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HOW 'EUROPEAN' ARE EUROPEAN PARLIAMENT ELECTIONS?

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HOW 'EUROPEAN' ARE EUROPEAN PARLIAMENT ELECTIONS?

Jo Shaw

Abstract:

This note was presented by the authors for a workshop organised by the Committee on Constitutional Affairs on 26/27 March 2008. It analyses the relationship between European citizenship and European electoral rules through an analysis of some recent case law of the European Court of Justice. The paper tries to answer the question whether there is a single European concept of the European Parliamentary ***demos***, or twenty seven separate, but overlapping, national concepts.

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I Introduction: The political representation of European citizens

What is a 'European' Parliament and who should vote for it? Should it be the 'citizens' of the European Union alone? If so, should it be all EU citizens, or only those who are resident in the Member States? Or should the electorate include potentially all *residents* in the Member States which comprise the EU and who are thus affected by decisions taken in the Parliament? This would go beyond the definition of EU citizenship (as the nationals of the Member States) in Article 17 EC.

Does anyone have a 'right' to vote for the European Parliament? If so, what is the nature of that right? Is it a fundamental right or a citizenship right?

What is the territorial scope of the European Parliamentary *demos*? Is it circumscribed by the outer geographical boundaries of the EU, as set by Article 299 EC, or can those covered by the personal scope of Union citizenship also quite properly vote for the European Parliament when they are resident in a third state, or in some associated territory which is not fully part of the EU?

And who should decide who votes for the European Parliament – the Member States, or the EU itself? **In other words, is there a single European concept of the European Parliamentary *demos*, or twenty seven separate, but overlapping, national concepts?**

At the present time, there are rather limited EU level legal materials regulating these matters. Article 19(2) EC, located amongst the EC Treaty's provisions on citizenship, along with its implementing Directive adopted in 1993, requires the Member States to accord to nationals of the other Member States resident in their territory the right to vote (and stand) for the European Parliament on the same basis as nationals (i.e. a non-discrimination right).[1] These measures have since applied on three occasions (1994, 1999 and 2004). The Act on Direct Elections, originally adopted in 1976 and subsequently amended on a number of occasions, directly addresses European Parliament elections.[2] It lays down certain limited 'uniform' aspects of elections to the European Parliament, with other matters left at the present time to the Member States. Neither set of provisions, at first sight, appears to confer a right on EU citizens to vote in European Parliament elections.

In 2006, the nature of European Parliamentary voting rights came under scrutiny in two cases before the Court of Justice concerning voting in Gibraltar and Aruba.[3] The facts of these cases arose in the context of deep-rooted political contestations *within* and *between*

[1] Council Directive 93/109/EC 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 L329/34.

[2] For the latest version of the Act on Direct Elections, see Council Decision amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Council Decision 76/787/ECSC, EEC, Euratom, OJ 2002 L283/1.

[3] Case C-145/04 *Spain* v. *United Kingdom* [2006] ECR I-7917 (*Gibraltar*); Case C-300/04 *Eman and Sevinger* v. *College van burgemeester en wethouders van Den Haag* [2006] ECR I-8055 (*Aruba*).

certain Member States (UK, Spain, the Netherlands), contestations which could perhaps be argued to render the general lessons which can be learned from these cases rather limited. I will argue that these cases do in fact articulate important messages about the nature of political representation in the EU, and also – indirectly – about the nature of European citizenship as a political, as well as socio-economic, concept. In particular, it is now possible to argue that the Court of Justice recognises the right to vote in European Parliament elections as **a European citizenship right.**

This note provides a detailed commentary upon these cases, in order to elaborate some of the questions about European Parliament elections which are of particular concern to the Committee on Constitutional Affairs at the present time which came before the Court of Justice. Comments upon the cases are supplemented some references to the question whether the outcome of these cases would be any different after the entry into force of the Treaty of Lisbon, with its consequential amendments to a number of provisions affecting the European Parliament and the concept of EU citizenship.

The conclusion to be drawn at the present time is that Member States enjoy substantial discretion in relation to the definition of who can vote in European Parliament elections, although they are precluded from treating different categories of EU citizens who are in the same situation in a different way. Looking forward, it seems unlikely that the Member States would swiftly alter the content of EU law in this area in order to create a common framework for determining the scope and nature of the franchise for European Parliament elections.

II The *Gibraltar* and *Aruba* cases

The *Gibraltar* case dealt with the question whether Commonwealth citizens resident in Gibraltar should be able to vote in European Parliament elections. This situation arose after the UK included Gibraltar in its electoral territory in time for the 2004 elections, having previously applied Annex II of the 1976 Act on Direct Elections in order to exclude Gibraltar. Annex II provides that 'The United Kingdom will apply the provisions of this Act only in respect of the United Kingdom'. A case was brought before the European Court of Human Rights in the 1990s by Denise Matthews, challenging the exclusion of Gibraltarians from the right to vote in European Parliament elections.[4] In the resulting judgment, the Court of Human Rights held that the European Parliament is a legislature *vis-à-vis* Gibraltar. Gibraltar, although not part of the UK, is part of the EU by virtue of Article 299(4) EC, as a European territory for whose external relations a Member State is responsible. Although Gibraltar is not part of the customs territory, none the less many EU legislative acts in the areas such as the free movement of persons, services and capital and the protection of the environment and consumers do apply to Gibraltar and become part of the legal order of Gibraltar in the same way as they do in relation to the Member States. The conclusion drawn by the Court of Human Rights was that Annex II was problematic from the point of view of Article 3 of Protocol No. 1 of the European Convention on Human Rights and Fundamental Freedoms (ECHR), which obliges states to hold free and fair elections ensuring the free expression of the people in

