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Case C-145/04, *Spain* v. *United Kingdom*, judgment of the Grand Chamber of 12 September 2006;
Case C-300/04, *Eman and Sevinger*, judgment of the Grand Chamber of 12 September 2006;
ECtHR (Third Section), 6 Sept. 2007, Applications Nos. 17173/07 and 17180/07 by Oslin Benito Sevinger and Michiel Godfried Eman against the Netherlands (*Sevinger and Eman*)

1. Introduction

The judgments of the European Court of Justice on voting rights in Gibraltar and the Netherlands Caribbean island of Aruba highlight the great extent to which the constitutional orders of the European Union and the Member States together form a compound. Constitutional orders presuppose each other, mutually depend on each other and influence each other to the point of becoming one inseparable constitutional order. The cases discussed here, show that this produces a multifarious result as to the question who can exercise the democratic rights pertaining to citizenship: European citizenship is dependent on divergent national concepts of citizenship.

Eman and Sevinger concerns a reference for a preliminary ruling from the Netherlands Council of State (*Raad van State*) in its judicial capacity. *Spain* v. *UK* is an action brought under Article 227 EC for failure to fulfil obligations. The cases are each other's counterparts. In essence *Eman and Sevinger* concerns a complaint that Netherlands citizens who are inhabitants of the Caribbean parts of the Kingdom of the Netherlands are withheld the right to vote for the European Parliament, whereas *Spain* v. *UK* concerns the Spanish allegation that an extension of the right to vote for the European Parliament to certain inhabitants of the Crown Colony of Gibraltar who do *not* have British nationality (the so-called Qualifying Commonwealth Citizens) is an infringement of EU law. The Dutch case is about *excluding* certain *EU citizens* from the electorate of the European Parliament; the Spanish case is about *including* certain *non-EU citizens* in the electorate of the European Parliament. The Caribbean parts of the Kingdom of the Netherlands are an Overseas Country or Territory (OCT) in the sense of the EC Treaty, in which EC law does not in principle apply.[1] Gibraltar is a British Crown Colony in which, in principle – though with some notable exceptions[2] - EC law applies integrally.

Spain v. *UK* started in the European Court of Human Rights in Strasbourg. In a sense, *Eman and Sevinger* – which also took its cue from the ECtHR case law – ended in Strasbourg as *Sevinger and Eman*, albeit in a different constitutional context. In section 5 of this comment, we will briefly discuss that stage of the saga, as it touches on the issue of divergent, if not opposite, approaches between the ECJ and ECtHR in nearly identical cases to identical national provisions on the fundamental political right to vote.

As we shall see, there are some similarities as well as some striking differences in the ECJ reasoning in these cases. The similarities include the failure to consider electoral rights as fundamental political rights within the terms of the EU Charter on Fundamental Rights, while among the differences there is the role which the ECJ attributes to the nature and role of European citizenship in the two cases. In both cases the ECJ apparently takes a broad interpretation of the franchise. In this respect we will notice that democratic rights seem to be in better hands at the ECJ compared with the ECtHR.

[1] Except for the special association regime contained in Part Four of the EC Treaty and decisions based thereon.
[2] E.g. in the area of taxation; these exceptions are interpreted narrowly by the ECJ: cf. Case C-349/03, *Commission v. United Kingdom*, [2005] ECR I-7321.

2. Factual and legal background

2.1. Voting rights in Gibraltar

In conformity with Annex II (now Annex I) of the Act concerning the election of the representatives of the European Parliament by direct universal suffrage (hereafter: the 1976 Act), the UK had held elections for the European Parliament only in the United Kingdom. No elections for the European Parliament had been held in its Crown Colony Gibraltar, and inhabitants of Gibraltar were excluded from the elections. Article 3 of the First Protocol to the ECHR,[3] according to the case law of the ECtHR, grants the right to vote and stand for elections for legislatures – a right not included in the ECHR itself due to problems foreseen primarily by the UK in its colonies.[4] The ECtHR established, in *Matthews* v. *the United Kingdom*, that the exclusion of Gibraltar citizens from elections for the European Parliament infringes Article 3 First Protocol ECHR.[5] The UK subsequently changed its legislation so as to grant inhabitants of Gibraltar the possibility to vote. Just as is the case within the UK itself, it granted the right to vote in elections for the European Parliament to UK citizens and also to Qualifying Common Wealth Citizens ("QCCs") of more than 18 years of age resident in Gibraltar. Gibraltar was combined with the electoral region of South West England into a new electoral region. A bilateral agreement between Spain and the UK was attached to the 1976 Act concerning the election of the European Parliament, to the effect that "the UK will ensure that the necessary changes are made to enable the Gibraltar electorate to vote in elections to the EP as part of and on the same terms as the electorate of an existing UK constituency", in order to comply with the *Matthews* judgment. The above-mentioned Annex to the 1976 Act had failed to be amended due to a Spanish veto, caused by Spanish resistance to British exercise of sovereignty over Gibraltar.

