizenship occurred as an inevitable consequence of the completion of the internal market in 1992. The core of Union citizenship is the right to free movement. The free circulation of the factors of production was necessary for the effective functioning of the Common Market.²⁴ The Treaty establishing the European Economic Community provided for certain economic rights, such as the free movement of persons, goods and services, and the right of establishment. In addition to these economic rights, social rights were granted, for example the right to equal pay for men and women. The Member States of the Community were of the opinion that the EEC Treaty did not differ from a standard international treaty and that the States were the sole subjects of law. As a consequence, nationals of Member States could not claim subjective rights protected by the courts. The Court of Justice did not share the Member States point of view. “When giving its famous judgement in the *Van Gend en Loos* case, the Court of Justice of the European Communities held that the objective of the EEC Treaty was to establish a Common Market, the functioning of which was of direct concern to interested parties in the Community.”²⁵ The EEC Treaty was more than an agreement that had only created mutual obligations between the contracting States. The Court motivated this view by referring to the Preamble of the Treaty, which mentioned not only governments but peoples as well. The Community, stated the Court, constituted a new legal order of international law the subjects of which are not only Member States but also their nationals. The *Van Gend en Loos* decision²⁶ paved the way for the creation of a genuine European civil society.

The EU citizenship lies on a supra-national level and is part of the EC Treaty. This is part of the ambition of creating a “People’s Europe”. Article 1 EU states that the Treaty “marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.” It is clear form the wording of Article 2 EU that one of the goals of the Union is to strengthen the protection of the rights and interests of Member State nationals through the introduction of a Citizenship of the Union.

The introduction of citizenship of the Union was at the time considered to be of little value to the Community law rights already granted to nationals of the Member States by the last treaty and secondary EC legislation. “The single exception might have been Denmark where political fears were aroused that this newly created citizenship could partly replace national

¹ _____

²⁴ Marias E A, From Market Citizen to Union Citizen, p. 1.

²⁵ Marias E A, p. 2.

²⁶ Case 26/62 van Gend en Loos (NV Algemeene Transporten Expeditie Onderneming) v. Nederlandse Administratie der Belastingen [1963] ECR 1.

citizenship and in doing so entail an unacceptable intrusion into the hard core of national sovereignty.”²⁷ Introduction of citizenship was one of the reasons for the negative vote in a Danish referendum on the Maastricht Treaty. These fears were put to rest by an explanatory decision adopted during the European Council of Edinburgh 1992.²⁸ In the Edinburgh decision the Member States once again established that the question whether an individual possesses the nationality of a Member State will be settled solely by reference to the national law of the Member State concerned.

Five years after the introduction of European citizenship, in the Treaty of Amsterdam²⁹, the provision was amended in order to make it clear that Union citizenship was intended to complement, and not to replace, national citizenship. An additional sentence was added to Article 8:

“Citizenship of the Union shall complement and not replace national citizenship.”

The resulting provision, Article 17 (1), is an expression of both European ambition and Member State conservatism.

The citizenship of the Union has two main purposes. Primarily, it aims at protecting the individual through safeguarding his or her interests and strengthening his or her rights, both at Union and Member State level. Article 18 EC grants every citizen of the Union the right to move and reside freely within the Territory of the Member States. Article 19 EC states that every EU citizen residing in a Member State of which he is not a national has a right to vote and to stand as a candidate at municipal elections and in elections to the European Parliament in the State in which he resides. Every citizen of the Union that is present in a third country has the right to diplomatic or consular protection by the authorities of another Member State according to Article 20 EC if the citizen’s own Member State is not represented in the territory. A principle of non-discrimination applies to the right to free movement according to Article 18, the electoral rights granted by Article 19 and the right to diplomatic and consular protection governed by Article 20. Article 21 EC gives the Union citizen rights in relation to the Union itself. The rights granted are the right for every citizen to petition the European Parliament and to apply to the European Ombudsman in questions regarding maladministration in the activities of Community institutions and bodies.³⁰

The second main purpose of citizenship of the Union is to create a more open and “state-like” Union. EU citizens have the right to participate in Union politics through direct elections to the European Parliament. The citizens of the Union have also have a certain possibility of insight in the decision making processes through the right to petition the European

1 _____

²⁷ Timmermans C, Lifting the Veil of Union Citizens’ Rights, p. 195.

²⁸ OJ 1992, C 348.

²⁹ OJ C 340 of 10 November 1997, in force since 1 May 1999.

³⁰ Lokrantz Bernitz H, p. 97.

Parliament and to apply to the Ombudsman, as mentioned above. Article 1 EU establishes that decision should be taken as openly as possible and as closely as possible to the citizens. Increased participation could strengthen the democratic legitimacy of European integration and the individual's sense of belonging to the Union. The aim is to create a true European identity.

Article 8 (1) of the Draft Treaty establishing a constitution for Europe prepared by the European convention chaired by Valéry Giscard d'Estaing provides repeats Article 17 (1). Only the wording is slightly different.

"Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship; it shall not replace it."

Authors disagree about Union citizenship and its significance. EU citizenship has been called a constitutional paradox. The Union has no legal personality, so how can one be citizen of an entity that has no legal personality? "Notwithstanding that the EU Constitution now provides legal personality for the Union, it does not bring any substantive changes to the status of Union citizenship. Therefore, it can be stated that the concept of EU citizenship is very different from the traditional concept of State citizenship."³¹ Besides this, there has been concern "at the symbolism of super-statehood inherent in the notion of EU citizenship. There has been criticism of the paucity of the rights created. Critics have focused on the absence of reciprocal duties which might give rise to a more active or participatory citizenship, the subjection of the right of residence to the limiting conditions laid down in earlier directives, and the discrimination against resident third-country nationals."³² A broader dimension to this critique is that a meaningful idea of Union citizenship is connected with the need for broader institutional and political reform within the EU, something that goes beyond concrete and practical measures such as residence, travel, voting etc.³³

2.3 Who is a citizen of the Union?

According to Article 17 (1) EC every person holding the nationality of a Member State shall be a citizen of the Union. "As opposed to United States' citizenship, European Citizenship is contingent upon having the nationality of a Member State. According to Article XIV of the United States Constitution, all persons born or naturalised in the United States and subject to the jurisdiction thereof are citizens of the United States and of the States wherein they reside. Furthermore no State has the right to make or enforce any law which can abridge the privileges or immunities of citizens of the

¹ _____

³¹ Krüma K, EU citizenship: unresolved issues, p. 5.

³² Craig P, de Búrca G, p. 760.

³³ Craig P, de Búrca G, p. 760.

United States.”³⁴ In the case of the European Union, the situation is different. Nobody can acquire citizenship of the Union without having the nationality of a Member State.

A fundamental principle within the EU is that it lies within the exclusive competence of each Member State to define which individuals are to be considered its citizens. This principle has its origins in international law, especially in Article 1 of the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws. The freedom of action of the states has however never been unlimited. In the *Nottebohm* case, the International Court of Justice stated that third states do not have to recognise determinations of nationality under the municipal law of a state, if there is no genuine connection between the individual and the state of which he or she is a national.³⁵ “This case concerned nationality rather than citizenship, in so far as nationality is linked to external relations (diplomatic protection), while citizenship can be perceived as a bundle of political and other rights under the domestic constitutional and legal system.”³⁶

There are no common rules on how a Union citizen can acquire citizenship of a Member State other than his own. The exclusive competence of the Member States in regulating nationality matters creates differences in who is to be considered a citizen of the Union in different Member States. Political and legal traditions lead to variations in citizenship legislation in the different Member States. These differences can concern rules on how to acquire or lose citizenship and the legal consequences of citizenship. The Member States can, through restrictive legislation, define the group that will be regarded as EU citizens narrowly, just as they, if applying generous legislation, can allow the group that are to be regarded as citizens of the Union to comprise of a much larger group of people. It can be easier to become citizen of a state, and thereby also citizen of the Union, in a Member State that applies *jus soli* than in a Member State that applies *jus sanguinis*.³⁷

The principle that every state has the exclusive competence to determine, under its own law, who its nationals are, was confirmed by the European Court of Justice in the *Micheletti* ruling. However, the Court held that Spain had to accept that Mario Vincente Micheletti, born of an Italian father and an Argentinean national through naturalisation, was to be considered Italian for Community purposes. This was a result of the Italian interpretation of the content of an Italian/Argentinean treaty on dual citizenship. The Italian/Argentinean treaty was a copy of the Spanish/Argentinean treaty on dual citizenship. Spain would have concluded, under similar circumstances, that a child of an originally Spanish parent, who had acquired Argentinean nationality through naturalisation, would not qualify as Spanish national for

1 _____

³⁴ Marias E A, p. 13.

³⁵ *Nottebohm case (second phase)*, I.C.J. Reports 1955, p. 4, at p. 23.

³⁶ Rosas A, p. 141.

³⁷ Lokrantz Bernitz H, p. 165.

Community purposes. The European Court of Justice indicated that Member State autonomy in regulating nationality is not absolute; it pointed out the importance of respecting Community law when regulating and interpreting the nationality law of the State involved. “Whenever a Member State, having due regard to Community law, has granted its nationality to a person, another Member State may not, by imposing an additional condition for its recognition, restrict the effects of the grant of that nationality with a view to the exercise of a fundamental freedom provided for in the Treaty, particularly since the consequence of allowing such a possibility would be that the class of persons to whom the Community rules on freedom of establishment were applied might vary from one Member State to another.”³⁸

No problem of compliance with EU law should occur regarding neither voluntary nor involuntary loss of national citizenship. This is a consequence of the autonomy of the Member States in matters of nationality and citizenship. A prerequisite should be that the loss is allowed under international law. If an individual loses his or her Member State citizenship, without acquiring citizenship of another Member State he or she will also, as a consequence, lose his or her Union citizenship. This is the only way to lose Union citizenship. It is not possible for an individual to lose his or her Union citizenship but remain citizen of the Member State in question.³⁹

Citizenship does not have the same significance on Member State level as it has on Union level. On national level, citizenship implies being entitled to certain national rights, for instance the right to vote in national elections, and being subject to certain national duties, an example being compulsory military service. At EU law level, citizenship determines who is to be included in the EU legal order and thereby enjoy the rights granted by the EC treaty.

An interesting question is if every national citizen of a Member State is also a citizen of the Union. Is it possible for a Member State to define who is a citizen for Community purposes, so that this group of individuals will not be identical with the group that is considered to be citizens for national purposes? The main rule is that a citizen of a Member State is also a citizen of the Union. The rule is easy to apply in countries in which the citizens constitute a clearly defined group and where there are no different kinds of citizenship that are different in their extension. This is the case with Sweden, for example. In countries with more complicated citizenship legislations, like Germany, France and the United Kingdom, where even inhabitants in lost territories, for instance ex-colonies and protectorates can have a certain kind of citizenship status, the main rule is much more difficult to apply.⁴⁰

1 _____

³⁸ See C-369/90 Mario Vincente Micheletti and Others/ Delegación del Goberno en Cantabria [1992] ECR I-4239.

³⁹ Lokrantz Bernitz H, p. 170.

⁴⁰ Lokrantz Bernitz H, p. 171.

Both the term national and the term citizen are used in the English version of Article 8 (1) of the Draft Constitution just as they are in the wording of Article 17 EC Treaty. This raises several questions. Gerard-René de Groot points out that the statement that all nationals of a Member State are European citizens, as expressed in these provisions, is incorrect.⁴¹ “In spite of the clear statement of Article 17 EC and Article 8 Draft Constitution that every national of a Member State is a citizen of the Union, it can be observed that some nationals of Member States do not have this status. This is in particular the case in the United Kingdom.”⁴² According to de Groot, the relationship between the two concepts, nationality and citizenship, is not clear in the English language. “In the United Kingdom, the term “nationality” is used to indicate the formal link between a person and the state. The statute that regulates this status is the British *Nationality Act*. The most privileged status to be acquired under this Act, however, is the status of “British *citizen*”. In Ireland, it is the Irish Nationality and Citizenship Act that regulates who precisely possess Irish citizenship. In the United States, the Immigration and Nationality Act regulates who is an American citizen, but the Act also provides that the inhabitants of American Samoa and Swains Island have the status of American national without citizenship.”⁴³

The Member States have the possibility to make special definition of citizenship for Union purposes. At the occasion of its accession to the European Community in 1972, the United Kingdom issued a special declaration defining who is British for Community purposes.⁴⁴ In this declaration, the United Kingdom excluded categories of its citizens from the enjoyment of rights under EU law.

“As to the United Kingdom of Great Britain and Northern Ireland, the terms “nationals”, “nationals of Member States” or “nationals of Member States and overseas countries and territories” wherever used in the treaty establishing the European Economic Community, the Treaty establishing the European Atomic Energy Community or the Treaty establishing the European Coal and Steel Community or in any of the Community acts deriving from those Treaties, are to be understood to refer to:

persons who are citizens of the United Kingdom and Colonies or British subjects not possessing that citizenship or the citizenship of any other Commonwealth country or territory, who, in either case, have the right of abode in the United Kingdom, and are therefore exempt from United Kingdom immigration control;
persons who are citizens of the United Kingdom and colonies by birth or by registration or naturalisation in Gibraltar, or whose father was so born, registered or naturalised.”

1 _____

⁴¹ De Groot G, Towards a European Nationality Law – Vers un droit européen de nationalité, p. 5.

⁴² De Groot G, p. 11.

⁴³ De Groot G, p. 6.

⁴⁴ See Official Journal (EC) 1972, L 73/196.

This declaration was replaced by a new declaration 1982, because the rules on British nationality had been changed by the British Nationality Act 1981, which came into effect on 1 January 1983⁴⁵:

“As to the United Kingdom of Great Britain and Northern Ireland, the terms “nationals”, “nationals of Member States” or “nationals of Member States and overseas countries and territories” wherever used in the Treaty establishing the European Economic Community, the Treaty establishing the European Atomic Energy Community or the Treaty establishing the European Coal and Steel Community or in any of the Community Acts deriving from those Treaties, are to be understood to refer to:

British citizens;

Persons who are British subjects by virtue of Part IV of the British Nationality Act 1981 and who have the right of abode in the United Kingdom and are therefore exempt from United Kingdom immigration control; British Dependent Territories citizens who (have acquired) their citizenship from a connection with Gibraltar.

The reference in Article 6 of the third Protocol to the Act of Accession of 22 January 1972, concerning the Channel Islands and the Isle of Man, to “any citizen of the United Kingdom and Colonies” is to be understood as referring to “any British citizen.”

These declarations cause the exclusion of some categories of British nationals, in particular most “British Dependent Territories Citizens”, “British Overseas Citizens”, British Subjects without Citizenship” and “British Protected Persons” from European citizenship.⁴⁶ The “British Dependent Territories” were renamed “British Overseas Territories” by Section 1 of the British Overseas Territories Act 2002. The Act received Royal Assent on 26 February 2002. “British Dependent Territories Citizenship” was renamed “British Overseas Territories Citizenship”. From then on, “British Dependent Territories Citizen” in the 1981 British Declaration must be read as “British Overseas Territories Citizen”. The British Overseas Territories Act 2002 produced also another, more important, modification, Section 3 of the Act which provides as follows:

“Any person who, immediately before the commencement of this section, is a British overseas territories citizen shall, on the commencement of this section, become a British citizen.”

21 May 2002 was fixed as day of commencement.⁴⁷ “In respect of the formulation of the 1981 British Declaration, it can be concluded that former British Dependent Territories Citizens by Royal Assent on 26 February 2002, on 21 May 2002 also received European citizenship through having been granted British citizenship. However, there is one exception: British citizenship was not extended to persons who after 26 February 2002 were British Overseas Territories Citizens by virtue of a connection with the Sovereign Base Areas of Akrotiri and Dhekelia.”⁴⁸ These base areas are

1 _____

⁴⁵ See Official Journal 1983, C 23/1.

⁴⁶ De Groot G, p. 12.

⁴⁷ See British Territories Act 2002 (Commencement) Order 2002.

⁴⁸ De Groot G, p. 13.

located on the Island of Cyprus. They are British Overseas Territories but it was not considered appropriate to extend citizenship to these British possessions because of their military nature. These British Overseas Territories Citizens do not possess British citizenship and are therefore not European citizens. British citizenship is conferred to the other British Overseas Citizens in addition to the status they possess. Therefore, the persons in question can renounce to their British citizenship by making a declaration of renunciation. If they choose to take advantage of this possibility, they are exclusively British Overseas citizens without European citizenship. According to de Groot, these legal constructions show that the status of “British Overseas Territories Citizen” has not been abolished and that acquisition of this status does not result in acquisition of British citizenship. Persons who have acquired British Overseas Territories Citizenship after 21 May 2002 can only apply to be registered as British Citizens, and according to the British Overseas Territories Act 2002, “the Secretary of State may if he thinks it fit cause the person to be so registered.”⁴⁹

Because of all these changes concerning British Dependent Territories Citizens, De Groot concludes that The United Kingdom must review the 1982 declaration. “It is not the British Dependent Territories Citizens, but some British Overseas Territories Citizens (and some other categories such as British Overseas Citizens) who are now excluded. Furthermore, it is useful to know whether the United Kingdom will preserve the statement that, for Community purposes, all British citizens are British, including those living in British Overseas Territories.”⁵⁰

The group of persons that is considered citizens for EU law purposes is quite different from the group that is considered citizens for national purposes, when it comes to the United Kingdom. The United Kingdom definition of citizens for Union purposes was discussed with the Union. The United Kingdom government obviously did not feel that it was free to make the definition completely on its own. The declaration has important consequences. There are close to 950 million people in the world that have some kind of British nationality.⁵¹

The European Court of Justice dealt with the exclusion of certain British nationals from European citizenship in the 2001 *Manjit Kaur* case.⁵² Ms Kaur was a British Overseas Citizen of Asian origin who lived in East Africa. She argued that the British declaration deprived her of European citizenship. The European Court of Justice ruled that she was not deprived of her European citizenship, because she had never been a EU citizen, according to the British declaration. “Furthermore, the Court stressed that

1 _____

⁴⁹ S.4A BNA 1981, as amended by the British Overseas Territories Act 2002.