[4] *Matthews* v. *United Kingdom* no. 24833/94, ECHR 1999-I.

the choice of the legislature. The UK was found to be in breach of the ECHR and thus it needed to find a way of bringing Gibraltar and Gibraltarians within the scope of European Parliament elections.

Having had its subsequent attempt to amend the Act on Direct Elections to remove the offending text vetoed by Spain, the UK was forced to take unilateral action, without specific authorisation at the EU level, to give effect to the human rights imperative generated by the *Matthews* judgment. It adopted the European Parliament Representation Act 2003, and incorporated the voters of Gibraltar into the South West of England multi-member constituency for the June 2004 elections. In line with the general position on the suffrage in the UK, certain qualified Commonwealth citizens resident in Gibraltar were entitled to register and vote. UK suffrage rules give Commonwealth citizens who are legally resident the right to vote and stand in all elections in the UK.[5] This affected about 100-200 Commonwealth citizens resident in Gibraltar (i.e. all Commonwealth citizens other than those with Maltese and Cypriot nationality who are in any event EU citizens and thus covered by Article 19(2) EC). Spain objected to this extension of UK law to Gibraltar and, after attempting unsuccessfully to persuade the Commission to bring an action against the UK under Article 226 EC, the Spanish Government decided to bring a case before the Court of Justice itself under the little used Article 227 EC. It argued *inter alia* that the right to vote in European Parliament elections must be confined to EU citizens, and that the UK was in breach of EU law.

The *Aruba* case concerned the right to vote in European Parliament elections of citizens of the Kingdom of the Netherlands who are resident in the island territory of Aruba, which is just off the cost of Venezuela. Aruba is part of the Kingdom of the Netherlands, but is a self-governing overseas territory (OCT) and as such is not part of the EU under Article 299 EC. As an OCT, only very limited aspects of EU law apply to Aruba, either directly or indirectly by virtue of Dutch law, or in some cases voluntarily because the Aruban legislature has chosen to align itself with EU law.[6] The Euratom Treaty does apply there, as, arguably, does the Part VI of the Treaty on European Union (third pillar on police and judicial cooperation in criminal matters) which has no territorial scope but merely binds the governments of the Member States. The *Matthews* argument of the Court of Human Rights could not, therefore, apply. However, as *citizens* of the Kingdom of the Netherlands benefiting from a single national citizenship for the Kingdom (which extends also to the Dutch Antilles) but with permanent residence in Aruba, the applicants Eman and Sevinger argued that they were *citizens of the Union*. However, so long as they were resident in Aruba, under Dutch law they are denied the right to vote in European Parliament elections. They could vote if they moved to reside in the Netherlands itself or if they moved to live in a third country. In the latter case, their rights would be based on the general Dutch external voting arrangements which make no distinction in respect of Netherlands nationals who are resident in third countries as to whether they have previously been resident in the Netherlands itself, or in Aruba or the other non-European territory of the Netherlands, the Netherlands Antilles. In accordance with Article 1(2) of

[5] For details of the UK franchise, see House of Commons Library, Standard Note, *Electoral Franchise: Who can Vote?*, SN/PC/2208, 1 March 2005.
[6] Opinion of the Advocate General, para. 159.

Directive 93/109, which preserves the discretion of the Member States in relation to external voting rights, the Netherlands is one state which does grant voting rights to its citizens when they reside in third countries, with the justification that this preserves the link between the expatriated citizen and the home state. The case came before the Court of Justice by way of a reference for a preliminary ruling under Article 234 EC from the Dutch *Raad van State*, in a case brought by the applicants Eman and Sevinger against a decision of the municipal authorities of The Hague refusing to place their names on the electoral register for European Parliament elections in the Netherlands.

The judgments themselves are relatively narrow, with the *Gibraltar* judgment focusing on the Act on Direct Elections, and the *Aruba* judgment focusing on citizenship of the Union. However, the joint Opinion of Advocate General Tizzano issued in April 2006 contains some more general comments, and the judgments and the Opinion together offer some interesting food for reflection suggesting that the political potential of EU citizenship could be further exploited in future cases pushing at the limits of EU law's treatment of the right to vote.

III The AG's Opinion and Court's judgments in brief

The Advocate General's advice to the Court of Justice was that:

- it should declare, in the *Gibraltar* case, that the UK has failed to fulfil its obligations under the EC Treaty, and in particular the Decision relating to the Act on Direct Elections, by allowing Commonwealth citizens resident in Gibraltar to vote in European Parliament elections, and that
- it should rule, in the *Aruba* case, that it is contrary to EU law for a Member State to withhold (without objective justification) the right to vote in European Parliament elections from citizens residing in another part of the state other than the European territory, when it grants that right to vote to citizens when they are resident in the European territory and when they are resident in a non-Member State. This would leave it open to the Member State to provide such an objective justification, but in this case the Netherlands had failed to satisfy that requirement.