Spain brought an action against the UK in which it claimed in essence that under EC law only European citizens can have the right to vote and stand for elections for the European Parliament (Arts. 189, 190, 18 and 19 EC). Spain relied on the declarations following accession by the UK to the EC, in which the UK defined the scope of EC law *ratione personae* in view of the complexities of British nationality law, and claimed that, as confirmed by the ECJ in *Kaur*,[6] the declarations do not include QCCs. Spain also relied on the wording of Article 39 of the EU Charter of Fundamental Rights in the version of 7 December 2000, which grants electoral rights in EP elections to "every citizen of the Union", as well as the relevant provisions of the Constitutional Treaty which similarly seems to restrict electoral rights to EU citizens. Moreover, Spain complained on the basis of the Annex to the 1976 Act that the UK should have extended the right to vote in the UK to British citizens in Gibraltar, so that it was not necessary to organize the elections the way it did and extend the vote to QCCs. By not merely merging Gibraltar with an existing UK constituency, but also establishing a register in Gibraltar, having elections take place there (instead of allowing Gibraltar's inhabitants to vote by post or cast their vote within the UK), and giving local courts jurisdiction to hear proceedings in electoral matters, the UK did much more than was necessary to comply with *Matthews*, and thus infringed the bilateral undertaking between Spain and the UK as well as the (unamended) Annex to the 1976 Act.

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[3] "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."
[4] See Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford University Press, 2001).
[5] ECtHR 18 Feb. 1999, Application No. 24833/94.
[6] Case C-192/99, *Kaur*, [2001] ECR I-1237.

The UK explained that the status of Qualifying Commonwealth Citizen is conferred on persons who are not nationals of the UK but do have the right to live in the UK. This status also exists in other commonwealth countries for certain citizens who reside in a country of which they do not possess the nationality. QCCs in the UK have the right to participate in general elections for Parliament as well as for the European Parliament. In Gibraltar the same principle applies. The number of QCCs in the UK who can vote in those elections is about a million; the number of such citizens in Gibraltar is about 200. The UK disputed that any provision of EC law prohibited Member States from extending the right to vote in EP elections to nationals of non-Member States. The UK also disputed Spain's understanding of the Court's interpretation of the Declaration in *Kaur*, and claimed that this judgment only regarded the free movement of persons.

The Commission, in support of the UK, argued that the concept of European citizenship is only affected when the extension of rights to non-Member State nationals infringes an EU citizen's rights; this is not the case.

As to the EU Charter, both the UK and the Commission submitted that Article 53 of the Charter should apply, which stipulates that nothing in the Charter can restrict or adversely affect the fundamental rights under national constitutional law. The UK claimed that the Constitutional Treaty was irrelevant as it has not entered into force; in any case, the UK submitted that its provisions do not amount to exclusive voting rights for EU citizens, while Declaration 48 makes clear that the Member States had disagreed on such exclusive rights.

2.2. Voting rights in Aruba

The Netherlands Electoral Act, the *Kieswet*, grants the right to vote in elections for the Lower House of the States General (the parliament of the Netherlands) and the right to vote in elections for the European Parliament to Netherlands nationals over 18 years of age, with the exception of nationals resident in the Netherlands Antilles or Aruba.[7]

The Kingdom of the Netherlands consists of three countries: the Netherlands, located in Europe; the Netherlands Antilles, which are five islands in the Caribbean; and Aruba, which belonged to the Netherlands Antilles until 1986. In many policy fields these countries are autonomous, but there are a number of important issues (including foreign affairs, defence, nationality and safety at sea) which are regulated by acts for the whole Kingdom. These acts for the whole Kingdom are made by the government of the Kingdom, in which plenipotentiary ministers of the Caribbean governments are represented, and the States General; however, Caribbean representatives have no vote in the States General, and as mentioned above, Netherlands nationals resident in those countries do not have the right to vote in elections for the States General. This point has always been a problem, since as a consequence legislation is passed which is binding in Aruba and the Netherlands Antilles on which no directly elected representatives have had a say. Moreover, as European law – though