⁵⁰ De Groot G, p. 14.

⁵¹ Lokrantz Bernitz H, p. 173.

⁵² C-192/99, R. v. Secretary of State for the home Department ex p. Kaur [2001] ECR I-1237.

the British declaration was in conformity with the special “Declaration (no 2) on nationality of a Member State”, which is attached to the Maastricht Treaty.”

The declaration reads as follows:

“The Conference declares that, wherever in the Treaty establishing the European Community reference is made to nationals of the Member States, the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned. Member States may declare, for information, who are to be considered their nationals for Community purposes by way of a declaration lodged with the Presidency and may amend any such declaration when necessary.”

The “Declaration (no 2) on nationality of a Member State” is not a part of either the EU or the EC Treaty. It is, however, the kind of declaration that is intended by Article 31.2a of the Vienna Convention on the Law of Treaties, an agreement relating to the treaty which was made by all the parties in connection with the conclusion of the treaty. The declaration should therefore be used when interpreting the treaties. According to Hedvig Lokrantz Bernitz, the declaration does, on this part, rather seem to be of psychological and symbolical value than have a legal function, since it is not necessary to make declarations of this kind in order to establish that states have an exclusive competence in matters of nationality or that questions regarding the citizenship of a state are to be settled in accordance with the State’s own legislation. This would have been the case also in absence of such a declaration. The principle applies to any sovereign state according to international law.⁵³

Apart from the United Kingdom, only Germany has issued a declaration on the definition of nationals for Community purposes. According to the German declaration, every person considered a German by Article 116 German Constitution (*Grundgesetz*) is to be considered German for Community purposes. This augments the number of German Union citizens. For instance, Article 116 was interpreted as meaning that there was only one citizenship for Eastern and Western Germany. Persons from Eastern Germany that had been able to cross the border therefore had access to EU rights, like the right of free movement, even before the union of the two countries in 1990.⁵⁴ Also the German declaration must be considered binding for Member States and the Union. The other Member States accepted the German declaration and therefore must be considered to have accepted the declaration in the meaning of the Vienna Convention on the Law of Treaties. Furthermore, it was necessary for the other Member States to accept the incorporation of the German Democratic Republic in the Union.

There are some other interesting borderline categories of European citizenship. “In spite of their Danish nationality, the Danish inhabitants of

1 _____

⁵³ Lokrantz Bernitz H, p. 166.

⁵⁴ Lokrantz Bernitz H, p. 173.

the Faroe Islands are not European citizens. However, with regard to the Danish Greenlanders, the Netherlands Antilleans, the Arubans and the French inhabitants of French overseas territories (*territoires outremer*), it must be concluded — after some hesitation — that they do possess European citizenship, although they reside within territories of the Member States, which are not situated within the territory of the European Union.”⁵⁵ The position of Spanish nationals, who have Spanish nationality and simultaneously the nationality of a Latin-American country because of Treaties on dual nationality, as well as the position of dual Italian-Argentinean citizens, due to the Italian-Argentinean treaty on dual nationality, are also interesting, although it is not useful for the purpose of this study to further deal with these borderline cases.

The fact that the Member States decide who is to be considered a citizen of the Union can be considered a bit strange from a Community law point of view. Many notions used in the Treaties have been given a special Community law definition by the ECJ. This is not the case with citizenship. The Member States are very reluctant to give up competence regarding matters of citizenship and nationality. The question of a common national citizenship conception is far too connected to the sovereignty of the Member States.⁵⁶

2.4 Principles on EU citizenship established by the ECJ

Only those entitled to benefit from economic migration rights under the EC Treaty became so entitled under the Union Treaty. The free movement rights were at first granted to individuals in their economic capacity, as part of the four fundamental economic freedoms. In the *Baumbast* case⁵⁷ the Court went further and stated that each citizen enjoys an unconditional right of free movement and residence. The actual exercise of this right is, however, subject to limitations and conditions set out in secondary legislation. The main rule is that individuals cannot become a financial burden on their State of residence. But national welfare systems are not immune from the application of Community law. The *Sala* case⁵⁸ was the Court’s first incursion into national welfare sovereignty. Mrs Sala was a Spanish national, lawfully residing in Germany. Her application for a child-raising allowance under German social legislation was rejected on the grounds that she, being a non-national, should have a residence entitlement or a residence permit which she was not able to produce. The ECJ stated that “A national of a Member State lawfully residing in the territory of

1 _____

⁵⁵ De Groot G, p. 16.

⁵⁶ Lokrantz Bernitz H, p. 178.

⁵⁷ C-413/99 Baumbast and R v. Secretary of State for the Home department *t*[2002] ECR I-7091.

⁵⁸ C-85/96 Maria Martínez Sala v Freistaat Bayern [1998] ECR I-2691.

another Member State comes within the scope of the *ratione personae* of the provisions of the Treaty on European citizenship and can rely on the rights laid down by the Treaty which Article 8 (2) attaches to the status of citizen of the Union, including the right, laid down in Article 6, not to suffer discrimination on grounds of nationality within the scope of application *rationae materiae* of the Treaty.” In *Grezylck*⁵⁹, the Court continued on the same line of reasoning. Mr Grzelczyk was a French national studying in Belgium. He had a right of residence provided for by Directive 93/96. Directives 90/364, 90/365 and 93/96 deal with conditions for non-economically active citizens. Mr Grzelczyk was working to sustain himself during the first years of his education, but the last year he wanted to study full-time and applied for a Belgian non-contributory social benefit, called minimex, intended to ensure a minimum income. He was refused the minimex on the grounds that he was neither a Belgian nor a worker. The ECJ qualified as situations falling within the scope *ratione materiae* of EC law “those involving the exercise of the fundamental freedoms guaranteed by the Treaty and those involving the exercise of the right to move and reside” under Article 18 EC. “The Court observed that its former case law according to which subsistence allowances to students fell outside the scope of the Treaty, preceded the Treaty on European Union which had introduced citizenship of the Union, and moreover added to Title VIII of Part Three of the EC Treaty a new chapter 3 devoted to educational and vocational training. Obviously, the Court could not limit its interpretation to that and simply apply, what I would call, the rule in Bickel and Franz, that is to conclude the issue to fall within the scope of the Treaty because of the exercise of the right of free movement by M. Grzelczyk as a Union citizen being “involved”, and thus to be subject to the principle of non-discrimination under Article 12 EC. Indeed, the right of free movement and residence of students has been specifically regulated by Directive 93/96 on the right of residence for students.”⁶⁰ The Court interpreted Directive 93/96 in view of the circumstances of the case and declared that the principle of non-discrimination should be fully applied in the case at hand.

The above-mentioned cases could be interpreted as indications of a slow movement towards greater financial solidarity. That the EU is still not a true social union is illustrated by the *Collins* case⁶¹. Mr Collins was an American national who had resided in the United Kingdom for short time periods while studying and had managed to acquire Irish nationality. After a couple of years away, he returned to the United Kingdom and wanted to be treated as a job seeker and be granted allowance on the basis of his Irish nationality. The Court stated that it was no longer possible to exclude from the scope of Article 48(2) of the Treaty—which expresses the fundamental principle to equal treatment, guaranteed by Article 6 of the Treaty—an

1

⁵⁹ C-184/99 Rudy Grzelczyk v. Centre Public d’Aide Aociale d’Ottigniens-Louvain-la-Neuve (CPAS) [2001] ECR I-6193.

⁶⁰ Timmermans C p 199

⁶¹ C-138/02 Brian Francis Collins v. Secretary of State for Work and Pensions [2004] ECR I – 0000.

allowance granted to job-seekers in a Member State, but that the right to equal treatment laid down in Article 48(2), read in conjunction with Articles 6 and 8 of the Treaty, does not preclude national legislation which makes entitlement to such a benefit conditional on a residence requirement if that requirement may be justified on the basis of objective considerations that are appropriate to the legitimate aim of the national provisions.

It is difficult to draw a conclusion from *Sala*, *Grzelyck* and *Collins*. Is *Collins* to be considered as the main rule and *Sala* and *Grzelyck* as exceptions? Clarity is lacking as to when an individual can or cannot rely on rights under Community law.

The Court, when dealing with cases regarding citizenship, seems to be driven by a vision of its own. The Treaty gives little guidance. The *Avello* judgement⁶² came as a surprise to most international private law layers. Mr Carlos Garcia Avello, a Spanish national, and his Belgian wife, Isabelle Weber, wanted to give their two children two surnames according to Spanish tradition, the mother's and the father's. The Belgian authorities refused to register these names for the children because it was not an option under Belgian law. The children had dual nationality, Spanish and Belgian. The applicants argued that their rights under Articles 12 and 17 EC Treaty had been violated. The Court agreed that Article 12 and 17 EC must be seen as precluding, in the circumstances at hand, the administrative authority of a Member State from refusing to grant an application for a change of surname made on behalf of minor children resident in that state and having dual nationality of that State and another Member State, in the case where the purpose of that application is to enable those children to bear the surname to which they are entitled according to the law and tradition of the second Member State.

Who is held responsible towards citizens: the States or the EU? The Member States decide on who are their citizens, but the EU and especially the Court of Justice show ambitions to create a meaningful supra-national citizenship.⁶³ In the *Airola* case the Court declined to recognise Italian nationality of an official working for the Commission and considered her as a Belgian citizen because Italian legislation was purporting “unwarranted difference of treatment as between male and female officials”.⁶⁴ In the above-mentioned case of *Micheletti*, the Court disregarded national competences when it ruled on recognition on nationality in cases of double citizenship.

According to Kristine Krüma, the case law of the ECJ shows a “readiness to deal with issues of citizenship seriously or desperate attempts to make the

1 _____

⁶² C-148/02 Carlos Garcia Avello v. Etat Belge [2003] ECR I-11613.

⁶³ Krüma K, p. 7.

⁶⁴ Case 21/74 Jeanne Airola v. Commission [1972] ECR 221.

relevant Treaty articles more substantive despite the resistance coming from the Member States.”⁶⁵

¹ _____
⁶⁵ Krüma Kristine p, 17.

3 Elections to the European Parliament

3.1 The right to vote in European Parliamentary elections

The European Parliament is the parliamentary body of the European Union. Its origins go back to the 1950s and the founding treaties. Together with the Council of Ministers, it comprises the legislative branch of the institutions of the Union. The European Parliament is meant to express the democratic will of the citizens of the Union and represent their interests in relation to other institutions of the Union.

The European Parliament is the only supranational parliamentary assembly whose members are democratically elected by direct universal suffrage. The road towards direct elections for a supranational parliamentary body in Europe has been long.

“The first European Parliamentary assembly to meet (on 10 August 1949) was that of the Council of Europe, an intergovernmental organisation that pre-dated the EEC by almost a decade.”⁶⁶ In the Council of Europe, the British were contrary to any form of autonomy for the parliamentary organ. The French and the Belgians, on the other hand, aimed for some supranationality. The main working method for the Council of Europe was, and is, intergovernmental. “The Consultative Assembly was perceived primarily as an additional debating chamber.”⁶⁷ Still today, the representatives of the Parliamentary Assembly of the Council of Europe are elected within the national or federal parliaments of the Member States.

The European Coal and Steel Community was created in 1951. The Common Assembly of that Community met for the first time in 1952. “The Common Assembly was the first international assembly in Europe with legally guaranteed powers. In retrospect, the Common Assembly seems a tame affair. It had no legislative powers.”⁶⁸ However, it was in this assembly that many of the modern-day characteristics of the European Parliament emerged. Of importance was also the Treaty Establishing a European Defence Community, signed in Paris 1952. “It was a revolutionary document, going far beyond simple military cooperation.”⁶⁹ The Treaty was vetoed by the French *Assemblée* in 1954, but a conceptual step of significance had been taken. “The treaty’s Article 38, which had

1 _____

⁶⁶ Westlake M, A Modern Guide to the European Parliament, p. 5.

⁶⁷ Westlake M, p. 6.

⁶⁸ Westlake M, p. 11.

⁶⁹ Westlake M, p. 12.

been inserted at the insistence of Italy's Prime Minister, Alcide de Gasperi, provided for a directly elected Common Assembly and for this Assembly to study ways of creating a federal organisation with a clear separation of powers and a bicameral parliament.”⁷⁰

In 1957, the two treaties establishing a European Economic Community and a European Atomic Energy Community (“Euratom”) were signed. The treaties provided for direct elections to the Parliamentary Assembly. “The Parliament was to draft proposals for direct universal suffrage under a uniform electoral system and submit them to the Council of Ministers. In October 1958 it set up a working party to draft such proposals. The draft Convention ultimately adopted by the Parliament on 10 May 1960 was the result of intense and protracted debate and extensive consultation in national capitals. Unfortunately it was forwarded to the Council (on 20 June 1960) just for days after the French Prime Minister, Michel Debré, had told the French national assembly that ‘the essential thing in our view, as General de Gaulle has said...is the political association of states...through governmental cooperation...I do not see what direct elections by universal suffrage of a political assembly dealing with technical bodies or with higher civil servants can accomplish.’”⁷¹ The French opposed any further federalist progress, which led to the United Kingdom announcing that it was “rethinking” its position on the EEC. In the political climate around 1965, the year of the “empty chair” crisis (when France refused to take its seat in the Council for six months), the idea of direct elections to the European Parliamentary Assembly appeared to be dead. But “de Gaulle’s 1969 departure encouraged the pro-federalists to speculate again.”⁷² In 1975 the Member States promised that they would hold direct European elections after 1978. The Parliament picked up the pace of its deliberations on a fresh Convention. New proposals were adopted on 14 January 1975. “The 1 and 2 December 1975 Rome European Council (as summits were known) examined a report on Parliament’s Convention and announced that elections would be held “on a single date in May or June 1978”.⁷³ European elections were finally held on 7-10 June 1979.

Under ex Article 8b(2) (Now Article 19) of the Maastricht Treaty “every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements to be adopted before 31 December 1993 by the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State”.

1 _____

⁷⁰ Westlake M, p. 12.

⁷¹ Westlake M, p. 17.

⁷² Westlake M, p. 22.

⁷³ Westlake M, p. 23.

For the first time, the concept of European citizenship had become a practical reality. The citizens of the Union had acquired a fundamental right, namely the right to vote and to stand as a candidate wherever they reside in the Union. Article 8b(2) was of major significance in terms of the principles involved — extending voting rights to non-nationals, which for most Member States was an important change — as well as in practice, since 3 million citizens could exercise their new rights for the first time in the European elections in June 1994. “This Article is clearly one of the most controversial provisions of the TEU, since political rights have traditionally been seen as rights belonging exclusively to the citizens of a given state.”⁷⁴ The Article meant an extension of the Community principle of equal treatment into the field of electoral rights.

The relevant implementing arrangements were adopted by the Council on 6 December 1993 in a directive laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals (Directive No. 93/109/EC). In accordance with the principles of subsidiarity and proportionality, the Council chose to adopt a directive and confined the contents to what is strictly necessary to achieve the set objective.⁷⁵ The provisions of the directive do not affect the Member States' legislation concerning the right to vote and stand as a candidate for their nationals who are resident outside the electoral territory. The primary focus of the directive is repealing any nationality requirements still in force in the various Member States and harmonising the electoral rules.

All the EU Member States have amended their legislation to comply with the Community directive. The Council directive establishes arrangements for the exercise of the right to vote. For instance, EU citizens must have their names entered on the electoral roll in their country of residence. To accomplish this, a citizen of the Union has to produce the same documents as a national voter would have to produce in order to have his or her name entered on the electoral roll, but also a formal declaration stating nationality, address and intention to exercise the right to vote in the Member State of residence only. A Union citizen who has been deprived of his right to vote in his home Member State is precluded from exercising that right in his Member State of residence. An EU citizen who wants to stand as a candidate in a Member State in which he resides but of which he is not a citizen, shall produce the same supporting documents as a national candidate has to produce. He is also required to produce a formal declaration stating that he is not standing as a candidate for election in any other Member State. The directive establishes that Member States shall exchange information in order to ensure that no EU citizen votes more than once or stands as a candidate in more than one Member State. The directive also allows derogations motivated by specific problems in the Member States. However, it stipulates that such derogations do not apply to the

1 _____

⁷⁴ Lundberg E, p. 113.

⁷⁵ Legislation governing elections to the European Parliament.

<<http://www.europarl.eu.int/workingpapers/poli/w13/note1>> (accessed January 17, 2006).

principle of the right to vote and to stand as a candidate in the country of residence but only to the arrangements for doing so; the relevant provisions are derogations and not transitional arrangements and will be maintained as long as the specific problems persist. As a consequence, in its directive the Council of the European Union has granted Luxembourg a series of derogations because of the exceptionally high proportion of Community nationals resident in Luxembourg (over 20%). These derogations entail a minimum residence requirement (five years) for the right to vote, a similar restriction (ten year residence requirement) to stand as a candidate and a clause restricting the proportion of non-Luxembourg nationals on any list of candidates (they may not constitute a majority on any list).

3.2 The organisation of European elections

Article 189 EC stipulates that the European Parliament shall consist of representatives of the peoples of the States brought together in the Community, and that it shall exercise the powers conferred upon it by the Treaty. The representatives in the European Parliament shall be elected by direct universal suffrage and for a term of five years, as provided by Article 190 (3). Article 191 provides that political parties at the European level contribute to forming a European awareness and expressing the political will of the EU citizens. “This provision was originally placed among the citizenship provisions, but was moved to the section concerning the European Parliament in the chapter on the institutions of the Community in the final version of the text.”⁷⁶

The European elections are governed by national legislation and the Act of 20 September 1976 concerning the election of the representatives of the European Parliament by direct universal suffrage,⁷⁷ and by the Edinburgh European Council decisions on the number of representatives of the European Parliament, the provisions of the Treaty on European Union which came into force on 1 November 1993 concerning citizenship of the Union and the Council directive of 6 December 1993.