The Court of Justice differed slightly in its approach to the two cases from the Advocate General. In the first place, its judgment does not contain an extended discussion of the citizenship and constitutional issues which are raised by the cases. To that extent, it is hard to say with certainty whether it might approve of some of the more general statements made by the Advocate General which will be discussed below. Furthermore, while adopting essentially the same ruling as proposed by the Advocate General in the *Aruba* case on the rights of the Arubans, it found in favour of the United Kingdom in the *Gibraltar* case, concluding that in the arrangements that it made it had not exceeded its discretion under EU law as it stands. The discussion which follows presents first the broader approach presented by the Advocate General, and then highlights the narrower solutions offered by the Court of Justice. Of course the former's approach is not the definitive statement of the law as it stands, but is merely an advisory Opinion, but it is interesting to study this Opinion because it may provide some pointers as to how EU law in this field might develop in the future.

IV The Advocate General's Opinion analysed in depth

The Advocate General's (AG) Opinion offers the first extended consideration by a judicial authority in the EU of the political rights of Union citizens, insofar as it discusses the nature of European citizenship as a political status. The AG began his discussion with a general meditation on whether a right to vote in European Parliament elections is one of the EU citizenship rights guaranteed under the EC Treaty. Such a reflection was not strictly essential for the task of deciding the case (as the omission of any such discussion from the Court's judgment clearly shows), but it provides vital background for understanding the underlying position on the nature of EU citizenship which the AG chose to take, as his argument focuses on the legitimate extensions and restrictions which Member States may grant or impose, taking as a baseline a premise that the right to vote in European Parliament elections is indeed an incident of citizenship of the Union.

The AG's first finding was that

> 'it can be directly inferred from Community principles and legislation as a whole, thus overriding any indications to the contrary within national legislation, that there is an obligation to grant the voting rights [in European elections] to citizens of the Member States and, consequently, to citizens of the Union.'[7]

He reached that conclusion even though no provision of EU law explicitly includes the right to vote for the European Parliament amongst the list of rights inherent in citizenship of the Union, although Article 19(2) 'in any event takes it for granted that the right…is available to citizens of the Union.'[8] He argues that the right is based on

> 'the principles of democracy on which the Union is based,[9] and in particular, to use the words of the [European Court of Human Rights] the principle of universal suffrage, which 'has become the basic principle' in modern democratic states'.[10]

In the arena of EU law, this finding can also be derived from the references to universal suffrage in Articles 189 and 190 EC, and Article 1 of the 1976 Act on direct elections, which militate 'in favour of recognition of a right to vote attaching to the largest possible number of people'.[11] The AG finally supported the argument by reference to Article 3 of the Protocol No. 1 of the ECHR, which was the foundation for the *Matthews* judgment, protecting 'the free expression of the opinion of the people in the choice of the legislature.'

The AG then considered whether there was a 'strict link' between citizenship of the Union and the scope of the electorate for the European Parliament, as argued by the Spanish Government, as the basis for contesting the extension of the suffrage to

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[7] Opinion, para. 67.
[8] Opinion, para. 68.
[9] Article 6(1) EU provides 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.'
[10] Opinion, para. 69. In the ECHR case law see, for example, *Hirst* v. *United Kingdom (No. 2)*, Application no. 74025/01, judgment of 5 October 2005, at para. 60.
[11] Opinion, para. 69.

Commonwealth citizens in Gibraltar. The AG concluded that the reference to 'peoples' of the Member States in Articles 189 and 190 should be treated as largely coterminous with the citizens or nationals of the Member States (thus avoiding alternative 'ethnic' rather than 'civic' connotations of the term 'peoples'), but that the people/citizens, so defined, and the electorate for the European Parliament should not be treated as automatically coextensive. Such an argument, which focuses on the civic connotations of 'people' as used in the present version of the EC Treaty pre-empts somewhat the possibility of relying upon the shift, in Article 10 TEU post-Lisbon, from 'people' to 'citizens' as a significant change in terminology. The AG doubted, in any event, whether the expression 'peoples of the States brought together in the Community' in Article 190(1) EC was intended to have a 'precise legal meaning'.[12]

The AG based his conclusion that Member States should be allowed discretion or leeway in relation to the implementation of the Act on Direct Elections and the running of European Parliament elections on the fact that Member States can and do place restrictions on the right to vote, even for citizens (e.g. age or competence criteria) in any and every election. Moreover, albeit less often, they do also from time to time deploy a more generous approach to the suffrage, for example, by including certain categories of non-nationals within it. This is the case in the UK with Commonwealth citizens and indeed Irish citizens, who can vote in national elections, and is the case with more than ten EU Member States which give rights to vote in local elections to all non-nationals.[13] The AG also referred to the fact that EU law does not itself treat the rights it ascribes citizens of the Union as exclusive; he cited Articles 194 and 195 EC as examples of rights (to complain to the Ombudsman or to petition the European Parliament) which are ascribed also to natural and legal persons resident in the Member States.[14] He noted that it would be paradoxical if the Member States were to remain the ultimate gatekeepers of the personal scope of Union citizenship, by virtue of the link between Union citizenship and nationality of a Member State in Article 17 EC, whilst not at the same time being free to ascribe at least some of those rights of Union citizenship to third country nationals.[15] In other words, it would be odd if the Member States were in an all-or-nothing situation where they could extend all the rights of Union citizenship to a person by allowing them to acquire national citizenship, but they could not, acting autonomously, ascribe a subgroup of those rights to non-citizens.