The Act of 20 September 1976 lays down the details for, among other things, when elections shall be held, when the counting of votes may begin and when the Parliament shall meet. It establishes that the European Parliament shall draw up a proposal for a uniform electoral procedure to serve as a basis for deliberations by the Council with a view to the adoption of this proposal by the Member States. Membership of the European Parliament is compatible with membership of a national parliament. Article 15 of the 1976 Act provides that “Annexes I to III shall form an integral part of this Act”. Annex II to the 1976 Act states that “The United Kingdom will apply the provisions of this Act only in respect of the United Kingdom”. The 1976 Act does not address the issue of franchise. Thus national

¹ _____

⁷⁶ Lundberg E, Political freedoms in the European Union, p. 132.

⁷⁷ OJ L 278, 08.10.1976

provisions are applicable regarding the category of persons entitled to vote. The franchise in European Parliamentary elections is covered by general principles relating to elections. That means that elections have to be direct, universal, free and secret. Neither does the 1976 Act include provisions on establishment on electoral constituencies. The Member States lay down such provisions autonomously.

3.3 The significance of European elections

The powers of the European Community are divided amongst the institutions set up by the EC Treaty, including the European Parliament, the Council, the Commission and the Court of Justice. The European Parliament originates from the Common Assembly, one of the four institutions created by the Treaty establishing the European Coal and Steel Community (ECSC) in 1951.⁷⁸ With time, the powers of the Parliament have increased significantly, and there has been an increasing establishment of the European Parliament as a fully functioning legislature. The influence of the European Parliament grew with the two budgetary treaties of 1970 and 1975. Through the first budgetary Treaty of 1970 and the Own-Resources Decision of the same date, the Community achieved financial independence and the Parliament strengthened its role as a decision-maker. “By 1975, the date by which the Community budget was required to be financed entirely from its own resources, a second budgetary treaty had been agreed, with further increases in the Parliament’s budgetary role.”⁷⁹ The transition to the election of Parliament by direct universal suffrage from 1979 onwards, dealt with above, was of great importance. In 1980, the *Isoglucose*⁸⁰ ruling of the Court of Justice struck down a piece of EC legislation because the Council had adopted it before hearing the opinion of the Parliament. The Single European Act of 1986 made a number of significant institutional and substantive reforms. Among other things, a legislative *co-operation* procedure was introduced, with an enhanced consultative role for the European Parliament. The *co-operation* procedure initially applied “to only ten Treaty articles, but they covered most of the legislation necessary for the competition of the internal market as well as individual research programmes and the rules for the structural funds.”⁸¹ The Maastricht Treaty granted the Parliament legislative *co-decision* powers. This procedure was based on the co-operation procedure but with two important additional provisions, one being the inclusion of a formal conciliation committee with the task of negotiating a compromise between the Council and the Parliament and the second the option for the Parliament to reject the decision of the Council following conciliation, causing the legislation to

¹ _____

⁷⁸ Choate A, The European Parliament and the Democratic Deficit, p. 14.

⁷⁹ Craig P, De Búrca G, p. 18.

⁸⁰ Cases 138/79, Roquette Frères v. Council [1980] ECR 3333 and 139/79 Maizena v. Council [1980] ECR 3393.

⁸¹ Corbett R, Jacobs F and Shackleton M, p. 4.

fall⁸². Among other things, the Parliament “was also given the right to request the Commission to initiate legislation and the power to block the appointment of the new Commission”⁸³. The role of the European Parliament was further strengthened and extended under the Amsterdam Treaty and the Nice Treaty. The Parliament has acquired a substantial decision making role. Therefore, it is alarming that the interest for European Parliament elections has been so low. The 2004 elections continued an already existing downward trend.⁸⁴ The turnout was particularly low in the new Member States.

3.4 A uniform electoral procedure for the European elections

Considering the Parliaments increased influence and relevance, it may be considered not entirely suitable that all the Member States have different electoral systems for the European Parliament elections. “Divergent national regulations do not give equal weight to European citizens’ votes, and the overall balance within the European Parliament is distorted.”⁸⁵ A uniform procedure for the elections to the European Parliament could also include rules defining the category of persons entitled to vote. Article 190 of the Consolidated Treaty calls on the Parliament to "draw up proposals for elections by direct universal suffrage in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States". Once the proposal is drawn up, the Treaty states that "The Council shall, acting unanimously after obtaining the assent of the European Parliament which shall act by a majority of its component members, lay down the appropriate provisions, which it shall recommend to Member States for adoption in accordance with their respective constitutional requirements."

Establishment of a uniform electoral procedure could be seen as an effort to create a stronger Parliament, which maybe could become the focal point of representative democracy within the Union.

In 1982, the *Seitlinger* report (OJ C 87/1982 p. 64) suggested a system of proportional representation, with seats distributed according to the *d'Hondt* system, within multi-member constituencies (each with between three and 15 representatives). No electoral threshold was set. The *d'Hondt* method is a highest average method for allocating seats in party-list proportional representation.⁸⁶ Although the Council considered this text several times, no

1 _____

⁸² Corbett R, Jacobs F and Shackleton M, p. 5.

⁸³ Craig P, De Búrca G, p. 25.

⁸⁴ Turnout trends in European elections, <http://www.elections2004.eu.int/ep-election/sites/en/results1306/turnout_ep/turnout_table.html> (accessed January 19, 2006).

⁸⁵ Corbett R, Jacobs F and Shackleton M, p. 16.

⁸⁶ Giovannelli A, Orlandi M A and Canepa A, Riforme elettorali, parlamento europeo ed integrazione comunitaria, p. 110.

further action was taken. The British government did not want to refrain from the plurality system. The question of however there should be an obligation to have a system of proportional representation in all countries has been of fundamental importance. “The main exception in this regard was the majority system used in the UK, which could alone alter the entire political balance in the European Parliament. A small swing in the votes can produce a magnified swing in a ‘first past the post’ system.”⁸⁷ Other proposals to introduce a uniform electoral procedure were equally unsuccessful. However, during the Intergovernmental Conference in October 1996 the Member States showed increased willingness to make progress. Before the conference, Parliament had repeatedly called on the Member States to implement what was then Article 138 of the Treaty. No direct action was taken on this, but a consensus was very quickly formed around the proposal for a reference in the Treaty to “principles common to all Member States”.

The Treaty adopted in Amsterdam includes the following addition to ex Article 138(3), now Article 109 (4): “The European Parliament shall draw up a proposal for elections by direct universal suffrage in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States.” The addition makes it less difficult to handle the differences in opinion between Member States. No across-the-board harmonisation of the electoral procedure was required. In 1998, before the coming into effect of the Treaty of Amsterdam, the Parliament adopted another resolution proposing an electoral procedure⁸⁸, based on the report by Giorgios Anastassopoulos. The resolution proposed an electoral procedure with the basic principle that all Members of Parliament should be elected by a list of proportional representation.⁸⁹ At this point the situation in the UK no longer posed an obstacle, since the *European Parliamentary Elections Bill*⁹⁰ had introduced proportional representation for the European Parliament elections throughout Great Britain (except for Northern Ireland used a system of single transferable vote for the European elections). The *European Parliamentary Elections Act 1999* received Royal Assent on 14 January 1999. A uniform electoral procedure seemed closer than before. But the enlargement of the Union pushed the unification of electoral systems off the agenda. “The Council’s unanimous consent is required under Article 190 (4), and the diversity of Member State electoral and constitutional traditions appears to be a major stumbling block to any further progress on this matter.”⁹¹

¹ _____

⁸⁷ Corbett R, Jacobs F and Shackleton M, p. 16.

⁸⁸ Resolution A4-0212/1998.

⁸⁹ Corbett R, Jacobs F and Shackleton M, p. 24.

⁹⁰ Bill No. 4 of 1998-99.

⁹¹ Craig P and De Búrca G, p. 77.

4 EU and the European Convention on Human Rights

4.1 Electoral rights in the European Convention

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) entered into force on 3 September 1953 and is a text from the Council of Europe, which is made up of over 40 countries, including Russia. “When governing elites in Europe and elsewhere have conceded electoral reforms, this has usually been seen as a *concession* rather than acknowledging an entitlement and a human right. This explains why there was reluctance in the late 1940s to include the right of political participation in the Universal Declaration of Human Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights; ECHR). After some discussions, this right was included in Article 21 of the Universal Declaration and subsequently in Article 25 of the International Covenant on Civil and Political Rights (CCPR) of 1966. It was left out of the ECHR in its original version but included a somewhat more limited requirement of free and periodic elections in Article 3 of Protocol No.1. (1950).⁹²

4.1.1 Article 3 of Protocol No.1 to the European Convention

Article 3 of Protocol No.1 of the Convention, which entered into force on 21 September 1970, provides:

“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

According to the Preamble to the Convention, the best way to maintain fundamental human rights and freedoms is by “an effective political democracy”. In the case of *Ždanoka v. Latvia*⁹³ the European Court of Human Rights underlined the outset that democracy constitutes a fundamental element of “European public order”. Article 3 of Protocol No. 1 enshrines a characteristic principle of democracy and is of great importance in the Convention system. The Strasbourg Court clarified, in the judgement in the *Mathieu-Mohin* case⁹⁴ that Article 3 of Protocol No.1 is not to be interpreted restrictively, contrary to what had previously been

1 _____

⁹² Rosas A, p. 137.

⁹³ *Ždanoka v. Latvia*, Judgment of the European Court of Human Rights of 17 June 2004.

⁹⁴ *Mathieu-Mohin and Clerfayt v. Belgium*, Judgment of the European Court of Human Rights of 2 March 1987.

assumed. Almost all the other substantive clauses in the Convention and its protocols use wordings like “Everyone has the right” or “No one shall”. Article 3 of Protocol No. 1 uses the phrase “The High Contracting Parties undertake”. Because of this, the conclusion had sometimes been drawn that the Article in question does not give rise to directly enforceable individual rights and freedoms enforceable but solely to obligations between States. As the Court points out in paragraph 49 of the *Mathieu-Mohin* judgement, such a restrictive interpretation does not stand up to scrutiny. The Preamble of Protocol No. 1 states that the Protocol ensures “the collective enforcement of certain rights and freedoms other than those already included in Section I of the Convention. According to Article 5 of Protocol No. 1, the provisions of Articles 1, 2, 3 and 4 “shall be regarded as Additional Articles to the Convention”, all of whose provisions “shall apply accordingly”. Also the Preamble to Protocol No. 4 refers to the “rights and freedoms” protected in Articles 1 to 3 of Protocol No. 1. Neither can the supporters of a restrictive interpretation of the Article find any support for excluding the right of individual petition as regards Article 3 in the “travaux préparatoires” of Protocol No. 1. In paragraph 50 of *Mathieu-Mohin* the Court explains that the inter-State colouring of the wording of Article 3 of Protocol No. 1 is motivated by a desire to give “greater solemnity to the commitment undertaken and in the fact that the primary obligation in the field concerned is not one of abstention or non-interference, as with the majority of the civil and political rights”, but an obligation of the State to take action and “hold” democratic elections.

Article 3 implies the personal rights to vote and to stand for elections to the legislature, subjective rights of participation that are important. In the judgement *Hirst v. the United Kingdom*⁹⁵, the Court stated that the right to vote is not a privilege, and that universal suffrage has become the basic principle (see paragraph 59). However, as the Court goes on to say under paragraph 60 of the same judgement, “the rights bestowed by Article 3 of Protocol No. 1 are not absolute. The Contracting States can subject the rights of participation to certain conditions and have wide margin of appreciation, but in the last resort it is the Court that has to decide if the requirements of Protocol No. 1 have been complied with. According to the Strasbourg Court in paragraph 52 of the *Mathieu-Mohin* case, the conditions must not “curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness”. Furthermore, the conditions must be motivated by the pursuit of a legitimate aim, and the means employed may not be disproportionate. It is of fundamental importance that the conditions do not hinder the free expression of the opinion of the people in choosing a legislature. In paragraph 82 of the *Ždanoka* case, the Court points out that Article 3 “must be interpreted in the light of the principle of the effectiveness of rights inherent in the entire Convention system: this Article must be applied in such a way as to make its stipulations not theoretical or illusory but practical and effective”. The

1 _____

⁹⁵ *Hirst v. the United Kingdom*, Judgment of the European Court of Human Rights of 6 October, 2005.

imposition of a minimum age may be motivated by a necessity to ensure the maturity of those participating in the electoral process. In paragraph 86 of the *Ždanoka* case, the Court gives three examples of legitimate aims: “protection of the State’s independence, protection of the democratic order and protection of national security”. In that case, the Court did however find that the means employed for the pursuit of these legitimate aims, the permanent disqualification from standing for election to the Latvian Parliament as a consequence of her activities within the Communist Party of Latvia after 13 January 1991, were disproportionate and that the applicants’ electoral rights had been curtailed to such an extent as to impair their very essence. There had therefore been a violation of Article 3 of Protocol No. 1 in that case.

Electoral systems have to be assessed in the light of the political evolution of the country in question. The Court does in *Ždanoka* point out that the Contracting States enjoy “considerable latitude in establishing constitutional rules on the status of members of parliament, including the criteria for declaring them ineligible”. In the judgement of the case of *Melnichenko v. Ukraine*⁹⁶, paragraph 55, the Court underlines that “for the purposes of applying Article 3, any electoral legislation must be assessed in the light of the political evolution of the country concerned, so that features that would be unacceptable in the context of one system may be justified in the context of another”, the limit to the State’s sphere of appreciation being the obligation to respect the fundamental principle of Article 3 of Protocol No. 1, that is “the free expression of the opinion of the people in the choice of legislature”. In paragraph 56 of the same judgement, the Court pronounced its opinion on a condition of residence in relation to the right to stand for elections. “The Court considers that a residence requirement for voting may be justified on the grounds of (1) the assumption that a non-resident citizen is less directly or continuously concerned with, and has less knowledge of, a country’s day-to-day problems; (2) the impracticability for and sometimes undesirability (in some cases impossibility) of parliamentary candidates presenting the different electoral issues to citizens living abroad so as to secure the free expression of opinion; (3) the influence of resident citizens on the selection of candidates and on the formulation of their electoral programmes, and (4) the correlation between one’s right to vote in parliamentary elections and being directly affected by the political bodies so elected”. The Court had previously held that such a condition, in relation to the separate right to vote, was not *per se* an unreasonable or arbitrary requirement (*Hilbe v. Liechtenstein*⁹⁷). In *Melnichenko*, it was held that stricter requirements might be imposed on the eligibility to stand for election to parliament, as distinguished from voting eligibility. A requirement of continuous residence in the country for potential parliamentary candidates would not be outright precluded. The Court does,

1 _____

⁹⁶ *Melnichenko v. Ukraine*, Judgment of the European Court of Human Rights of 19 October, 2004.

⁹⁷ *Hilbe v. Liechtenstein*, Decision of the European Court of Human Rights of 9 September, 1999.

however, in paragraph 59 point out that “the right to stand as a candidate in an election, which is guaranteed by Article 3 of Protocol No. 1 and is inherent in the concept of a truly democratic regime, would be illusory if one could be arbitrarily deprived of it at any moment.” In the *Melnichenko* case, the Court found that the residence requirement in Ukraine had not been absolute, and that the applicant’s situation had been specifically difficult since he would have been in serious danger if he had stayed in Ukraine, rendering the exercise of any political rights impossible. Leaving the country, he had also been prevented from exercising such rights. There had therefore been a breach of Article 3 of Protocol No. 1 of the Convention, when the Ukrainian Central Electoral Commission had refused the applicant’s candidacy as untruthful. The applicant had held a valid registered place of legal residence in Ukraine, but had been forced to seek asylum in the USA.

The *Hirst* case, mentioned above, dealt with the right to vote of convicted prisoners who are detained. It was the first time that the Court could consider a general and automatic disenfranchisement of convicted prisoners. In paragraph 69 of the judgement, the Strasbourg Court underlined that “prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty, where lawfully imposed detention expressly falls within the scope of Article 5 of the Convention.” A prisoner does not forfeit his Convention rights simply because of being detained following conviction. However, democratic societies can take measures to protect themselves against activities intended to destroy the rights of freedoms protected by the Convention.

In paragraph 53 of *Mathieu-Mohin*, the European Court of Human Rights establishes that Article 3 applies only to the election of the “legislature” or at least one of its chambers if more than one. However, the word “legislature” does not only have to mean the national parliament, but has to be interpreted in the light of the constitutional structure of the relevant State.

4.1.2 Electoral rights for foreigners

For a long time, the Council of Europe was not particularly concerned with rights to political participation for foreigners. This changed in 1970ies. It was a fact that many foreigners lived permanently in other countries than their own. The creation of the European Community had led to greater movement between the countries. There were large groups of Spanish and Italian citizens living permanently in Germany, in addition to the large community of Turkish citizens residing in that country. France had large groups of people originating from North Africa living in the country. This led to increased discussions about electoral rights for foreigners. “The traditional approach in constitutional Bill of Rights has been to limit the rights catalogues to the citizens (nationals) of the state concerned. At the same time, questions of nationality and citizenship have been deemed to fall

under the competence of each state.”⁹⁸ The last century presented a gradual loosening of the “linkage between sovereignty, nationality and citizenship, and fundamental rights.”⁹⁹ It is easy to find arguments in support for electoral rights for foreign nationals. This can be seen as following basic principles of liberalism and democracy. A person living in a state for a longer period of time is necessarily subject to political decisions taken regarding that state, and that person should have the right to influence those decisions. The most important way of doing so is, in a democratic society, through the participation in elections.

Even though Member States of the Council of Europe are obliged to respect the rules of parliamentary democracy, electoral rights for immigrants that have not acquired citizenship are neither derivable from the case law of the Court of Human Rights nor from the Treaty provisions. Erik Lundberg wrote in 1995 that “making distinctions between citizens and aliens as regards their participation in the political life of the state is widely accepted. Generally speaking, both international human rights law and national law permit states to restrict the right to vote, and the right to stand as a candidate in elections to their own citizens.”¹⁰⁰ This point of view was generally accepted at the time. According to Article 16 of the Convention the states that are parties to the Convention can restrict the rights of foreigners to participate in political activities without the freedom of expression contained in Article 10, the freedom of assembly and association established by Article 11 or Article 14 which contains a prohibition of discrimination creating problems. “As Article 16 does not mention any specific purpose, it would appear to provide national authorities with a fairly wide margin of appreciation. There are, however, certain limits to the use of Article 16. To begin with, it is placed under the rule of proportionality, which permeates the entire Convention system (See Article 18 ECHR).”¹⁰¹ According to most commentators there is also a “spirit of the Convention” which limits how widely national authorities may interpret the concept of “political activities”.

However, things were changing. In *Piermont*¹⁰², the ECtHR discussed if the expression “foreigners” in Article 16 also apply to foreigners that are citizens of the EU. The case concerned a decision by the French authorities to expel a German national, Mrs Piermont, from French Polynesia. Mrs Piermont was a member of the European Parliament at the time, and had taken part in an authorized, peaceful demonstration in support of the independence of French Polynesia and in opposition to French nuclear tests in the area. Mrs Piermont had been invited by local parties, and during the demonstration she addressed the crowd. The Court decided that Mrs Piermont was not to be considered a foreigner in the meaning of Article 16

1 _____

⁹⁸ Rosas A, p 138.

⁹⁹ Rosas A, p 138.

¹⁰⁰ Lundberg E, p. 114.

¹⁰¹ Lundberg E, p. 116.

¹⁰² Piermont v. France, Judgment of the European Court of Human Rights of 27 April, 1995.

of the Convention. The Court stated that although Union citizenship did not exist at the time of the actual case, Article 16 could still not be applied. It should be possible to interpret the case as meaning that foreign EU citizens do not fall under the expression foreigners in Article 16, which in that case lessens the possibilities of the EU Member States to restrict the political rights of migrating EU citizens according to the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁰³

“With respect to voting and similar political rights, a distinction is often made between local and national elections.”¹⁰⁴ At the local level, electoral rights do sometimes apply also to foreigners resident in the state. The Nordic states detached voting rights in municipal elections from national citizenship in the late 1970s.¹⁰⁵ When the Soviet Union collapsed, the discussion of electoral rights for foreigner became topical once again. Since 1992 there is an international convention establishing such a right, the Convention on the Participation of Foreigners in Public Life at the Local Level.¹⁰⁶ It entered into force in May 1997, ratified by four states. The Convention has three parts, chapter A, B and C. Chapter A is the only one that the contracting states cannot opt out from. It demands freedom of speech, assembly and association for foreign nationals. According to Chapter B, the states parties to the convention have to encourage and facilitate the establishment of consultative bodies for foreign citizens on the local level. Chapter C establishes that the signatory states have to grant electoral rights at the local level to every non-citizen that is resident in a state party to the convention. The electoral rights are granted provided that the non-national fulfils the same requirements as citizens of the host state have to fulfil in order to vote or to stand for election and have been lawfully and habitually resident in the host country for five years. However, it is left to the contracting states themselves to decide whether to grant foreign nationals only the right to vote or to grant them also the right to stand for election. The convention has not yet been ratified by many states and of these states only Italy did not allow foreigners to vote in local elections before the creation of the convention. Italy has also opted out from the application of Chapter C. The importance of the convention in practice is still quite limited, but it can be seen as an expression of a change of outlook within the European framework and the fundamental importance that the European Council gives to franchise-rights.

“As to national elections in Europe, only Ireland and the United Kingdom have, on a reciprocal basis, granted voting rights to residents who are citizens of the other country. This special regime is, of course, explained by the historical ties between the two countries and is to be seen against the

1 _____

¹⁰³ Lokrantz Bernitz H p. 282.

¹⁰⁴ Rosas A, p. 139.

¹⁰⁵ Rosas A, p. 139.

¹⁰⁶ The Convention, ETS No. 144, a list of signatory states and their reservations and an explanatory report can be found under

<http://conventions.coe.int/Treaty/EN/WhatYouWant.asp?NT=144&CM=8&DF=19/11/02>.
(Accessed January 18, 2006)

background that the United Kingdom grants voting rights to all British subjects, including Commonwealth citizens.”¹⁰⁷ Parliamentary and presidential elections and referenda are considered to be “political elections” and are generally seen as having too much of a national aspect too them to allow the participation of non-nationals, since they play a part in determining national sovereignty. However, according to Allan Rosas, it can be questioned to what extent it is really truthful to distinguish between national elections as “political” and local elections as “non-political”. In many states, power is being transferred from national to local and regional governments. And often the results of local elections are being analysed in order to determine the support of the national government in power. “We are at least in Europe (but perhaps in the long run also at the world-wide level) moving towards a system of several ‘layers’ of public decision-making, where the nation-state will be seen more as one among many layers rather than as the dominating, ‘sovereign’ hub of the whole system, then it becomes all the more questionable to have differently defined electorates for, on the one hand, local and European elections and, on the other hand, national and regional elections.”¹⁰⁸ Allan Rosas points out that there is a Council of Europe-sponsored European Charter of Local Self-Government of 1985, which establishes that the status of local self-government, among the Contracting Parties is a matter of international concern and characterises local self-government as meaning that the local authorities have a right to, within the limits of law and under their own responsibility, regulate and manage a big part of public affairs in the interest of the local population. “With a perception of many more or less equal ‘layers’ of decision-making (European, national, regional and local levels), it would be natural to base electoral rights on residence rather than nationality.”¹⁰⁹

The point of view of the Council of Europe is that people that have resided in a country for a long time without becoming citizens of that country should be granted electoral rights, at least on the local level. Already in 1973 the recommendation of the Parliamentary Assembly of the Council of Europe was to grant "migrant workers after five years the right to vote and to stand for election in municipal affairs, provided they had lived in the municipality concerned for the previous three years"¹¹⁰ The issue became especially urgent when the Baltic States acceded to the ECHR, due to the large Russian minorities resident in those countries. “The importance of restrictions on the political and other rights of aliens should, of course, not be separated from the concepts of nationality and citizenship and the conditions that states follow in their national legislation on granting nationality and citizenship by way of naturalisation. If these conditions are very liberal, political rights may easily be obtained by way of naturalisation.”¹¹¹ It is more difficult to argue that foreign residents should

1

¹⁰⁷ Rosas A, p. 140.

¹⁰⁸ Rosas A, p. 153.

¹⁰⁹ Rosas A, p. 153.

¹¹⁰ Recommendation 712 (1973) on the integration of migrant workers with the society of their host countries.

¹¹¹ Rosas A, p. 141.

be granted to right to vote if it would be very easy for them to acquire the respective country's citizenship. To give the Russian minorities in the Baltic countries citizenship is a very sensitive issue, but at least some kind of minimum standard should apply to the treatment of these minorities of non-citizens. The point of departure for the Council of Europe is nowadays that the right to vote and to stand in elections is a basic pre-condition for preserving other fundamental civil and political rights upheld by the Council of Europe.¹¹² That foreigners should be granted rights to political participation in the state in which they reside is a fundamental thing that ought to be respected by all Member States of the Council of Europe.

4.2 The position of the European Convention in EU law

In the EU, protection of fundamental rights exists on three levels¹¹³: in international law as a part of EU law, at a national level and at union level. All EU Member States are signatories to the Convention, but not all of them have ratified all its protocols. The EU is not a party to the ECHR, which today can only be acceded to by states.¹¹⁴

In the 1950s, when the three EC Treaties were signed, they contained no express provisions concerning the protection of human rights in the conduct of Community affairs.¹¹⁵ Initially, the European Communities were aimed at economical rather than political integration, and not very concerned with the protection of fundamental rights. The European Court of Justice first made reference to the ECHR in *Nold*¹¹⁶. 15 days before the *Nold*-decision the German Bundesverfassungsgericht had given the so-called *Solange I* decision in which serious questions about responsibility for the protection of human rights in EC law was raised.¹¹⁷ “The debate raging in Germany and which found expression in *Solange I* asked whether the transfer of a competence to the Community can be exclusive if the result is a diminution of fundamental rights protection available to the individual under the national constitution. To this question, the German court answered with a

1

¹¹² The Parliamentary Assembly of the Council of Europe has, through adopting Resolution 1459(2005), “Abolition of restrictions on the right to vote”, urged Member States to sign and ratify the 1992 Convention on the Participation of Foreigners in Public Life at Local Level and to grant active and passive electoral rights on the local level to all persons legally resident in their territory. The Resolution followed reports of the Venice Commission on the subject, CDL-AD(2005)011 and CDL-AD(2005)012, which had been adopted in December 2004. The Venice Commission is the Council of Europe’s advisory body in constitutional matters.

¹¹³ Lokrantz Bernitz H, p. 224.

¹¹⁴ Lokrantz Bernitz H, p. 225.

¹¹⁵ Craig Paul and De Búrca G, p. 318.

¹¹⁶ C- 4/73 *Nold* [1974] ECR 491.

¹¹⁷ [1974] 2 CMLR 540, 549-50.

resounding no.”¹¹⁸ The Court of Justice had made reference in its judgments to human rights as a concept before the *Nold* decision, for example in *Stauder*¹¹⁹, but it had not mentioned specifically the ECHR.¹²⁰ In the *Nold* decision, the ECJ affirmed that the principles of the European Convention constitute a part of the general principles of law that are to be respected in the Union. The European Convention is given a more prominent role than other international agreements governing human rights and fundamental freedoms, and the Court of Justice refers explicitly to the case-law of the European Court of Human Rights. One of the utmost achievements by the ECJ is the strengthening of the individual’s legal position in the EC legal system, achieved mainly through the activist case-law of the court.

The Treaty of Amsterdam, which came into force on 1 May 1999, inserted a new Article 6 in the Treaty on European Union, which reaffirms that “the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.” Article 6 (2) specifies that the EU shall “respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.” According to Article 7, the Council can decide to suspend certain of a Member State’s rights, including the voting rights of the representative of the government of that Member State in the Council, if the Member State is in serious and persistent breach of the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, that are common to the Member States. This provision was intended to give the Union a way of putting pressure on Member States if needed, especially in consideration of the enlargement of the Union towards Eastern Europe, but has so far not been employed.

“It has repeatedly been contended that the Community, because of the far-reaching legal implications its activities have on individuals, should not settle for the minimum level of protection offered by the ECHR.”¹²¹ Especially the European Parliament has strongly emphasised the need for a specific Community catalogue of human rights, going beyond what is granted by the Convention. However, the Charter of Fundamental Rights of the European Union signed and solemnly proclaimed on 7 December 2000,¹²² lacks binding force.

Application of EU law is not solely a matter for the institutions of the Union, but also for its Member States. These Member States are all parties to, and bound by, the European Convention. Decision by Member States

1 _____

¹¹⁸ Guild E and Leiseur G, The European Court of Justice on The European Convention on Human Rights. Who said what, when? p. xviii.

¹¹⁹ C-26/69 *Stauder* [1969] ECR 215.

¹²⁰ Guild E and Leiseur G p. xvii.

¹²¹ Lundberg E, p. 123.

¹²² Published in the Official Journal: C 364 of 18 December 2000.

regarding matters that fall under the Convention can be tried by the European Court of Human Rights. In the case of *Van De Hurk v. the Netherlands*, the ECtHR found the Netherlands guilty of breach of the Convention, since the Dutch EC law-based procedure for determination of reference quantities for milk was not considered a fair hearing by an independent tribunal, which everyone has the right to according to Article 6 of the European Convention.¹²³

Above state-level, there are two Courts that interpret and apply the ECHR—the European Court of Justice in Luxembourg and the European Court of Human Rights in Strasbourg. This application has not always been completely coherent. Some divergences that have attracted a lot of attention concerned EC competition policy, for instance the rights of the defence in course of administrative proceedings, regulated by Article 6 of the Convention, and the applicability of Article 8 of the Convention to the issue of searches of business premises. Divergent interpretation and application of the ECHR creates ambiguity in the EU Member States regarding which interpretation to follow. Within the sphere of EC law, the interpretation that the ECJ has made should be given precedence. In spite of this, on the basis of Article 1 ECHR, the Contracting States are also bound to secure the rights and freedoms granted by the Convention as interpreted by the Strasbourg Court. In case of two diverging case-laws, the Member State court will be in the undesirable situation of having to act in breach of either EC law or the ECHR. The European Court of Justice is not formally bound by the rulings of the European Court of Human Rights. It can however be assumed that the ECJ does its best to avoid to make decisions that are contrary to the case law of the Strasbourg court. In *Hoechst*, the ECJ confirmed that fundamental principles of law must be adhered during the “dawn-raids”, the unannounced inspections that the Commission is empowered to undertake in order to collect information necessary for the monitoring and enforcement of EC competition law. The Court did however not regard the fundamental right to the inviolability of the home as applicable to undertakings, because the legal systems of the Member States contained considerable variations in regard to the nature and degree of protection afforded to business premises against intervention by public authorities.¹²⁴ Later on, the Court of Human Rights in Strasbourg stated that the protection of the home provided for in Article 8 of the Convention in certain circumstances can be extended to cover other premises. In *Roquette Frères* the ECJ clarified that case-law of the European Court of Human Rights subsequent to the Hoechst-judgment was to be respected.¹²⁵ The *Roquette Frères*-judgment leaves it open to debate if the European Court of Human Rights has ceased to be merely a source of inspiration for the ECJ and become but an authority in the ambit of Human Rights.

1

¹²³ *Van De Hurk v. the Netherlands*, Judgment of the European Court of Human Rights of 19 April, 1994.

¹²⁴ Case 46/87&227/88, *Hoechst AG v. Commission*, 21 September 1989, [1989] ECR 2859.

¹²⁵ Case C-94/00, *Roquette Frères SA v Directeur général de la concurrence, de la consummation et de la repression des frauds*, 22 October 2002, [2002] ECR I-9011.

4.3 Should the EU accede to the European Convention?

Article 7(2) of the Draft Treaty establishing a Constitution for Europe provides that the EU “shall seek accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms”. As mentioned above, this is not possible today, since only states can accede to the European Convention. The Convention could, however, be revised by the Member States. To enable an accession by the EU to the Convention, changes would also have to be made of the founding Treaties, since the Court of Justice has found that accession of the Community to the European Convention is not allowed by the present wording of the Treaties.¹²⁶ At present, if an individual feels abused by an organ of the EU he or she cannot, even if he has exhausted all national possibilities of judicial remedy, turn to the European Court of Human Rights in Strasbourg, at least not with a claim directly aimed against the Union.¹²⁷ “As long as the Union has not acceded to the ECHR it is clear that the provisions of the ECHR do not as such enjoy the status of directly applicable law within the Union Member States. The fundamental rights recognised by the ECJ are not absolute as they may be balanced against other interests and objectives set out by the Union, such as the organisation and functioning of a Common Market. Hence, the interpretation of the ECHR provisions within the Union framework may differ from that given by the Strasbourg organs.”¹²⁸ If the EU would itself accede to the ECHR, the problem would be solved. The citizens of the Union would, in their relation to the EU, be granted the same level of protection guaranteed today by the Convention in favour of the citizens of the states which are its contracting parties. Today that protection applies only in the relationship between the citizen and the state, party to the Convention. This would be important, taking into consideration that the Member States have transferred considerable competence to the Union in many important fields. States aspiring for EU membership must be parties to the ECHR in order to qualify. An accession of the Union to the European Convention would be a sign of cohesion between the EU and the larger Europe represented in the Council of Europe and its pan-European system of human rights.¹²⁹ If the EU would be a party to the European Convention, the development of the human rights case law of the Court of Justice of the European Communities in Luxembourg and the European Court of Human Rights in Strasbourg would be more co-ordinated. The Court of Justice would still be the highest instance in questions regarding EU law and the validity EU legislation. The Court of Human Rights would be seen as a specialised court which externally monitors the activities of the EU and

¹ _____

¹²⁶ Opinon of the Court of Justice of the European Communities 2/94, Recueil de jurisprudence 1996 page I-01759.

¹²⁷ Lokrantz Bernitz H, p. 225.

¹²⁸ Lundberg E, p. 122.

¹²⁹ Lokrantz Bernitz H, p. 226.

makes sure that the EU acts in compliance with international law as it follows from the ECHR. The position of the ECJ would equal the position of national constitutional or supreme courts today, and the Court of Human Rights would be the highest instance when it comes to Human Rights. Coherence and certainty in the legal standards applied in Europe would be ensured.¹³⁰ Although it seems doubtful, as present, that the Draft Treaty establishing a Constitution for Europe will ever be adopted by all the Member States, many hope that the ambition to see the Union acceding to the European Convention will live on in another form.

1 _____
¹³⁰ Lokrantz Bernitz H, p. 227.

5 Gibraltar

5.1 Gibraltar: historical outline

5.1.1 Prior to the Treaty of Utrecht

The territory of Gibraltar is a narrow coastal lowland bordering the 426-metre high Rock of Gibraltar, which is sometimes called the Pillar of Hercules. Mythology tells us that the Rock was the “northern portion of the mountain split asunder by Hercules and pushed northward by him in order to create the strain which connects the Atlantic Ocean and the Mediterranean Sea.”¹³¹ Human beings have populated the Gibraltar region since prehistoric times. The name “Gibraltar” derives from a Spanish corruption of the term “Djabal Tarik”, Tarik’s Rock. Tarik ibn Ziyad was the commander of an expedition across the Strait, sent by the Moorish conqueror of the Magreb, Musa ibn Nusayr. That expedition meant the beginning of Gibraltar’s Moslem period.¹³²

5.1.1.1 Moslem period: 711 to 1462

The Moslem possession of Gibraltar (and much of the territory now known as Spain) lasted for almost 600 years, “the only changes being from the control of one Moslem faction to another”.¹³³ There were attacks on the Moslem dynasty in Spain, the Amoravids, both from Christian princes and from a Moslem faction from Africa, now known as the Almohades. The Almohades were of the opinion that the Amoravids had strayed from the true faith, and began a holy war directed against the Armoravids and the Christians in Spain.” The fanatical invaders were successful and, in order to ensure their future security against the attacks which were anticipated, in 1160 A.D. the leader of the faction, Abd-al-Mu’mín, ordered the planning and the construction of what was intended to make Gibraltar a mighty bastion.”¹³⁴ Years of combat between Moslems and Christians followed without much interest being paid to Gibraltar and the fortifications begun by Abd-al-Mu’mín were allowed to disintegrate. Sancho IV, king of Castille, seized Tarifa in 1292 and held it against a Moslem siege which ended unsuccessfully in 1294. In 1309 “his son, Ferdinand IV, besieged Algeciras—and, as a part of the siege tactics, he ordered several of his nobles to attack Gibraltar.”¹³⁵ Gibraltar fell quickly, which was the end of Moslem possession of the rock. Ferdinand IV ordered the construction of works that would make Gibraltar easier to defend against Moslem attacks.