The AG rejected conclusively a Spanish argument that allowing the extension of Union citizenship rights to non-nationals of the Member States would '"dismember" the unicity of the concept of citizenship'.[16] He also appeared (albeit implicitly) to refer approvingly to the general principle of alien suffrage, by commenting positively upon how the principle of universal suffrage seems to demand voting rights for the largest possible number of persons including 'possibly also for foreigners established in a particular State, who, like citizens, are effectively subject to the measures approved by the national and

[12] Opinion, para. 80.
[13] See generally J. Shaw, *The Transformation of Citizenship in the European Union*, Cambridge, Cambridge University Press, 2007.
[14] Opinion, para. 91.
[15] Opinion, para. 82.
[16] Opinion, para. 92.

Community legislative authorities.'[17] The AG also accepted pragmatically, that in the absence of a uniform electoral procedure there was indeed no consistency among the Member States as to the rules which govern the entitlement to vote for the European Parliament.[18]

It might have been expected, given the general conclusions which he reached, that the AG would find in favour of the UK's extension of the franchise to allow Commonwealth Citizens resident in Gibraltar to vote in European Parliament elections, even though that group of persons *cannot* vote in legislative elections for the Gibraltar Assembly.[19] However, the AG insisted that there are limitations upon the freedom of the Member States to determine the scope of the right to vote for the European Parliament, in particular because such elections are not one-off affairs affecting only one Member State, but rather are matters which affect all the Member States.[20] Consequently, he stressed that the power may be exercised 'only exceptionally' and 'within limits and under conditions which are compatible with Community law'.[21] He cited an example of extensions to persons who had no actual link with the Community (which cannot surely cover the Commonwealth citizens in Gibraltar, who are affected in the same way as other residents by EU legislation) which would not be permissible, and also referred to the principles of reasonableness, proportionality and non-discrimination as governing the compliance of the national rules with EU law. In that sense, the AG saw the situation quite differently to the UK which referred, in its declaration on this matter made within the Council of Ministers in 2002, to the extension of the right to vote to Gibraltar 'on the same terms' as the electorate of an existing UK constituency.[22]

The reference to compatibility with EU law guided the AG to a consideration of the specifics of Annex II of the Act on Direct Elections. This is a text which, as noted above, originally excluded Gibraltar from the scope of European Parliament elections and a text which remains, to this day, unamended. It was in relation to compliance with Annex II that he found support for the Spanish case, for in effect all of the measures adopted by the UK to give Gibraltarians the vote were adopted in breach of the formal text of Annex II. The AG rejected the contention that in implementing the *Matthews* judgment by facilitating the participation of Gibraltarians in the European Parliament elections the UK should not have included Gibraltar in another UK-based constituency, provided for the establishment of the necessary electoral register, made it possible physically to vote in the dominion, or allowed for legal proceedings to be possible in Gibraltar to contest the elections should an irregularity have occurred.[23] However, as the UK was adopting the relevant unilateral measures essentially in order to comply with a fundamental rights imperative as established in the *Matthews* case, he concluded that it should not take any

[17] Opinion, para. 93.
[18] Opinion, para. 100.
[19] Government of Gibraltar, House of Assembly Ordinance, 1950-19, s.3, available from www.gibraltarlaws.gov.gi.
[20] Opinion, para. 102.
[21] Opinion, para. 103.
[22] Opinion, paras. 32-24.
[23] Opinion, para. 125-126.

measures in relation to Gibraltar which did not necessarily follow from this mandate or imperative. He argued that the

> 'extension [of the franchise to Commonwealth citizens] does not stem from the need to ensure the exercise of a fundamental right and … therefore a derogation from Annex II is not justified.'[24]

On this point, therefore, the AG suggested that the Court should find in favour of Spain. He made that finding notwithstanding having concluded that there was nothing in the general principles concerned with citizenship and democracy embodied in Articles 17, 19, 189 and 190 EC which precluded the UK adopting the measures that it chose to adopt. Interestingly enough, the AG appeared to find a pathway through the relevant legal provisions allowing him to conclude that while it was permissible for the UK to give Commonwealth Citizens the right to vote in European Parliament elections in 'mainland' UK (and indeed Spain had not sought to argue this), it was in breach of its EU obligations in so doing in Gibraltar.

The AG's coverage of the issues in the *Aruba* case is somewhat briefer, and draws upon the general principles articulated in the first part of the Opinion about the nature of the right to vote in European Parliament elections under EU law, the role of Member States in this respect, and the scope of limitations and restrictions which they may impose. In this case, the case concerned limitations on the right to vote of Union citizens in European Parliament elections, specifically a limitation imposed upon Netherlands nationals resident in Aruba. Arubans share a single national citizenship with all other Netherlands nationals (whether resident in the Netherlands or in third countries), but they are denied the right to vote in either 'domestic' Dutch or European Parliament elections. The AG concluded that while normally speaking a Member State may withhold the right to vote in European Parliament elections from certain groups of citizens, where this can be objectively justified, here there was no objective justification for the distinction drawn. The relevant distinction was not between Netherlands nationals resident in the Netherlands and those resident in Aruba, but rather between Netherlands nationals resident in Aruba and those, previously resident in Aruba, who had moved to another Member State or indeed a third state, without having previously established a connection with the Netherlands (i.e. the European part of the state) itself. The latter group are given, on *leaving* Aruba, the right to vote in national and European Parliament elections under Netherlands law, an outcome which the AG saw as 'not comprehensible'.[25] It undermines completely the basis for arguing that Arubans, although Netherlands nationals and therefore EU citizens, are denied the right to vote in European Parliament elections on the grounds that they lack a relevant connection with the EU. It should be noted that Aruba has a different status in relation to the EU and the EU Treaties from that ascribed to Gibraltar, and is not directly affected by EU legislation in the same way as Aruba. Thus in relation to Aruba, the European Parliament could not be described as a legislature, within the meaning of Article 3 of Protocol 1 of the ECHR, which was the basis for the

[24] Opinion, para. 128.
[25] Opinion, para. 167.

reasoning in the *Matthews* case and thus the starting point for the entire saga underpinning the *Gibraltar* case.

While the AG's Opinion is a productive source of provocation about the future of European citizenship, it ultimately leaves unresolved the tension between internal inclusivity and external exclusivity which invades all concepts of citizenship, so long as the bounded nature of citizenship is treated as its central facet. He seems instinctively to want to develop the exclusive aspects of European citizenship, not least because he saw this as fostering closer European integration, and his conclusions in the *Gibraltar* case seem to indicate a preference for European Parliament elections to be elections by 'European' citizens unless the Member States can demonstrate very good reasons why non-Europeans should be involved. On the hand, there are several points in the Opinion where the AG appears simultaneously to recognise the attractiveness of an argument which opens out electoral rights to non-nationals on the basis of a principle of affectedness. He notes that

> 'the democratic principle of universal suffrage upon which the European Union is based…militates…in favour of recognising voting rights for the largest possible number of persons, and there possibly also for foreigners established in a particular State, who, like citizens, are effectively subject to the measures approved by the national and Community legislative authorities.'[26]

If it is applied, of course, the principle of affectedness can challenge the bounded conception of citizenship.

V The Court's judgments analysed in depth

In the *Gibraltar* case, the Court opted for a narrower approach than the AG to the texts and arguments placed before it. It noted from the beginning that Spain was looking for some means of establishing 'a link between citizenship of the Union and the right to vote and to stand as a candidate for the European Parliament, the consequence of that link being that only citizens of the Union can have that right.'[27] However, contrary to the contentions of Spain, it confirmed that Article 19(2) is 'confined to applying the principle of non-discrimination on grounds of nationality'[28] to the exercise of the right to vote for the European Parliament. Nor did it find anything in either Article 190 EC or the 1976 Act on Direct Elections defining 'expressly and precisely who are to be entitled to the right to vote and to stand as a candidate in elections to the European Parliament.'[29] It could derive no clear conclusion that there was a clear link between citizenship of the Union and the right to vote in European Parliament elections in Articles 189 or 190 EC or in the provisions on citizenship of the Union. It repeated its favoured phrase from *Grzelczyk*,[30] whereby citizenship of the Union is 'destined to be the fundamental status'

[26] Opinion, para. 93.
[27] Case C-145/04, para. 59.
[28] Case C-145/04, para. 66.
[29] Case C-145/04, para. 70.
[30] Case C-184/99 *Grzelczyk* v. *Centre Public d'Aide Sociale d'Ottignes-Louvain-la-Neuve (CPAS)*, [2001] ECR I-6193.

of nationals of the Member States, but then went on to state that this statement 'does not necessarily mean that the rights recognised by the Treaty are limited to citizens of the Union.'[31] Thus to a greater extent than the AG, the Court appeared to opt for an open and outward-looking concept of citizenship for the European Union, under which citizenship rights may be constitutive of the status of the nationals of Member States, but the rights themselves are not necessarily confined to citizens alone. However, a warning note should also be sounded for those who seek to derive a stronger concept of Union citizenship from these words, for later in the judgment the Court noted the highly segmented nature of European Parliamentary elections. Because of the way in which the elections are currently organised, 'an extension by a Member State of the right to vote at those elections to persons other than its own nationals or other than citizens of the Union resident in its territory affects only the choice of the representatives elected in that Member State, and has no effect either on the choice or on the representatives elected in the other Member States.'[32] This contrasts quite sharply with the approach on this issue taken by the AG, who stressed the *European* nature of European Parliament elections.