1

¹³¹ Levie H S, The Status of Gibraltar, p. 2.

¹³² Levie H S, p. 3.

¹³³ Levie H S, p. 4.

¹³⁴ Levie H S, p. 4.

¹³⁵ Levie H S, p. 4.

The attacks came as expected, and in 1333 Moslems regained control over Gibraltar, this time represented by the Sultan of Fez and Morocco. In 1462, “Castille regained Gibraltar from Granada, to which it had been conveyed by a Sultan of Fez; and thereafter it remained in Spanish hands until it was lost to the Grand Alliance in 1704.¹³⁶

5.1.1.2 Spanish period: 1462 to 1704

Henry IV, King of Castille, extended the municipal borders of Gibraltar to include all the territory which had been part of Algeciras. Gibraltar was held as a personal fief by the Dukes of Medina Sidonia between 1467 and 1501, when Isabella, Queen of Castille and Aragon, ordered the Duke to return Gibraltar to the crown. “Little or nothing was done by the Crown of Spain to fortify Gibraltar, to make it the impregnable fortress that many tacticians of that day believed that it could be.”¹³⁷ It was attacked and sacked by a renegade Turkish commander at Algiers and Moslem pirates. In 1652 it became known in Spain that a large British fleet had left England and was moving in the direction of Spain. This caused the defences of Gibraltar to be strengthened, but they were soon again allowed to return to their inadequate state. “In 1693 a number of British ships, both naval and merchant, belonging to the command of Admiral Sir George Rooke, took refuge at a friendly and allied Spanish Gibraltar from the vastly superior fleet of French Admiral Tourville.” Although the British landed guns from their own warships in order to supplement those of the fort, the French ships, which entered the Bay of Algeciras, were able to do as they pleased.

5.1.1.3 Gibraltar during the War of the Spanish Succession (1702 – 1713)

The Spanish Succession was at the core of the major problem of the final quarter of the seventeenth century: the maintenance of a balance of power between the French Bourbons and the Austrian Habsburgs. Charles II was king of Spain from 1665. He was epileptic, childless and in poor health. Both the Bourbons and the Habsburgs claimed the throne. In 1689 Leopold I who was the reigning Holy Roman Emperor and the Dutch entered into the Treaty of Vienna, an alliance against France. England, Spain and mutual German principalities adhered to this Treaty. This was the creation of what was called “The Grand Alliance”. The members of this alliance were at war with France until 1697. Then there was a brief respite from war, during which negotiations were held to try to solve the problems through diplomacy. But despite many efforts to avoid it, Philip of Anjou, a son of the Dauphin of France, was seated on the throne of Spain after the death of Charles II in 1700. The war continued. The Austrian, English and the Dutch created the “Second Grand Alliance”, supporting the claim of the Archduke Charles of Austria to the Spanish throne. The British declared war against

1 _____

¹³⁶ Levie H S, p. 5.

¹³⁷ Levie H S, p. 5.

France and Spain in 1702. An Anglo-Dutch force led by Sir George Rooke seized the Rock in 1704. Spain ceded the territory of Spain to Great Britain in the Treaty of Utrecht 1713. The Treaty of Utrecht and the Treaty of Rastatt 1714 concluded the war. Philip V remained king of Spain but was removed from the French line of succession. This averted a union between France and Spain. According to the Treaty of Utrecht, Gibraltar will automatically be ceded to Spain if Great Britain relinquishes the colony.

5.1.2 Following the Treaty of Utrecht

Since the Treaty of Utrecht, Gibraltar has remained British. “Even before the Treaty of Utrecht was signed in 1713 and Gibraltar was thereby officially ceded to Great Britain, and down to the present day, not only Philip V of Spain, his ministers and his people, but all of the subsequent rulers of Spain, whether King, Prime Minister, or Dictator, their ministers and their people, have called for the vindication of Gibraltar with all of the passion with which Cato the Elder called for the destruction of Carthage approximately two millennia earlier.”¹³⁸ Spain made many attempts to retake Gibraltar, most notably the “Great Siege” which took place between 1779 and 1783.¹³⁹

In May 1907 Great Britain and Spain agreed to maintain the territorial *status quo*. During the Second World War the residents of Gibraltar were evacuated and the Rock was turned into a fortress again. Hitler believed it to be important to deprive Great Britain of Gibraltar. An operation aimed at taking Gibraltar from the British and handing it over to Spain was planned but never took place, due to Franco’s reluctance to allow the German Wehrmacht on Spanish territory.

Chapter XI of the Charter of the United Nations bears the title “Declarations regarding Non-Self-Governing Territories”. Article 73 of that chapter provides for the submission by an Administering Power to the Secretary-General of periodic reports relating to each non-self-governing territory administered by it. The UN General Assembly also created a Special Committee on the information so transmitted. 1946, the United Kingdom submitted the name of Gibraltar as an “Administrative Territory” with respect to which it would submit reports to the United Nations in accordance with Article 73. Spain became a Member of the United Nation on the 14th of December 1955¹⁴⁰. Beginning in 1957, each year it recorded a “jurisdictional reservation” regarding the United Kingdom’s right to submit information on Gibraltar as a Non-Self-Governing Territory. The Spanish government considered Gibraltar to be an integral part of Spain.¹⁴¹ Spain argues that Gibraltar should become an autonomous part of Spain, like Basque country and Catalonia. The Special Committee considered the

1 _____

¹³⁸ Levie H S, p. 43.

¹³⁹ Levie H S, p. 52.

¹⁴⁰ “List of Member States”, <<http://www.un.org/Overview/unmember.html>> (accessed January 18, 2006).

¹⁴¹ Levie H S, p. 103.

subject of Gibraltar for the first time in 1963. In 1967, the vast majority of the population of Gibraltar (12,138 votes against 44) expressed their will to retain the link with Britain.¹⁴² The United Nations General Assembly, in resolution 2429 of the 18 December 1968 requested Great Britain to terminate the colonial situation in Gibraltar. The Spanish Government imposed restrictions on Gibraltar, from 1964 onwards. In June 1969 the frontier between Gibraltar and Spain was sealed by Spain. It remained closed until 1985, although pedestrian traffic was again permitted across beginning in 1983¹⁴³. In 1969 the British Government promulgated an order in council entitled the Gibraltar Constitution Order 1969.¹⁴⁴ “Perhaps the most important provision of this Order, and one which has proved and will continue to prove to be an albatross hung around Great Britain’s neck, is the preamble.”¹⁴⁵ In the preamble to the Constitution, the British guaranteed that the people of Gibraltar would not be passed to the sovereignty of another State against their democratically expressed wishes. In 2002, Britain and Spain discussed sharing sovereignty of Gibraltar. The reaction was a referendum held in Gibraltar in 2002 in which the population voted almost unanimously against shared sovereignty. According to both Spain and the United Kingdom the referendum held no legal weight.

5.2 Gibraltar: legal status

Gibraltar is a British overseas territory and often referred to as a “Crown colony”. It is self-governing in all matters except for foreign policy and defence which are responsibilities of the British Crown. The United Kingdom of Great Britain and Northern Ireland constitutionally consists in two parts: Great Britain (England, Wales and Scotland) and Northern Ireland. Gibraltar, like the Channel Islands and Isle of Man, is not a part of the United Kingdom but still a dominion under Her Majesty the Queen of England.¹⁴⁶

The Governor is head of the executive power, appointed by the British sovereign and advised by the Gibraltar council. Certain defined domestic matters are allocated to the locally elected chief Minister and his Ministers in the Council of Ministers, appointed by the governor. The ministers come from the party or the coalition that has majority in the House of Assembly, the domestic legislature in Gibraltar, and are responsible to the Gibraltar electorate via general elections to the House of Assembly. The House of Assembly consists of a speaker, 15 members elected for four-year terms and two ex-officio members. The governor appoints the speaker. The House of Assembly has the right to make laws for Gibraltar on defined domestic matters, but the Governor can refuse to assent to legislation. There is no city

1 _____

¹⁴² Levie H S, p. 112.

¹⁴³ History <<http://www.gibraltar.gov.gi/>> (accessed January 18, 2006).

¹⁴⁴ The Gibraltar Constitution Order 1969 is to be found on <<http://www.gibraltar.gov.gi/>> (accessed January 18, 2006).

¹⁴⁵ Levie H S, p. 114.

¹⁴⁶ Danelius H, Rösträtt i Gibraltar, ERT 2001 p 88.

council but one of the ministers is responsible for municipal affairs.¹⁴⁷ The United Kingdom Parliament has the ultimate authority to legislate for Gibraltar, but in practice it rarely exercises it.

Through the British Nationality Act of 1981, Gibraltarians were granted British Dependent Territories citizenship (renamed British Overseas Territories citizenship through the 2002 British Overseas Territories Act). The inhabitants of Gibraltar are to be considered EU citizens. Men and women from Gibraltar over the age of 18 and British civilians resident for more than 6 months are entitled to vote in the elections for the Gibraltar House of Assembly. British Overseas Territories do not have representation in the British Parliament, since they are considered separate jurisdictions.

Gibraltar is part of the EU by virtue of Article 227 (4) of the EC Treaty (now Article 299) that is as a “European territory for whose external relations a Member State is responsible.” The United Kingdom acceded to the precursor of the EC Treaty, the Treaty Establishing the European Economic Community of 25 March 1957 (“the EEC Treaty”), by a Treaty of Accession of 22 January 1972. Article 28 of the Act concerning the Conditions of Accession and the Adjustments to the Treaties (which concerns the accession of the UK, Denmark and Ireland) provides that there shall be certain exceptions from Community measures with respect to Gibraltar. Gibraltar is excluded from Community policy in some areas: the Community Customs Territory (and thus EC rules on the free movement of goods do not apply though those concerning services do); the Common Agricultural Policy; the Common Fisheries Policy; and the requirement to levy VAT. Gibraltar is treated as a third country for the purposes of the common agricultural policy. Subject to these explicit exceptions, all legislation adopted by the Community since 1973 has been applicable to Gibraltar. The Treaty provisions on the free movement of capital, services and persons, health, the environment and consumer protection apply to Gibraltar. Relevant EC legislation becomes part of Gibraltar law in the same way as in other parts of the Union. Regulations are directly applicable. Directives and other legal acts of the EC, which call for domestic legislation, are transposed by domestic primary or secondary legislation.¹⁴⁸

As mentioned above, Gibraltar is not part of the United Kingdom under domestic terms. But by virtue of a declaration made by the British government at the time of the entry into force of the British Nationality Act 1981, the term “nationals” and derivatives used in the EC Treaty are to be understood as referring to British citizens and to British Dependent Territories citizens (now renamed British Overseas Territories citizens) who acquire their citizenship from a connection with Gibraltar.

1 _____

¹⁴⁷ Gibraltar. <<http://search.eb.com/eb/article-9036754>> (accessed January, 18. 2006).

¹⁴⁸ Gibraltar in Europe.

<http://www.gibraltar.gov.gi/gov_depts/finance/gibraltar_and_the_eu.htm> (accessed January 18, 2006).

By a special declaration dated the 23 October 1953, the United Kingdom, pursuant to former Article 63 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, extended the Convention to Gibraltar.

5.3 The Gibraltar case

5.3.1 The *Matthews* judgment

In the case *Matthews v. the United Kingdom*, the European Court of Human Rights tried the applicability of the European Convention in situations when Member States act according to Community law. A decision made according to EU law was appealed to the Court in Strasbourg. The question was if the United Kingdom had violated Article 3 of Protocol No.1 to the Convention, since elections to the European Parliament had not been held in Gibraltar.

In a judgement delivered 18 February 1999 the European Court of Human Rights held by 15 votes to two that there had been a violation of Article 3 of Protocol No.1 to the Convention.

The applicant was Ms Denise Matthews, a British citizen resident in Gibraltar. In April 1994 she applied to be registered as a voter in the elections to the European Parliament. She was told that she was not entitled to register or vote because Annex II of the Act Concerning the Elections of the Representatives of the European Parliament by Direct Universal Suffrage of 20 September 1976 limited the franchise for European Parliamentary elections to the United Kingdom. This Act was agreed upon by all Member States and had Treaty status. Denise Matthews claimed that the absence of elections in Gibraltar to the European Parliament was in violation of her right to participate in elections to choose the legislature under Article 3 of Protocol No. 1 to the Convention. The applicant also alleged a violation of Article 14 of the Convention (freedom from discrimination in the enjoyment of Convention rights) based upon the fact that she was entitled to vote in European Parliament elections anywhere in the European Union where she lived except in Gibraltar.

The application was lodged with the European Commission of Human Rights on 18 April 1994. The Commission declared the application admissible and adopted a report on 29 October 1997 in which it expressed the opinion that there had been no violation of Protocol No 1 to the Convention (12 votes to 5). The Commission did not consider it to be necessary to decide whether the European Parliament was a legislature within the ordinary meaning of the term. Further it held that Article 3 of Protocol No. 1 did not extend to supranational representative organs and therefore the European Parliament was not “the legislature” of Gibraltar,

causing the inapplicability of Article 3 of Protocol No.1 to the circumstances of the particular case. The Commission referred the case to the European Court of Human Rights on 26 January 1998. Normally, the Court of Human Rights operates with seven judges. When giving judgements in cases of great importance the Courts sits in a Grand Chamber of 17 judges. Matthews was considered a case of enough importance to be decided upon by a Grand Chamber.

The Court began by stating that it was common ground that Article 3 applied in Gibraltar and then went on to consider whether the United Kingdom could be held responsible for the lack of elections to the European Parliament in Gibraltar. It was pointed out that acts of the European Community as such could not be challenged before the Strasbourg Court because the European Community is not a Contracting Party. According to the Court, however, notwithstanding the transfer of competencies to the European Community, Contracting States remained responsible for ensuring that Convention Rights were guaranteed. The Contracting States were held responsible under the Convention and its Protocols for the consequences of international treaties entered into subsequent to the applicability of the Convention. The United Kingdom had also, as a party to the European Convention and through expanding the applicability of the Convention to include Gibraltar, undertaken a commitment to ensure the respect Article 3 of Protocol No. 1 in Gibraltar.¹⁴⁹ It was held that legislation emanating from the legislative process of the European Community affected the population of Gibraltar just like legislation that entered the domestic legal order exclusively via the Gibraltar House of Assembly. Therefore the United Kingdom should be required to secure the rights set out in Article 3 of Protocol No. 1 in respect of European legislation. The United Kingdom was held responsible for securing the rights guaranteed by Article 3 of Protocol No 1 to the Convention regardless of whether the elections were purely domestic or European.

The Court then went on to determine the applicability of Article 3 of Protocol No 1 to an organ such as the European Parliament and whether that body had the characteristics of a “legislature” in Gibraltar. The Court held that the word “legislature” in Article 3 did not necessarily mean the national Parliament and that elections to the European Parliament could not be excluded from the ambit of Article 3 merely because they concerned a supranational, and not purely domestic, representative organ. Considering the precedence of EC law over domestic law, the Court concluded that the Parliament was sufficiently involved both in the specific legislative process leading to the passage of certain types of legislation and in the general democratic supervision of the activities of the European Community to constitute part of the legislature in Gibraltar for the purposes of Article 3 of Protocol No 1. However, it does not follow from Article 3 of Protocol No 1 that every citizen must have the right to vote in elections to a legislative assembly. Contracting States may apply conditions for the right to vote, for

¹ _____
¹⁴⁹ Danelius H, p. 88.

instance require residence in the country, and it is not incompatible with the Convention that a State establishes that a citizen may be disqualified from voting, for example because of bankruptcy or serious criminality. The limitations of the right to vote can however not be so wide that they can be considered to impede the free expression of the will of the people. They have to have a legitimate purpose and cannot be disproportional in relation to this purpose. In the case at hand, Denise Matthews was denied the right to vote simply because of residing in Gibraltar. This restriction could not be motivated like restrictions of electoral rights regarding citizens who had moved away from the state of which they are citizens and thereby weakened the ties between that country and themselves. Not making it possible for the Gibraltarians to vote in the elections to the European Parliament was a general restriction that concerned the very essence of the right to vote.¹⁵⁰

The Strasbourg Court then dealt with the question whether the absence of European Parliamentary elections in Gibraltar was compatible with Article 3 of Protocol No 1 to the convention or not. It was held that there had been a violation of the Article even though “the choice of the electoral system by which the free expression of the opinion of the people in the choice of the legislature was ensured was a matter in which States enjoyed a wide margin of appreciation.” In the case at hand Denise Matthews had been denied “any opportunity to express her opinion in the choice of members of the European Parliament, despite the fact that, as the Court had found, legislation that emanated from the European Community formed part of the legislation in Gibraltar and the applicant was directly affected by it.”

The European Court of Human Rights made requirements on the rules that govern the election of representatives to the European Parliament. This is an illustration of the complicated interplay between the European Convention and the law of the Union. The single states have a responsibility for the way in which they carry out their duties under the Convention also as Member States of the European Union.

5.3.2 EPRA 2003

The European Parliament (Representation) Act 2003 (hereinafter referred to as EPRA 2003) was adopted by in May 2003 by the United Kingdom following the *Matthews* judgement in which the European Court of Human Rights held that the United Kingdom had infringed Article 3 of Protocol No 1 to the ECHR through not holding European Parliamentary elections in Gibraltar. EPRA 2003 was adopted in order to enable the Gibraltar electorate to take part in such elections. Section 9 of the Act provides the combination of Gibraltar with an existing electoral region in England and Wales to form a new, “combined” electoral region for the purposes of

¹ _____
¹⁵⁰ Danelius H, p. 88.