In conclusion, the Court confirmed that it was 'within the competence of each Member State in compliance with Community law' to define the persons entitled to vote and stand in European Parliament elections, a conclusion which it bolstered also by a reference to the 'constitutional traditions' of the UK in this matter, which include the extension of rights to vote in all UK elections to Commonwealth citizens.[33] It should be noted that the AG himself did not find any problems in the general context of EU law with the principle of Member States extending the right to vote to non-EU citizens, so on this matter the AG and the Court are broadly at one. However, unlike the AG, the Court found no impediment in the detailed text of the Act on Direct Elections and the commitments made by the UK to organise European Parliament elections including the territory of Gibraltar, consequent upon the judgment of the Court of Human Rights in the *Matthews* case. Rather, given the imperative upon the UK, the Court concluded that in applying its legislation to the specific case of Gibraltar, the UK 'cannot be criticised for adopting the legislation necessary for the holding of such elections under conditions equivalent, with the necessary changes, to those laid down by the legislation applicable in the United Kingdom.'[34] This includes, of course, the definition of the franchise, which is the same in Gibraltar as it is for the rest of the UK. It is important to note that, even in its newest version, which moves some way towards a uniform electoral procedure by at least requiring the representatives to be elected on the basis of proportional representation, Article 8 of the Act on Direct Elections continues to provide that 'subject to the provisions of this Act, the electoral procedure shall be governed in each Member State by its national provisions,' and the first recital in the preamble to the 2002 amendments provides that Member States remain free 'to apply their national provisions', subject to the limited restrictions in the Act.

[31] Case C-145/04, para. 74.
[32] Case C-145/04, para. 77.
[33] Case C-145/04, paras. 78 and 79.
[34] Case C-145/04, para. 95.

In passing, one should note that the Court, in its presentation of the arguments of the parties, referred to an argument made by Spain (and refuted by the UK) on the basis of the Treaty establishing a Constitution for Europe, which was then moving through its ultimately unsuccessful ratification phase.[35] Article I-20(2) CT stated that '[t]he European Parliament shall be composed of representatives of the Union's citizens', and Article I-46(2) CT provided that '[c]itizens are directly represented at the Union level in the European Parliament.' The UK submitted, inevitably, that the Constitutional Treaty was not in force, and so had no legal weight in this context. In its judgment, the Court made no reference to the Constitutional Treaty, and thus it is not possible to discern from this what its approach to the materially identical formulas in the Treaty of Lisbon, involving the shift from 'peoples' to 'citizens', might be. However, there seems no strong reason why the Court would not adopt the same approach of the AG who did implicitly address this question. Despite giving the concept of 'peoples' an interpretation driven by civic rather than ethnic imperatives (thus effectively making it synonymous with citizens), the AG saw no obstacle in this interpretation to the conclusion that Member States may largely adopt an inclusionary and flexible approach to defining who may benefit from citizenship rights. If the Court gave a similar interpretation, then it seems likely that even with the changes likely to be introduced by the Treaty of Lisbon, the *Gibraltar* case would be decided the same way in the future, at least until such time – likely to be long in the future – when the Member States have resolved to provide a common definition of the suffrage.

The *Aruba* case concerned not the extension of the right to vote beyond the scope of Union citizenship, but rather its restriction, in this case on the basis of the place of residence of the citizens in question. It is significant that the Court does expressly confirm that as nationals of one of the Member States (sharing Netherlands nationality with those resident in the Netherlands) 'citizens' of Aruba are indeed citizens of the Union. It seems to limit its conclusion to those who 'reside or live in a territory which is one of the OCTs referred to in Article 299(3) EC',[36] but it would seem equally logical to argue that citizenship of the Union is a personal status of nationals of the Member States which they carry with them wherever they are. How else, logically, could the principle of consular and diplomatic protection for Union citizens while in third countries enacted in Article 20 EC actually apply? It should surely not be limited only to those who are temporarily in third countries, but must also extend to those with settled residence in third countries. [37]

However, the Court also confirmed that as the Treaty contains no rules expressly stating who are to be entitled to vote and stand as a candidate for the European Parliament, it remains a matter, in the current state of Community law, for the competence of the Member States.[38] There is no unconditional right on the part of nationals of the Member States to vote for the European Parliament. In particular, the Member States may choose the criterion of residence to determine who votes. In this context, it cited case law of the

[35] OJ 2004 C310/1. See paras. 45 and 57 of the judgment.
[36] Case C-300/04, para. 29.
[37] See F. Geyer, *The External Dimension of EU Citizenship: Arguing for Effective Protection of Citizens Abroad*, CEPS Policy Brief, No. 134, July 2007.
[38] Case C-300/04, para. 45.

Court of Human Rights concluding that 'the obligation to reside within national territory to be able to vote is a requirement which is not, in itself, unreasonable or arbitary.'[39] However, the exercise of national competence must occur in compliance with Community law. This led the Court to consider whether an OCT was in the same situation, with regard to Community law, as Gibraltar. It concluded that, unlike the case of Gibraltar, the European Parliament cannot be regarded as a legislature with regard to the OCTs. Hence the *Matthews* doctrine at issue in *Gibraltar* case does not apply. Moreover, Article 19(2) and Directive 93/109 are of no assistance to the applicants in this case, as they concern only the application of the principle of non-discrimination on grounds of nationality.

Where the Court did support the applicants is, as with the AG, in relation to the application of the equal treatment principle as between different groups of Netherlands nationals. It confirmed that the principle of equal treatment or non-discrimination is a general principle of Community law,[40] and concluded that 'the relevant comparison is between a Netherlands national resident in the Netherlands Antilles or Aruba and one residing in a non-member country.'[41] As the general principle of equal treatment includes the duty not to treat differently those who are in like situations, and since the two groups identified have in common that they are not resident in the Netherlands, there is a *prima facie* case that they should be treated alike. In fact, the latter group can vote in European Parliament elections (on the argument that this helps to maintain their connection to the Netherlands), whereas the former cannot. However, this 'connection' rationale breaks down when it becomes apparent that Netherlands nationals resident in Aruba *gain* the right to vote if they leave Aruba for a third country, since they are then covered by the same *general* Netherlands external voting legislation. The Court concluded that the Netherlands was under an obligation to provide an objective justification for its difference in treatment, and that given this irrationality in the legislative scheme, it had failed to do so.[42]

The final section of the case is concerned with guidance to the national court on the question of redress. What was to be done about the fact that the applicants (along with their fellow Arubans) had been wrongly excluded from participating in the 2004 European Parliament elections? In accordance with its normal principles of remedies, the Court held that in the absence of relevant EU legislation, this is a matter for the national court, subject to the usual caveats that rules governing redress must be no less favourable than those governing rights which originate in domestic law (principle of equivalence) and that they do not render impossible or excessively difficult in practice the exercise of rights conferred by the EU legal order (principle of effectiveness).[43] However, the Court also made it clear that it was not excluded that state liability for the loss caused by the infringement of EU law could be included in the package of remedies made available, but the Court expressed no view about the various options such as re-running the elections or appointing special representatives to advise the Dutch MEPs on behalf of the excluded

[39] Case C-300/04, para. 54, citing *Melnychenko* v. *Ukraine*, Application no. 17707/02, para. 56, 18 October 2004.
[40] Case C-300/04, para. 57.
[41] Case C-300/04, para. 58.
[42] Case C-300/04, para. 60.
[43] Case C-300/04, para. 67.

Aruban electorate which were put forward by the parties. In the event, when the case was remitted to it for final decision, the referring *Raad van State* concluded that the relevant provisions of the electoral law had to be set aside and the municipal authorities' decision to refuse registration had to be annulled. However, the further issues of redress could not be finally disposed of by the *Raad van State*. It indicated that the failure identified by the Court of Justice could be addressed *either* by extending electoral rights to Arubans, *or* by removing external voting rights and applying a narrower residence principal to the right to vote. This was a political choice, which the Dutch legislature must make before the next elections in 2009.[44]

V The implications of the cases for European Parliament and other elections

It will quickly be apparent from this analysis that the political representation of European citizens has come a very long way since the inception of the European Communities. It is interesting to see what happens when the Court of Justice becomes involved in the contestation of EU citizenship rights. But, as noted at the outset, the two cases under review were driven by particular sets of political circumstances which do not directly relate to European integration, or the question of political representation within the EU as such. Thus it was the ongoing sovereignty dispute between the UK and Spain over Gibraltar and the continuing negotiations about the status of Aruba and the Antilles within the Kingdom of the Netherlands which provided the opportunity structures within which the cases could come before the Court of Justice. At one level, the cases have quite narrow *ratios*. In *Gibraltar* this concerned how a Member State resolved tensions between a human rights imperative resulting from a case before the Court of Human Rights, its constitutional traditions on electoral rights, the restrictive provisions of the Act on Direct Elections in relation to the territorial scope, and its freedom of manoeuvre in relation to the organisation of direct elections. At first sight, *Aruba* seems a relatively straightforward application of the equal treatment principle, which binds the Member States when they are acting within the scope of Community law, which clearly they are when organising European Parliament elections, notwithstanding their freedom of action under the Act on Direct Elections. Neither of the two cases addressed directly the meaning of the electoral rights granted to EU citizens by Article 19, although indirectly they have confirmed that these provisions are indeed equal treatment rules. Thus these do not seem, at first blush, to be cases which have the capacity to revolutionize the scope and nature of political representation in the EU.

While *Gibraltar* is probably the more immediately politically sensitive of the two cases, that does not of itself make this the more significant one. It is, of course, important to note that the Court explicitly recognises the electoral particularities of one Member State as being a 'constitutional tradition' which deserves respect,[45] and it should also be noted

[44] Judgment of 21 November 2006; personal communication Monica Claes, 22 November 2006.