European Parliamentary elections. In accordance with this provision, the British authorities combined Gibraltar with the southwest region of England by the European Parliamentary Elections (Combined Region and Campaign Expenditure) (United Kingdom and Gibraltar) Order 2004. Section 14 of EPRA 2003 creates an electoral register in Gibraltar for the European Parliament (the Gibraltar register), and section 15 confers the right to vote on those registered in that register on the day of the poll.

According to section 16, which specifies who is entitled to be enrolled in the Gibraltar register, a person is entitled to be registered if, on the relevant date, he or she is: resident in Gibraltar, not subject to legal incapacity to vote in Gibraltar at a European Parliamentary election (age apart), a “qualifying Commonwealth citizen” (hereinafter QCC) or a citizen of the European Union (other than a QCC) and at least 18 years old. A person is also entitled to be registered in the Gibraltar register if, on the relevant date, he or she is: not resident in Gibraltar but qualifies for registration in Gibraltar as an overseas elector, not subject to legal incapacity to vote in Gibraltar at a European Parliamentary election (age apart), a Commonwealth citizen and at least 18 years of age. The “relevant date” is the date in which an application for registration has been made or is treated as having been made. A QCC is, in the meaning of the EPRA 2003 a Commonwealth citizen who does not, under the law of Gibraltar, require a permit to enter or to remain in Gibraltar or, who for the time being has (or is by virtue of any provision of the law of Gibraltar to be treated as having) a permit of certificate entitling him to enter or remain in Gibraltar. The term QCC covers certain non-British third country nationals.

Detailed arrangements for the conduct of the June 2004 European Parliamentary election were made by the Secretary of State for Constitutional Affairs in the European Parliamentary Elections Regulations 2004, and in the European Parliamentary Elections Ordinance 2004, adopted by the Gibraltar House of Assembly.

5.3.3 C-145/04 Espagne/Royame-Uni

5.3.3.1 Pre-litigation

Following a broad exchange of correspondence, Spain filed a complaint with the European Commission pursuant to Article 227 EC against the United Kingdom on 27 July 2003, alleging that EPRA 2003 was contrary to Community law. According to Spain, the Act violates Articles 17, 19, 189 and 190 of the EC Treaty dealing with citizenship of the Union and with the European Parliament, because franchise is granted to persons who are not nationals of the United Kingdom and therefore not EU citizens. Spain further claims that EPRA 2003 violates Annex II to the 1976 Act on elections of representatives to the European Parliament, because it incorporates Gibraltar into an existing electoral region in England and Wales, creating a “combined electoral region”.

An oral hearing with both parties was held by the Commission on 1 October 2003. Both parties submitted written observations on 3 October 2003.¹⁵¹ The European Commission adopted a declaration on 29 October 2003 in support of the United Kingdom, revealing that the opinion of the Commission is that the United Kingdom has organised the extension of voting rights to residents in Gibraltar within the margin of discretion given to Member States by present EU law. The Commission did, however, refrain from adopting a reasoned opinion within the meaning of Article 227 of the Treaty, given the sensitivity of the underlying issue, and invited the parties to find a solution without resorting to litigation. The Commission points out that “there is no general principle of Community law according to which the electorate in European Parliament elections cannot be extended beyond EU citizens.” The Commission was granted leave to intervene in support of the United Kingdom by order of the President of the Court of 8 September 2004.¹⁵²

5.3.3.2 The action

According to Spain the action covered only elections as they are organised in Gibraltar and not the United Kingdom’s recognition of the right to vote for the European Parliament of QCCs resident in the territory of the United Kingdom. Spain raised two pleas in law supporting its action. Firstly, it claims that the EPRA 2003 constitutes an infringement of Articles 189, 190, 17 EC and 19 EC through enabling persons who are not nationals of the United Kingdom for the purposes of EC law to vote in European Parliamentary elections. The second plea consist in a claim that the creation of a combined electoral region is contrary to the 1976 Act and the commitments made by the UK Government in its Declaration of 18 February 2002.

5.3.3.2.1 On the first plea in law, concerning the alleged infringement of Articles 17, 19, 189 and 190 EC

5.3.3.2.1.1 Spain’s arguments

Spain claims that, according to Community law, in particular the Articles 17, 19, 189 and 190 EC interpreted historically and systematically, the right to vote and to stand as candidates in European Parliamentary elections belongs to citizens of the European Union alone. Therefore, the United Kingdom is in breach of EC law, since it has conferred the right to vote on QCCs who are not nationals of a Member State. The United Kingdom has defined several categories of British citizens which have rights that differ according to the nature of their ties to the United Kingdom. Referring to paragraph 24 of the Court’s judgement in the *Kaur* case, Spain claims that

1 _____

¹⁵¹ Report for the hearing in Case C-145/04 paragraph 23.

¹⁵² European Commission Press Release (IP/03/1479).

the declarations made by the United Kingdom in that regard must be taken into consideration when determining the scope of the EC Treaty rationae personae. QCCs are indisputably not within the categories set out in the 1982 Declaration. Article 17 (1) EC links citizenship of the Union to nationality of a Member State. QCCs are therefore not EU citizens. Spain sustains that only citizens of the EU can have the right to vote in European Parliamentary elections. This is supported, on the one hand, by the direct link between citizenship of the Union and nationality of the Member States, and on the other by enjoyment of rights conferred by the EC Treaty.

“Article 190 EC, which recognises the rights to vote and to stand as a candidate, and Article 17(2) EC, which states that citizens of the Union are to enjoy the rights conferred by the Treaty, must be construed systematically. Any extension of those rights to other persons requires an express reference, either in the Treaty or in a provision of secondary legislation granting it. Since recognition of the rights to vote and to stand as candidate thus comes within the powers of the Community, any change in the scope of persons entitled to such rights can be effected only by Community law.”¹⁵³

The 1976 Act does not contain a provision for a uniform electoral procedure. The electoral procedure continues to be governed by the national provisions of the Member States. However, according to Spain, the determination of the persons entitled to vote is already regulated by Articles 189 and 190 EC, in conjunction with Articles 17 and 19 EC, in a way that is binding for the Member States. Spain claims that Article 19 (2) EC, that confers on EU citizens the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which they reside under the same conditions as nationals of that State, as well as Directive 93/109, which lays down the detailed arrangements for the exercise of the electoral rights, illustrate that a link exists between nationality and the right to vote. A QCC, within the meaning of EPRA 2003, residing in another Member State cannot exercise his right to vote in the State in which he or she resides under those provisions.

Another point that Spain makes to support its claim is that Article 39 of the Charter of Fundamental Rights, which uses the expression “Every Citizen of the Union”, as opposed to a term like “everyone” or an expression referring to national law.¹⁵⁴ Regarding the expression “peoples of the States” in Article 189 EC, Spain underlines that the provision does not regulate the right to vote in elections and that the provision was in the Treaty much before the concept of citizenship was introduced by the Treaty on European Union. According to Spain, the expression “peoples of the States” refers to persons sharing the same nationality and not all the persons residing in a country. In several of the Member states constitutions the term “people” is used as meaning “nation”.

1 _____

¹⁵³ Report for the hearing in Case C-145/04, paragraph 31.

¹⁵⁴ Report for the hearing in Case C-145/04, paragraph 34.

Spain does not approve of the argument that the rights flowing from European citizenship can have different application since it, according to Spain, would mean dismembering citizenship of the Union. “In its submission, one of the characteristics that define citizenship is unitary, that is to say that all holders of the status should have full rights and obligations.”¹⁵⁵

Lastly, Spain cites the Treaty establishing a Constitution for Europe (OJ 2004 C 310, p. 1). In the proposed Treaty, the link between the right to vote for the European Parliament and European citizenship is explicit. Citizens of the Union shall have the right to “vote and to stand as candidates in elections to the European Parliament” according to Article I-10(2) (b), and “the European Parliament shall be composed of representatives of the Union’s citizens”, as established by Article I-20(2). Article I-46(2) states that “citizens are directly represented at Union level in the European Parliament”.

5.3.3.2.1.2 United Kingdom’s arguments

The United Kingdom presents historical reasons to explain the decision to continue to accord the franchise to resident citizens of other Commonwealth countries. “Thus, in particular, QCCs, that is to say Commonwealth citizens who do not require, or who have, leave to enter and remain in the UK, are, subject to residence there, entitled to vote in UK Parliamentary elections. The law provided, likewise, that QCCs in the United Kingdom have the right to vote in elections to the European Parliament, and thus more than one million such QCCs have taken part in those elections since 1978.”¹⁵⁶ To recognize the principle that QCCs may not vote in Elections to the European Parliament would force the United Kingdom to deprive a large number of people, resident in Gibraltar and the United Kingdom, of their traditional right to vote.

The United Kingdom, with the support of the Commission, disputes the conclusion that Spain draws from paragraph 24 of the *Kaur* judgement. Pointing out that the scope of the provisions of the Treaty vary as to the persons covered according to their subject-matter, it underlines that *Kaur* concerned only the provisions concerning the freedom of movement of persons and the rights consequent on citizenship in that regard. According to the United Kingdom, the 1982 Declaration has a limited purpose and was not intended to define the categories of the persons entitled to vote in elections to the European Parliament. It is not to be understood as meaning that the United Kingdom “there expressed the intention to withdraw that franchise from United Kingdom QCCs who were entitled to it since the first direct elections to the European Parliament. In addition, the United Kingdom has not gone against its own declaration by extending the right to

1 _____

¹⁵⁵ Report for the hearing in Case C-145/04, paragraph 36

¹⁵⁶ Report for the hearing in Case C-145/04, paragraph 38

vote for the European Parliament to Gibraltar QCCs.”¹⁵⁷ The United Kingdom, once again supported by the Commission, also considers that the Untied Kingdom was entitled to extend the right to vote and to stand as a candidate for the European Parliament to persons that are not citizens of a Member State, since there is no general principle of Community law that prohibits this. EC law does not regulate the right to vote and to stand as a candidate for the European Parliament in its entirety. Article 190(4) confers a power on the Community to define a “uniform procedure in all Member States or in accordance with principles common to all Member States”, a power that the Community has exercised only by the 1976 Act. Article 7 of that Act refers to the Member States’ national provisions for matters not governed by the 1976 Act. “The general principles of Community law must be complied with. Since the 1976 Act does not define the categories of persons entitled to vote in elections for the European Parliament, it is compatible with the Act that that question could be governed by the EPRA 2003.”¹⁵⁸

According to the United Kingdom, Article 19(2) and Directive 93/109 do not preclude the right to vote to non-citizens, being, as they are, essentially intended to remove the nationality requirement, not to define the right to vote. The third recital in the preamble to Directive 93/109 provides that the right to vote and to stand as candidate in elections to the European Parliament in the Member State of residence “is an instance of the application of the principle of non-discrimination between nationals and non-nationals and a corollary of the right to move and reside freely”.

United Kingdom disputes that the expression used in Articles 189 and 190 EC, “peoples of the States brought together in the Community” is to be understood as necessarily meaning “nationals of the Member States”. Instead it points out that it could equally well define those residing within a territory. According to the United Kingdom, the wording could have been changed, in particular at the time of the adoption of the Treaty on the European Union. But no change has been made, the terms “nationals” or “citizens of the Union are not used”. No link between Union citizenship and the right to vote in European Parliamentary elections is therefore to be established on the basis of those provisions.

The United Kingdom, supported by the Commission, points out that, in regard of Article 17 (2) EC, the EC Treaty confers certain rights on non-citizens, such as the right to petition the European Parliament and to apply to the Ombudsman. Some rights that the Treaty confers only on citizens can be extended by Member States to non-citizens, such as the right to the protection of the diplomatic or consular authorities. The same applies for rights of political participation. The United Kingdom does not think this entails “dismembering Union citizenship”.¹⁵⁹

1

¹⁵⁷ Report for the hearing in Case C-145/04, paragraph 40

¹⁵⁸ Report for the hearing in Case C-145/04, paragraph 42

¹⁵⁹ Report for the hearing in Case C-145/04, paragraph 46.

The granting of the right to vote to QCCs has no effect on the institutions of the Union or on other Member States and can affect only the identity of the representatives returned to the European Parliament from the constituencies of the United Kingdom.¹⁶⁰

The United Kingdom is supported by the Commission when pointing out that Article 39(1) of the Charter of Fundamental Rights must be interpreted in accordance with Article 53 of the same charter. The provision should be interpreted as not permitting limitation of the right to vote which is currently conferred on third country nationals by a Member State.

The Treaty establishing a Constitution for Europe has still to come into effect and is therefore to be considered irrelevant. In any event, the Articles of that treaty referred to by Spain do not necessarily exclude third country nationals from the franchise, nor do they prescribe in any manner the way in which Member States set conditions for the franchise. Nor does Article III-330, that like Article 190(4) EC empowers the Council to adopt measures for the election of Members of the European Parliament, seek to limit the Council's discretion. Member States did not agree upon the right to vote of third country nationals during the creation of the Treaty establishing a Constitution for Europe, leading to unilateral Declarations appended to the Constitution, in particular the United Kingdom Declaration 48 on the right to vote in elections to the European Parliament.¹⁶¹

5.3.3.2.1.3The Commission's arguments

The Commission points out that no link between the legitimacy of public power and nationality exists in all Member States. "It is appropriate to take account of different approaches, such as that resulting from the constitutional tradition of the United Kingdom."¹⁶² The Commission submits that the concept of Union citizenship is only infringed where citizen's rights are infringed. The fact that a Member State in accordance with its own historical traditions under certain conditions extends the right to vote in elections to the European Parliament to third country citizens resident within the territory of the Member State does not encroach on the right to vote of citizens of the Union.

The Commission disputes that the wording of Article 39 of the Charter of Fundamental Rights should be understood as requiring the right to vote in European Parliament elections to be limited to EU citizens.

The concept of European citizenship is fundamental to the union, but so is the commitment to respect the national identities of the Member States. An expression of that principle is Article 7 of the 1976 Act which provides that

1

¹⁶⁰ Report for the hearing in Case C-145/04, paragraph 47.

¹⁶¹ Report for the hearing in Case C-145/05, paragraph 49.

¹⁶² Report for the hearing in Case C-145/04, paragraph 45.

national provisions on the procedure for European elections may take account of the specific situation in the Member States, if appropriate.¹⁶³

5.3.3.2.2 On the second plea in law, concerning the alleged breach of the 1976 Act and of the commitments made by the United Kingdom Government in its Declaration of 18 February 2002

5.3.3.2.2.1 Spain's arguments

Spain claims that the United Kingdom is in breach of Annex II to the 1976 Act since it provides for the combination of Gibraltar, which is not part of the United Kingdom, with an existing electoral region in England or Wales. Annex II to the 1976 Act is a provision of primary EC law and excludes Gibraltar from European Parliamentary elections. “The United Kingdom should have limited itself to including the electors resident in Gibraltar in a UK electoral region in their capacity as persons who hold United Kingdom nationality under the terms of the 1983 Declaration.”¹⁶⁴

EPRA 2003 provides for the application of complementary electoral legislation to Gibraltar itself, according to Spain. An example is that section 14(2) of the EPRA 2003 provides that the electoral registration officer is the Clerk of the House of Assembly of Gibraltar, not an agent of the British Crown. Another example is that local courts of Gibraltar have jurisdiction to hear election petitions. Moreover, section 28(2) of the EPRA 2003 defines its territorial scope as being the United Kingdom and Gibraltar.

According to Spain, the inconsistency of the EPRA 2003 with Annex II to the 1976 Act also means that the United Kingdom has disregarded its Declaration of 18 February 2002, a unilateral declaration which creates an international law obligation by which the United Kingdom has obligated itself in favour of Spain to implement the *Matthews* judgment in compliance with EC law.

5.3.3.2.2.2 The United Kingdom's arguments

The United Kingdom is supported by the Commission when arguing that, “by applying by analogy the decision in Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8, Annex II to the 1976 Act must be construed, as far as possible, in the light of, and consistently with, fundamental rights. In this case, Annex II to the 1976 Act can be construed as meaning that the United Kingdom legislature was entitled to include the Gibraltar electorate in the United Kingdom electorate.”¹⁶⁵

1

¹⁶³ Report for the hearing in Case C-145/04, paragraph 50.

¹⁶⁴ Report for the hearing in Case C-145/04, paragraph 51.

¹⁶⁵ Report for the hearing in Case C-145/04, paragraph 54.

The method used, referring to the territory of Gibraltar, is inherent in the United Kingdom electoral system and does not result in treating Gibraltar as if it were part of the United Kingdom. “Since the electorate is defined by reference to the same three types of eligibility condition as apply in the United Kingdom — citizenship/status, residence and registration — it is plainly necessary to refer to the place where a person, in order to qualify for the franchise, must reside, in this case Gibraltar, to fulfil the United Kingdom’s commitment to enfranchise the Gibraltar electorate ‘on the same terms as’ an existing United Kingdom constituency.”¹⁶⁶

5.3.3.2.2.3 The Commission’s argument

The Commission is of the opinion that the discretion left to the Gibraltar legislature is narrow and that the EPRA 2003 provides for mechanisms ensuring sufficient control by the United Kingdom’s own authorities.

5.3.3.3 The oral hearing of 5 July 2005

On the 5th of July 2005 at the Court of Justice in Luxembourg a hearing was held in the case C-145/04 and in the case C-300/04 that I will be dealing with below. The Court of Justice chose to deal with the two cases together since they deal with connected subject matters. I had the privilege of attending these two hearings, and what follows is based on my own notes from the hearing.