[45] It may not be an immutable constitutional tradition. In a Review of citizenship issues commissioned by UK Prime Minister Gordon Brown and carried out by former Attorney General Lord Goldsmith during 2007-2008 (*Citizenship: Our Common Bond*, 2008), it was suggested that these voting rights could be abolished in the future in an effort to remove anomalies and also to tighten up the nature and scope of UK citizenship rights at 6 and 74-76.

that the Court projects a broadly inclusive notion of the electoral franchise for the European Parliament, throughout its judgment. On the other hand, it is arguable that the *Aruba* case may be the more significant of the two cases. From this case, it can be argued that the combination of the organisation of European-wide elections to the European Parliament, albeit thus far on a segmented national basis, with the creation of a Europe-wide personal status of 'citizen of the Union' can result in quite substantial intrusions into the national electoral sovereignty of the Member States. Indeed, it is not only in this case that one of the Court's Advocates General has recognised the future political potential of concept of citizenship of the Union, when it is analysed from a normative point of view. There is a somewhat neglected 'obiter dictum' from Advocate General Ruiz-Jarabo Colomer, which makes precisely this point. Speaking of EU citizenship generally, he suggested that it represents 'a considerable qualitative step forward in that it separates that freedom [of movement] from its functional or instrumental elements (the link with an economic activity or attainment of the internal market) and raises it to the level of a genuinely independent right inherent in the political status of the citizens of the Union'.[46]

Returning to *Aruba*, what is notable about the case is the willingness of both the Court of Justice and the AG to extend the protection of the general principles of Community law to a group of citizens of the Union on a personal basis, notwithstanding that they are not 'connected' in any way to the EU as single market or to the European Parliament as a legislature. Nor indeed are they even residing in ***another*** Member State, which has been the standard trigger in earlier citizenship cases. This is the true innovation of the case, and is in many respects far more significant for citizenship as a whole than it is for the narrower question of the right to vote for the European Parliament. The equal treatment principle from which the Arubans benefit is not the general principle of non-discrimination on grounds of nationality which has pervaded the vast majority of the cases hitherto on EU citizenship since *Martínez Sala*,[47] nor the right of free movement and the right of residence, at issue in cases such as *Baumbast*[48] and *Morgan*,[49] but rather a general principle of equal treatment which protects persons from irrational and unjust legislative outcomes, without reference to some physical or social characteristic which they may have (like gender, age or nationality). It is hard to see how the Court could reach that conclusion if it did not have in its mind, notwithstanding its failure to state this explicitly, that the right to vote in European Parliament elections is indeed **an important incident, or right, of Union citizens.**

It would seem that the Court has concluded, while upholding the clear statement in Article 1(2) of Directive 93/109 that 'nothing in the *Directive* shall affect each Member State's provisions concerning the right to vote or stand as a candidate of its nationals who reside *outside its electoral territory*' (emphasis added), that in fact *other provisions* of EU law *may indeed* constrain such provisions. In this case, it is the general principle of non-discrimination or equal treatment. It could in future be other facets of EU citizenship,

[46] See Opinion of AG Ruiz-Jarabo Colomer in Cases 11/06 and 12/06 *Morgan and Bucher*, 20 March 2007, para. 82, repeating a statement made earlier in his Opinions in Cases C-65/95 et C-111/95 *Shingara et Radiom* [1997] ECR I-3343, para. 34 and Case C-386/02 Baldinger [2004] ECR I-8411, para. 25.
[47] Case C-85/96 *Martínez Sala* v. *Freistaat Bayern* [1998] ECR I-2691.
[48] Case C-413/99 *Baumbast and R* [2002] ECR I-7091.
[49] See Cases C-11 & 12/06 *Morgan* v. *Bezirksregierung Köln*, *Bucher* v. *Landrat des Kreises Düren*, 23 October 2007.

such as the right of residence, or arguments focused on the exercise of the right of free movement, which is now often the frame within which the Court of Justice is approaching citizenship cases. Clearly the EU, at its present state of integration, lies some way away from a situation in which there could be a harmonisation of national rules on external voting, but a challenge to general exclusionary external voting rules (e.g. in Ireland) or limited external voting rights (e.g. in the UK where they are limited to fifteen years) could be regarded as a logical next step of the holding in the *Aruba* case. But this may not be in relation to European Parliamentary elections, absent another situation arising such as that in *Aruba*, but rather in relation to voting in national elections. EU citizens resident in other Member States, who find themselves unable to vote in any *national* elections as a result of the combination of restrictive naturalisation rules, restrictive external voting rules, and non-existent rights to vote as EU citizens in such elections, may find fruitful lines of argument which they can develop on the basis of *Aruba* in combination with the recent citizenship case law on freedom of movement such as *Morgan*.

Returning to the Article 19 electoral rights (local and European Parliamentary), it is conceivable that *Aruba* could give a green light to challenges to the effects of some national rules which apparently restrict the *exercise* of the rights, but which in practice imperil their very *existence*. A challenge could be envisaged to the derogation given to Luxembourg in the European Parliament and local elections directives, allowing the imposition of lengthy qualifying residence periods for EU citizens seeking to vote or stand in those elections where certain thresholds relating to the numbers of resident non-national EU citizens of voting age have been passed. This is notwithstanding the fact that such whole state derogations are explicitly provided for in Article 19. At the very least, the Court may be asked to assess whether the solution chosen in the two directives is proportionate and appropriate to the specific situation of Luxembourg as a Member State with a very small overall population and a high proportion of resident non-national EU citizens. Such an approach should also draw on the distinction made in citizenship cases such as *Baumbast* between the *existence* of the basic free movement right in Article 18 EC, which is directly effective, and the conditions which Member States may place upon its *exercise*, which must be proportionate.[50]

[50] See M. Dougan, 'The Constitutional Dimension to the Case Law on Union Citizenship', (2006) 31 *European Law Review* 613.