5.3.3.3.1 Spain

The representation for the Spanish government pointed out that the so-called “Brussels Process”, is still in force and ongoing. The “Brussels Process” is a negotiation process between United Kingdom and Spain, dealing with, among other things, the sovereignty of Gibraltar. It has been going on since 1984, but with little progress.¹⁶⁷ According to the Spanish government it has repeatedly pointed out that the United Kingdom treats Gibraltar as a part of the United Kingdom, since it has been inserted into an already existing electoral region. Spain sees the combined electoral region as an attempt to illegally and unilaterally change the status of Gibraltar, and cannot accept that.

The EPRA 2003 allows electoral petition to be brought before the Court of Gibraltar. According to Spain, the territorial application to Gibraltar is ruled out by the 1982 Declaration.

1

¹⁶⁶ Report for the hearing in Case C-145/04, paragraph 55.

¹⁶⁷ Gibraltar <<http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmselect/cmfaff/973/97304.htm>> (accessed January 18, 2006).

According to Spain, the franchise granted by the EPRA 2003 could lead to negative consequences. The EPRA 2003 grants the right to vote to non-nationals residing in Gibraltar and even to non-nationals not residing in Gibraltar. The lawyers representing the Government of Spain made an example: a Nigerian with no links to the EU who has formerly been resident in Gibraltar and would need a visa for entering the United Kingdom and Spain, could have the right to vote in European Parliamentary elections, even though this could be a non-desirable person.

It is the opinion of Spain that it is not within the competence of the single Member State to extend the right to vote to non-nationals. Granting franchise to persons that are not EU citizens is in theory acceptable, but to make that possible, decisions would have to be made on EU level. It can not be done simply by a Member State act like the EPRA 2003. If the point of view of the United Kingdom were to be followed, there would be persons entitled to the franchise in elections to the European Parliament, but not to other rights belonging to EU citizenship. This is unacceptable given the Spanish point of view that citizenship is a unitary concept.

5.3.3.3.2 The United Kingdom

The barristers representing the government of the United Kingdom commenced by pointing out that the case is a result of the response of the United Kingdom, in good faith, to the *Matthews* judgement of the Court of Strasbourg, in which the United Kingdom was held guilty of denying the people of Gibraltar a fundamental right. The United Kingdom is entitled as well as obliged to comply with the *Matthews* judgement. Spain complains about the way in which this has been done. The United Kingdom does, however, wish to make it clear that the United Kingdom wanted to remove Annex II to the 1976 Act, but that this was blocked by Spain. Therefore, the United Kingdom had to find another solution for the implementation of the *Matthews* judgement, which is why a bilateral agreement was made with Spain. It was accepted that the Gibraltar electorate should be able to vote like any other United Kingdom voters.

As regards the territorial complaint made by Spain in relation to the “combined electoral region”, the United Kingdom strongly contested the validity of the Spanish statement that Gibraltar is “considered a part of the UK”. The United Kingdom fervently emphasised that that is entirely inaccurate. Gibraltar has never been a part of the United Kingdom, a fact that has not changed over the years. For electoral purposes, Britain is divided into constituencies. Gibraltar is too small to form its own electoral district, and therefore it had to be combined with another, already existing, constituency, for practical purposes only. This entails no territorial consequences. Spain objects to the maintenance of an electoral register in Gibraltar. The United Kingdom is of the opinion that it is self-evident that the electoral register has to be kept where the voters are, so that it is possible to inspect it. With regard to the Spanish complaint about the fact

that the voters are entitled to vote in Gibraltar, the United Kingdom representation submitted that the rest of the voters of the constituency are allowed to vote close to home. This should not be different for the voters in Gibraltar. Election petitions can be brought before the court of Gibraltar, but a challenge of the election must be brought before a United Kingdom court.

The United Kingdom underlined that the right to enter and remain in Gibraltar is determined by the law of Gibraltar. There are longstanding links between the United Kingdom and the Commonwealth countries. The United Kingdom intends to continue to grant voting rights to QCCs. It does not see it as a question of a Member State inventing a vast extension of the right to vote in European Parliamentary elections, but merely as an application of an existing constitutional tradition. The Spanish position that EC law only allows citizens of the Member States to vote in elections to the European Parliament, would only affect about 200 persons in Gibraltar, but one million persons in the United Kingdom, many of which are of Pakistani or Indian origin. These persons have voted since the beginning of direct elections to the European Parliament. The United Kingdom representation pointed out that it would be very ironic if the *Matthews* decision aiming to give the right to vote to people that do not have it, would have as a consequence to deprive more of a million people of their vote. The United Kingdom acknowledged that there are many models according to which nationality is an essential requisite for the right to vote, but emphasized that there are other models, and that the word “peoples” in Article 189 EC, regarding the European Parliament, is not to be read, as Spain suggests, as referring to only nationals or citizens. Instead, the United Kingdom claims that it is significant that the founders of the treaties chose to use the word “peoples” and not “nationals” or “citizens”.

The United Kingdom also pointed out that Article 6.3 of the EU Treaty establishes that the EU shall respect the national identities of its Member States.

5.3.3.3.3 The Commission

The Commission intervened on the side of the defendant, the United Kingdom. It pointed out that, although Article 190(4) EC speaks about a uniform electoral procedure, there is no EC legislation governing the subject matter of the litigation at hand and national law, which however has to be in compliance with EC law, therefore governs it. The Commission repeated that there is no express article in the treaties prescribing that only EU citizens can vote in the European Parliamentary elections. In Europe there is a divergence of constitutional traditions. The Union should respect the constitutional traditions of its Member States. Article 39 of the Charter of Fundamental Rights grants voting rights to all Union citizens, also those residing in their own state. According to the Commission it would hardly be a good solution to give the right to vote to the people of Gibraltar but only

by correspondence, or obliging them to go to Southern England in order to exercise the given right.

5.3.3.3.4 Questions of the Court and additional comments by the parties and the Commission

The members of the Court of Justice of the European Communities addressed some questions to the parties. For instance, a question was made regarding the nature of the constitutional traditions of the United Kingdom, referred to by the United Kingdom counsel. The United Kingdom replied that, in the past, there have been bilateral arrangements with the Commonwealth countries. Today, however, the United Kingdom grants these rights unilaterally to Commonwealth citizens.

Spain reconfirmed that it does not deny the possibility of citizens of a third country voting in the European Parliamentary elections, but that it retains that this has to be established explicitly in primary or secondary EC legislation. The question of competence is for Spain the fundamental issue of the case.

5.3.4 Adjacent case C-300/04 Eman & Sevinger

The Court of Justice chose to deal with the Gibraltar case in connection with the case C- 2007/04 *M.G Eman and O.B. Sevinger v. College van burgemeester en wethouders van Den Haag*, which is a reference for a preliminary ruling by the Raad van State by decision of that court of 13 July 2004.

5.3.5 Questions referred to the Court of Justice of the European Communities¹⁶⁸

1. Does Part Two of the Treaty apply to persons who possess the nationality of a Member State and who are resident or living in a territory belonging to the overseas countries and territories (hereinafter OCTs) referred to in Article 299(3) EC and having special relations with that Member State?
2. If the answer is no: are the Member States free, in the light of the second sentence of Article 17(1) EC, to confer their nationality on persons who are resident or living in the OCTs referred to in Article 299(3) EC?
3. Must Article 19(2) EC, read in conjunction with Articles 189 EC and 190 (1) EC, be construed as meaning that-apart from the not unusual exceptions in national legal systems relating to, *inter alia*, deprivation of voting rights in connections with criminal convictions and legal incapacity – even in the case where the persons concerned

¹ _____
¹⁶⁸ OJ C 228, 11.09.2004, p. 28.

are resident or living in the OCTs, the status of citizen of the Union automatically confers the right to vote and to stand as a candidate in elections to the European Parliament.

4. Do Articles 17 EC and 19(2) EC, read together and considered in the light of Article 3 of the Protocol, as interpreted by the European Court of Human Rights, preclude persons who are not citizens of the Union from having the right to vote and to stand as candidates in elections to the European Parliament?
5. Does Community law impose requirements as to the nature of the legal redress to be provided in the case where the national courts — on the basis of, *inter alia*, the answers given by the Court of Justice of the European Communities to the above question — conclude that persons resident or living in the Netherlands Antilles and Aruba and having Netherlands nationality were improperly refused registration for the elections of 10 June 2004?

5.3.6 Background

At present, the Dutch citizens that have the right to vote in European Parliamentary elections are those that have been residing in Holland for at least ten years, something that Mike Eman and Benny Sevinger, the appellants in the main proceedings before the Dutch courts, found discriminatory. Mr Eman and mr Sevinger are Dutch citizens, Aruba political leaders and they live in Oranjestad in Aruba. They were refused to register as voters for the elections to the European Parliament in June 2004.¹⁶⁹

5.3.7 Arguments discussed at the oral hearing of 5 July 2005

5.3.7.1 The relevant legal entity.

The parties discussed who is a Member of the European Union, the Netherlands which is situated in Europe or the Kingdom of the Netherlands which includes Aruba and the Dutch Antilles. The appellants, though stating that the issue is far from clear, are of the opinion that the statutory kingdom is the legal entity in this case, whereas the Dutch government claims that the Netherlands has ratified the Treaty only on behalf of the European part of the Kingdom, not on behalf of the three countries.

5.3.7.2 A unitary concept of citizenship?

According to the appellants, the OCT status does not lead to a restriction of the right to citizenship. The concept of nationality is unitary, Dutch nationals born in Aruba are EU citizens. The appellants argue that the EC

1 _____

¹⁶⁹ Rapport ter terechtzitting in Zaak C-300/04, paragraph 2.

Treaty has a personal, not a territorial, scope, and therefore a Dutch citizen born and living in Aruba should have the same rights in Aruba and in the Netherlands as he or she would have abroad. At present, Aruba nationals are excluded from voting to the Dutch first and second chamber.

The Dutch government explains that in general, Dutch nationals living abroad have the right to vote. But there are different situations to be considered. Dutch nationals living abroad for work-related reasons have strong links with the Netherlands. Persons from Aruba or the Dutch Antilles do not, in general, have that kind of connection to the European part of the Kingdom of Netherlands. However, the Dutch governments admits that Aruba nationals who go to other Member States of the EU can invoke the right to vote in the European Parliamentary election in the other Member State.

The Spanish Government intervened concerning number 4 of the questions referred to the Court of Justice. It repeated the argument put forward during the hearing for the Gibraltar-case that there is a connection between Member State nationality and franchise of the right to vote in elections to the European Parliament. The Spanish government supports a unitary concept of citizenship; all EU citizens must enjoy the same rights.

The Government of the United Kingdom points out that Dutch citizens resident in Aruba have the right to petition to the European Parliament and to make complaints to the European Ombudsman. A petition to the European Parliament must concern something within European Community competence; it must concern the petitioner directly.

The Commission adds that Dutch nationals from Aruba have the right to diplomatic protection from other Member States when abroad.

5.3.7.3 The European Parliament— a legislator for Aruba?

The appellants point out that although the OCTs are not part of the EC Internal Market, they are not third countries but part of the Member States. The relationship between the OCTs and the EU has never been clear. The European Parliament legislation affects also Aruba, because EC law intertwines with Dutch legislation that has consequences for Aruba. Aruba takes part in implementing EC policy. The residents of Aruba should be entitled the right to vote in the European Parliamentary elections.

The Dutch government contradicts the statement of the appellants by clarifying that every country within the Kingdom of the Netherlands has its own parliament. Therefore, they claim, the European Parliament cannot be seen as the legislator for Aruba. EC legislation does not in general apply to Aruba, but Aruba sometimes, on a voluntary basis, accepts that certain EC legislation applies to it.

The Commission is of the opinion that the answer, from a legal point of view, to the question if the European Parliament **is** a legislator for Aruba must be negative. However, certain measures taken under the third pillar apply to Aruba. The Commission asks the question: Does the European Parliament have legislative power under the third pillar? It has certain co-decision powers. Does that make it a legislator? It also points out that it should be borne in mind that the national legislator acts on behalf of the Community legislator. However the European Parliament exercises powers upon the OCTs is an issue open to debate, according to the Commission.

5.3.7.4 Does the Dutch legislation exceed Member State discretion?

The appellants claim that according to the EU Treaty, a citizen of the European Union is a person that is in possession of the citizenship of any Member State. As part of the Kingdom of the Netherlands, Aruba and Netherlands Antilles citizens possess the Dutch nationality. The fact that Aruba citizens have to reside in Holland for ten years in order to be able to vote in the European Parliamentary elections is something that the appellants find discriminatory.

The Dutch government points out that this arrangement is not beyond what lies within the discretion of the Member States. There is no harmonisation in this area; the discretion of the Member States is wide.

According to the Government of France, EC law *allows* Member States to grant residents of their OCTs grant franchise in the European Parliamentary elections, it does not *preclude* or *oblige* them to do so. The EU Treaty does not include any territorial clause. France did not make a statement to exclude the OCTs when ratifying the Treaty. The French electoral code does not differentiate between French nationals living in France and French nationals living in the OCTs, but the French government acknowledges the differences between the Dutch and the French situations and points out that the decision must rest with the Dutch legislators.

The Government of the United Kingdom is of the opinion that the Netherlands has not manifestly exceeded the bounds of its discretion.

The Commission agrees that the Member States have far reaching discretionary powers when it comes to giving franchise to residents of their OCTs, but still question is how the Dutch did arrive at the relevant legal order. The Dutch law focuses on “real” Dutch people, abroad for work-related reasons. A bizarre consequence of the Dutch legislation is that a person from Aruba, denied the right to vote in European Parliamentary elections in Aruba or in the Netherlands if not fulfilling the ten year

residence requirement, would be allowed vote if he was to take up residency in Peking or in any other country of the world. The Commission does not wish to interfere with the competence of the Netherlands, but it requires that the legislation remains consistent with the model chosen, and that it does not discriminate against groups or individuals.

6 Conclusion

Kristine Krüma notes, in relation to the Matthews-ruling, that “member States can be in violation of rules and principles of international law. Those rules and principles the ECJ has recognised as binding for the Community as well but within their sphere of competence. This means that a denial of Community rights to a group of persons entitled to benefit in accordance with international human rights law lies outside Community competence. This awkward construction seems to be strange indeed.”¹⁷⁰

As we have seen, the case law of the European Court of Justice has developed so as to embrace human rights and fundamental freedoms to an increasing extent. The economic heritage of the ECJ does, however, still shine through, and human rights continue to be assessed by the Court in relation to the traditional aims and purposes of the Union. The Community court has been accused of prioritising the Community’s financial aims over Human Rights protection. The ECtHR, on the other hand, was created specifically to ensure Human Rights in Europe. In contrast to the European Court of Justice, however, it lacks the possibility to directly sanction its interpretations of the Convention.

The relationship between the two courts is not entirely clear. What once appeared to be a horizontal relationship nowadays appears to have a more vertical character. This can be illustrated by cases like *Roquette Frères* of the ECJ and *Matthews* of the European Court of Justice dealt with above. Also *Senator Lines* dealt with the responsibility of Member States for acts of the EU institutions in breach of the ECHR. Senator Lines complained about a fine that the Commission had imposed upon it for breach of competition law. Senator Lines brought all 15 states at the time members of the EU before the ECtHR. However, the case was declared inadmissible.¹⁷¹ In June 2005, the Strasbourg Court handed down the judgement in the case of *Bosphorous v. Ireland*.¹⁷² The judgement draws attention to the fact that the problem of protection of fundamental rights in the EU cannot be solved without the involvement of the European Court of Human Rights, which, in the judgement, did not reject systematic involvement in the legal order of the European Union. In the case at hand, however, the Human Rights Court restricted itself to reviewing the national measures in favour of the EC regime. The ECtHR clearly sees itself as a controlling instance in relation to the European Court of Justice, when it comes to matters to which the European Convention is applicable.

1 _____

¹⁷⁰ Krüma K, p 17.

¹⁷¹ Senator Lines v The 15 Member States, Decision by the European Court of Human Rights of 10 March, 2004.

¹⁷² Bosphorous v Ireland, Judgment of the European Court of Human Rights of 30 June 2005.

In my opinion, the Community courts ought to endeavour to avoid giving judgements that are incompatible with those of the Strasbourg court. The fact that the United Kingdom had to respect the *Matthews* judgement is undisputed. What Spain objects to is how it was done. According to Spain, franchise cannot be given to non EU-citizens without a decision on the Community level. What Spain fears is the creation of a new class of European citizenship through the back door. Given the sensitivity of the Gibraltar issue described above, the aspirations of the Spanish government to challenge everything the United Kingdom undertakes in relation to Gibraltar are easily explicable.

It is clear that Member States are in dispute over the right to vote of third country nationals. The situation in Europe is multifaceted, and the complex of problems that stems from Commonwealth traditions and legal rules is just one part of this fragmented entirety. As has been described above, the Netherlands also faces complex issues due to its colonial past. The Baltic States face a different challenge because of the large groups of Russians resident in their territories. We have seen that the United Kingdom and the Commission are of the opinion that there is no general principle of Community law which prohibits the extension of the right to vote and to stand as a candidate for the European Parliament to nationals of non-Member States. I agree with the United Kingdom: the conclusion that Spain draws from the *Kaur* judgement is questionable. It is not realistic to believe that the United Kingdom, when making the 1982 Declaration, intended to withdraw franchise from United Kingdom QCCs who had already been entitled to vote in European Parliamentary elections. The right to vote is a fundamental right of great importance although it can be restricted.

I do not find any of the Spanish arguments convincing enough to support a ruling by the ECJ against the United Kingdom. At first glance, the idea of a unitary concept of citizenship appeared self-evident to me, being accustomed to the concept of citizenship in a legal system of the Swedish type. Having worked with this thesis it has become clear to me that the Member States of the EU have very different traditions in this regard. For instance, citizenship matters in Member States like the United Kingdom and the Netherlands are far more multifaceted and disjointed, as evident from the account above.

In a situation in which two or more interpretations are possible, one leading to more extensive, another to more restrictive franchise, I find it in line with general principles of law to make the choice in favour of the interpretation of the Treaties that involves a more extensive franchise. I see similarities with the principle of *favor libertatis* of Roman law, inspired by stoic philosophy, according to which in situations of *manumissio*, an act through which a master could release a slave from his authority, if two different interpretations were possible, one of which implied giving freedom to the slave and another that would have conveyed the opposite result, the continuation of slavery, precedence was given to the interpretation in favour

of freedom. Other similar principles were *favor testamenti* (in favour of the will) and *favor dotis* (in favour of the dowry).¹⁷³

There are, however, other aspects to be taken into consideration, for instance what can be decided solely within the competence of the Member State, and what must be decided on Community level. I am of the opinion that EC law does not regulate all aspects of franchise in European Parliamentary elections. The 1976 Act refers to Member States' national provisions for matters not governed by it. It is therefore compatible with the 1976 Act that EPRA 2003 defines the categories of persons entitled to vote in elections to the European Parliament, since the 1976 Act in itself contains no such provisions.

As has been expressed above, there does not exist, in all Member States, a link between the legitimacy of public power and nationality. It is therefore appropriate to consider different approaches, such as that of the United Kingdom. "The practice of EU Member States in relation to third country nationals is not uniform. The most liberal country in the EU is Sweden, which since 1975 has allowed third country nationals who are legally residing in Sweden for 3 years to vote in local elections as well as national referendums. Great Britain has adopted a similar approach to citizens of overseas territories."¹⁷⁴ I do not see how granting third country nationals rights of political participation on the European level can be considered an infringement of the concept of EU citizenship. The right to the protection of the diplomatic or consular authorities is conferred by the Treaty only to citizens, but it can be extended by Member States to non-citizens. No one has challenged this possibility by claiming that it entails "dismembering Union citizenship". I agree with the European Commission when it submits that the concept of Union citizenship is only really infringed when citizen's rights are infringed, because their exercise is denied or held back. I am of the opinion that the Court of Justice ought to rule in favour of the United Kingdom in the present case.

The real issue in the Gibraltar case, although not within the competence of the ECJ, is the underlying territorial conflict between Spain and the United Kingdom. Some of the Spanish arguments, such as the accusation that the United Kingdom has tried to change the status of Gibraltar under international law unilaterally through the creation of the combined electoral region, seem to be particularly vivid illustrations of this purely political conflict. The British argument that the method is inherent in the United Kingdom electoral system seems more plausible. The voters resident in Gibraltar are not numerous enough to constitute their own electoral district.

I believe that it was within the margin of discretion left to the Member States for the United Kingdom to enact and implement the EPRA 2003. I also think that it must be weighed in that the United Kingdom demonstrably

1

¹⁷³ Marrone M, p. 147.

¹⁷⁴ Krüma K, p. 31.

had tried to amend Annex II of the 1976 Act but that this had been stopped by Spain, and that the two countries had concluded a bilateral agreement according to which the United Kingdom was to ensure that the necessary changes were made in order to implement the *Matthews* judgment and therefore to enable Gibraltarians to vote in elections to the European Parliament on the same terms as the electorate of an existing constituency of the United Kingdom. The fact that very many QCCs in the United Kingdom would be disenfranchised through a judgement in favour of Spain is also of importance. It can hardly be considered just that the *Matthews* judgement of the ECtHR should lead to the disenfranchisement of a large group of people, instead of extending the right to vote, as was intended.

Due to the limited scope of this thesis, I have only had the chance to deal with C-300/04 *Evan & Sevinger* sketchily. I am generally in favour of the extension of franchise rather than its restriction. Restricted possibilities to participate in political processes may lead to marginalisation of the part of the society that is denied franchise. It remains a fact that the Member States have far-reaching discretionary powers in this area. In any case, they ought to respect the general principle of non-discrimination expressed for example in Article 21 of the Charter of Fundamental Rights of the European Union.

Whatever the ruling of the European Court of Justice will be in the Gibraltar case, the consequences will have a major impact. The case clearly illustrates the fact that questions of competence of Member States and the EU are still acute. The important thing is to establish who is to take the decision at a given level.

In contrast to the Spanish government, I do not believe that EC law, at present, regulates who is entitled to vote in European parliamentary elections, which means that it lies within the discretion of the Member States to decide who is to have that right. There is a need for harmonisation in this area. Both the Gibraltar case and *Evan & Sevinger* illustrate great confusion regarding the issue and it is difficult to find it satisfactory that a resident of the French Antilles is entitled to vote in the European Parliamentary elections but a resident of the Dutch Antilles is denied that right.

The same goes for citizenship of the Union. “The EU should take a chance to reconsider its approach to EU citizenship right from the beginning, taking into account current developments at both the EU and international level.”¹⁷⁵ What the concept implies is still not clear. Member States have very different traditions and legislations regarding citizenship, and until we have harmonisation in this area this kind of conflicts will continue to come up. Inflexible clinging to the principle that the rights and duties attached to the concepts of nationality and citizenship are completely left to the free will of each state will simply not do.

.

¹ _____

¹⁷⁵ Krüma K, p. 52.

Supplement

Relevant provisions

Article 3 of Protocol No 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter “Protocol No 1 to the Convention”) has the following wording:

“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

Article 17 EC establishes as follows:

“ 1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship.

2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby.”

The United Kingdom defined the term “nationals” in a declaration annexed to the Final Act of the Treaty concerning the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the European Communities (OJ 1972 L 73, p. 196). In connection with the entry into force of new legislation on nationality, that declaration was replaced by a further declaration in 1982 (OJ 1983 C 23, p.1, hereinafter “the 1982 Declaration”), which sets out the following categories:

“(a) British citizens;
(b) Persons who are British subjects by virtue of Part IV of the British Nationality Act 1981 and who have the right of abode in the United Kingdom and are therefore exempt from United Kingdom immigration control;
(c) British Dependent Territories citizens who acquire their citizenship from a connection with Gibraltar.”

Article 19 (2) EC reads as follows:

“Without prejudice to Article 190(4) and to the provisions adopted for its implementation, every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously on a proposal from the Commission and after

consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.”

In accordance with Article 19 (2), the Council adopted Council Directive 93/109/EC of December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals (OJ 1993 L 329, p. 34).

Article 189 (1) EC provides:

“The European Parliament, which shall consist of representatives of the peoples of the States brought together in the Community, shall exercise the powers conferred upon it by this Treaty.”

Article 190 EC is worded as follows:

“1. The representatives in the European Parliament of the peoples of the States brought together in the Community shall be elected by direct universal suffrage.

...

4. The European Parliament shall draw up a proposal for elections by direct universal suffrage in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States.

The Council shall, acting unanimously after obtaining the assent of the European Parliament, which shall act by a majority of its component members, lay down the appropriate provisions, which it shall recommend to Member States for adoption in accordance with their respective constitutional requirements.

...”

Article 7 of the 1976 Act reads as follows:

“Subject to the provisions of this Act, the electoral procedure shall be governed in each Member State by its national provisions.

These national provisions, which may if appropriate take account of the specific situation in the Member States, shall not affect the essentially proportional nature of the voting system.”

The 1976 Act contains an Annex II, with the following wording:

“The United Kingdom will apply the provisions of this Act only in respect to the United Kingdom.”

Bibliography

Literature

- Choate, Abigail *The European Parliament and the Democratic Deficit.* Publications by the Institute for European law at Stockholm University, No 22.1994.
- Corbett, Richard,
Jacobs, Francis,
and Schackleton,
Michael *The European Parliament.* 4th edition. John Harper Publishing. 2000.
- Craig, Paul, and
De Búrca, Grainne *EU Law. Text, cases and materials.* 3rd edition. Oxford University Press. 2003.
- Guild, Elspeth, and
Lesieur, Guillame *The European Court of Justice on the European Convention on Human Rights. Who said what, when?* Kluwer Law International. 1998.
- De Groot, Gerard-René *Towards a European Nationality Law— Vers un droit européen de nationalité.* Univeriteit Maastricht . Inaugural lecture. 2003.
- Delanty, Gerard Medborgarskap i globaliseringens tid.
Studentlitteratur. 2002.
- Krüma, Kristine *EU citizenship: unresolved issues.* RGSL Working Papers No. 22. 2004.
- Levie, Howard S. The Status of Gibraltar. Westview Press. 1983.
- Lokrantz Bernitz, Hedvig *Medborgarskapet i Sverige och Europa. Räckvidd och rättigheter.* Iustus Förlag AB. 2004.
- Marrone, Matteo *Istituzioni di diritto romano.* II edizione. G.B Palumbo & C.Editore S. P. A. 1994.
- Marshall, T. H. *Class, Citizenship and Social Development.* Doubleday & Company, Inc. 1964.

- Marshall, T. H. *Citizenship and Social Class*. Cambridge at the University Press. 1950.
- Prichard, A. M. *Leage's Roman Private Law. Founded on the INSTITUTES of Gaius and Justinian*. Third edition. Macmillan and ST Martins Press. 1967.
- Westlake, Martin A Modern Guide to the European Parliament. Pinter Publishers. 1994.

Articles

- Barber, Nick W. *Citizenship, Nationalism and the European Union*. Law, Politics and Morality: European Perspectives I. Globalisation, Democracy, and Citizenship—Prospects for the European Union. Edited by Jordi Ferrer and Marisa Iglesias. Duncker & Humboldt. Pages 200-226. 2003.
- Giovanelli, Adriano, Orlandi, Maria Angela, and Canepa, Aristide *Riforme elettorali, parlamento europeo ed integrazione comunitaria*. Sovranità, rappresentanza, democrazia. Rapporti fra ordinamento comunitario e ordinamenti nazionali. Casa Editrice Jovene. Pages 101-189. 2000.
- Danelius, Hans *Rösträtt i Gibraltar*. Europarättslig tidskrift. Pages 88-91. 2001.
- D'Oliviera, Hans Ulrich Jessurun *Union Citizenship: Pie in the Sky? A Citizen's Europe*. In Search of a New Order. Edited by Allan Rosas and Esko Antola. SAGE Publications. Pages 58-84. 1995.
- Guild, Elspeth *Citizens, Immigrants, Terrorists and Others*. The European Union Charter of Fundamental Rights. Edited by Steve Peers and Angela Ward. Hart Publishing. Pages 231-246. 2004.

- Lundberg, Erik *Political Freedoms in the European Union. A Citizen's Europe. In Search of a New Order.* Edited by Allan Rosas and Esko Antola. SAGE Publications. Pages 113-134.1995.
- Marias, Epaminondas A. *From Market Citizen to Union Citizen. European Citizenship.* Edited by Epaminondas A. Marias. European Institute of Public Administration/Institut européen d'administration publique. Pages 1-24. 1994.
- Preuss, Ulrich K. *Citizenship and Identity: Aspects of a Political Theory of Citizenship.* Democracy and Constitutional Culture in the Union of Europe. Edited by Richard Bellamy, Victorio Bufacchi & Dario Castiglione. Lothian Foundation Press. Pages 107-120. 1995.
- Rosas, Allan *Union Citizenship and National Elections. A Citizen's Europe. In Search of a New Order.* Edited by Allan Rosas and Esko Antola. SAGE Publications. Pages 134-155.1995.
- Timmermans Christiaan *Lifting the Veil of Union Citizens' Rights.* Une communauté de droit. Festschrift für Gil Carlos Rodríguez Iglesias. Edited by Ninon Colneric, David Edward, Jean-Pierre Puissochet, Dámaso Ruiz-Jarabo Colomer. Berliner Wissenschafts-Verlag. Pages 195-206. 2003.
- Tuori, Kaarlo *The many senses of European citizenship.* Europe in search of “meaning and purpose”. Edited by Kimmo Nuotio. Publications of the Faculty of Law. University of Helsinki. Pages 51-87.

Internet Sources

- Council of Europe *Convention on the Participation of Foreigners in Public Life at the Local Level.* Can be found on <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=144&CM=8&DF=19%2F11%2F02.&CL=ENG> (accessed January 18, 2006).
- Encyclopedia Britannica *Gibraltar.* Encyclopedia Britannica Online. <<http://search.eb.com/eb/article-9036754>> (accessed January, 18. 2006).

Government of Gibraltar	<i>Gibraltar in Europe.</i> http://www.gibraltar.gov.gi/gov_depts/finance/gibraltar_and_the_eu.htm (accessed January 18, 2006).
	<i>History.</i> About Gibraltar. http://www.gibraltar.gov.gi/ (accessed January 18, 2006).
	<i>The Gibraltar Constitution Order 1969.</i> Constitution & Parliament. http://www.gibraltar.gov.gi/ (accessed January 18, 2006).
Directorate-General for Research	<i>Legislation governing elections to the European Parliament.</i> Working Paper. Political Series.- W 13 – 1997. http://www.europarl.eu.int/workingpapers/poli/w13/note1 (accessed January 17, 2006).
United Nations	<i>List of Member States.</i> http://www.un.org/Overview/unmember.html (accessed January 18, 2006).
The United Kingdom Parliament	<i>Gibraltar,</i> Select Committee on Foreign Affairs Eleventh Report. < http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmselect/cmfaff/973/97304.htm > (accessed January 18, 2006).

EC Sources

Official Journal

Official Journal L 073, 27/03/1972 P. 196

Documents concerning the accession to the European Communities of the Kingdom of Denmark, Ireland, The Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland, Final Act, Declarations on the economic and industrial development of Ireland.

Official Journal L 278, 08/10/1976 P. 5.

Act concerning the election of the representatives of the Assembly by direct universal suffrage.

Official Journal C 023, 18/01/83, 28/01/1983 P.1.

New declaration by the Government of the United Kingdom of Great Britain and Northern Ireland on the definition of the term "nationals".

Official Journal C 348, 31/12/1992 P.1.

Denmark and the Treaty on the European Union.

Official Journal C 364, 18/12/2000 P. 1.

Charter of Fundamental Rights of the European Union.

Official Journal C 228. 11/09/2004 P.28.

Reference for a preliminary ruling by the Raad van State by decision of that court of 13 July 2004 in the case of M.G. Eman and O.B. Sevinger against het College van Bурgeemester en Wethouders van Den Haag.

The Court of Justice of the European Communities.

Avis 2/94. Recueil de jurisprudence 1996 page I-01759.

Adhésion de la Communauté à la convention de sauvegarde des droits de l'homme et des libertés fondamentales.

Report for the hearing in Case C-145/04. Allan Rosas, Judge-Rapporteur.

Rapport ter terechtzitting in zaak C-300/04. Allan Rosas, Rechter-Rapporteur.

The European Commission

IP 03/1479. Press Release. Right to vote in EP elections in Gibraltar.

The European Parliament

A4-0212/1998 Resolution on a draft electoral procedure incorporating common principles for the election of Members of the European Parliament.

COE Sources

Recommendations of the Parliamentary Assembly

Recommendation 712 (1973) on the integration of migrant workers with the society of their host countries.

Resolutions of the Parliamentary Assembly

Resolution 1459 (2005) Abolition of restrictions on the right to vote.

Reports of the Venice Commission

CDL-AD(2005)011 Report on the abolition of restrictions on the right to
vote

in general elections. Endorsed by the Venice Commission at its 61st Plenary Session (Venice 3-4 December 2004).

CDL-AD(2005)012 Report on the abolition of restrictions on the right to
vote

in general elections. Endorsed by the Venice Commission at its 61st Plenary Session (Venice 3-4 December 2004).

UK Sources

The British Nationality Act 1981.

The European Parliamentary Elections Act 1999.

The British Overseas Territories Act 2002.

The British Territories Act 2002 (Commencement) Order 2002.

The European Parliamentary Elections Bill [Bill No. 4 of 1998-1999]

Table of Cases

The Court of Justice of the European Communities.

26/62, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration. (1963). ECR 1.

26/69 Erich Stauder v. City of Ulm, sozialamt. (1969) ECR 419.

4/73 Nold Kohlen- und Baustoffgrosshandlung v. Commission. (1974). ECR 491.

21/74, Jeanne Airola v. Commission. (1972). ECR 221.

138/79, Roquette Frères v. Council. (1980). ECR 3333.

139/79, Maizena v. Council. (1980). ECR 3393.

46/87 & 227/88, Hoechst AG v. Commission. (1989). ECR 2859.

C-369/90, Mario Vincente Micheletti and Others v. Delegación del Gobierno en Cantabria. (1992). ECR 1-4239.

C-85/96, Maria Martinex Sala v. Freistaat Bayern. (1998). ECR I-2691.

C-184/99, Rudy Grzelczyck v. Centre Public d'Aide Sociale d'Ottignies-Louvain-la-Neuve (CPAS). (2001). ECR I-6193.

C- 192/99, R. v. Secretary of State for the Home Department, ex parte Kaur. (2001). ECR I-1237.

C-413/99, Baumbast and R v. Secretary of State for the Home Department. (2002). ECR I-7091.

C- 94/00, Roquette Frères SA v. Directeur general de la concurrence, de la consummation et de la repression des frauds. (2002) ECR I-9011.

C-138/02, Brian Francis Collins v. Secretary of State for Work and Pensions. (2004). ECR I.

C-148/02, Carlos Garcia Avello v. Etat Belge. (2003). ECR I-11613.

The European Court of Human Rights

Bosphorous v. Ireland. Judgment of 30 June, 2005.

Hilbe v. Liechtenstein. Decision of 7 September, 1999.

Hirst v. The United Kingdom. Judgment of 6 October, 2005.

Mathieu-Mohin and Clerfayt v. Belgium. Judgment of 3 March, 1987.

Matthews v. The United Kingdom. Judgment of 18 February, 1999.

Melnichenko v. Ukraine. Judgment of 19 October, 2004.

Piermont v. France. Judgment of 27 April, 1995.

Senator Lines GmbH v. The 15 Member States of the EU. Decision of 10 March, 2004.

Ždanoka v. Latvia. Judgment of 17 June, 2004.

Van de Hurk v. The Neatherlands. Judgment of 19 April, 1994.

All of the judgments listed above have been consulted in the version found at HUDOC, the database of the case-law of the European Court of Human Rights. <http://cmiskp.echr.coe.int/tkp197/default.htm>

The International Court of Justice

Nottebohm (Liechtenstein v. Guatemala), ICJ Reports 1955.

The German Bundesverfassungsgericht

Solange I [1974] 2 CMLR 540.