[7] The right to stand for election for the European Parliament is open to any Dutch national irrespective of his place of residence, see Art. Y 4 of the *Kieswet* [Netherlands Electoral Act]:
"The following shall be eligible for election to the European Parliament:
(a) those who fulfil the requirements laid down in Article 56 of the Constitution for membership of the States General;
(b) nationals of other member states of the European Union, provided:
1 their actual place of residence is in the Netherlands,
2 they have attained the age of eighteen years on polling day, and
3 they have not been disqualified from standing for election in the Netherlands or in the member state of which they are nationals."
Art. 56 of the Dutch Constitution reads: "To be eligible for membership of the States General, a person must be a Dutch national, must have attained the age of eighteen years and must not have been disqualified from voting."

not as such binding on Aruba and the Netherlands Antilles, which are associated with the EC under Part Four of the EC Treaty on Overseas Countries and Territories – makes itself felt directly and indirectly in the overseas countries of the Kingdom, the *Matthews* judgment of the ECtHR gave further food to dissatisfaction with this aspect of constitutional relations between the Netherlands and the Caribbean parts of the Kingdom.

Finally it should be noted that Netherlands nationality within the Kingdom of the Netherlands is said to be "undivided", in the sense that also inhabitants of the Netherlands Antilles and Aruba possess Netherlands nationality under the same conditions as the inhabitants of the European part of the Kingdom (the Netherlands).

Mr Mike Eman and Mr Benno Sevinger, two local Christian Democrat politicians resident on the island of Aruba and members of the local Aruban parliament, took their cue from the *Matthews* judgment of the ECtHR and applied for registration as electors in EP elections in the municipality of The Hague. Their registration was refused on the basis of the *Kieswet*. They appealed to the Netherlands Council of State (judicial branch), *Raad van State Afdeling bestuursrechtspraak*, complaining that this refusal to register them, based on the *Kieswet*, constituted unjustified discrimination and an infringement of their electoral rights under Article 3 of the First Protocol to the ECHR, the provisions on citizenship of the Union, and their electoral rights for European Parliament elections as guaranteed by the EC Treaty. The *Raad van State* referred to the ECJ a set of preliminary questions concerning:

- whether the provisions on citizenship are applicable to persons living in an Overseas Country or Territory (to which only the special provisions of association under Part Four of the EC Treaty seem applicable); in case of a negative answer to this question whether Member States are free to grant nationality to inhabitants of such OCTs;
- whether Article 19(2) EC in conjunction with the provisions on elections for the EP mean that citizenship of a Member State automatically implies voting rights also for inhabitants of OCTs;
- whether the provisions of Articles 17 and 19 EC on EU citizenship and the right to vote for the EP, read in conjunction with Article 3 First Protocol ECHR, prohibit Member States from granting voting rights to non-EU citizens; and
- what the nature of legal redress under EC law would have to be in case the refusal to register Netherlands nationals residing in the Netherlands Antilles or Aruba as voters in EP elections was deemed unlawful under EC law.

3. Opinion of the Advocate General

Advocate General Tizzano gave a single Opinion for both ECJ cases discussed here. He took his starting point in a discussion of principle. In doing this, he acknowledged that there is no provision of Community law which posits openly and directly that EU citizens have to be granted the right to vote. He pointed out that there are certain provisions which seem an indication of this right (Articles 19 (2), 189 and 190 EC), but he argued that

> "even if we disregard the above and other possible references, it seems to me that the right to vote in European elections is enjoyed by citizens of the Union primarily by virtue of the principles of democracy on which the Union is based, and in particular, to use the words of the Strasbourg Court, the principle of universal suffrage which 'has become the basic principle' in modern democratic States (19) and is also codified within the Community legal order in Article 190(1) EC and Article 1 of the 1976 Act, which specifically provide that the members of the European Parliament are to be elected by 'direct universal suffrage'. That rule militates in favour of recognition of a right to vote attaching to the largest possible number of people and therefore, at least in principle, to all citizens of a State."

The Advocate General found confirmation for this in the fact that the right to vote has been elevated to a fundamental right safeguarded by the ECHR, in particular Article 3 of its First Protocol (paras. 67-71). The exercise of this right can obviously be made subject to certain conditions.

As to the *Gibraltar* case, he concluded that the extension of voting rights to QCC (who are not UK nationals, and therefore not EU citizens) in Gibraltar was not necessary to comply with the *Matthews* judgment of the ECtHR, and constituted a violation of Annex II (now I) to the Act concerning elections for the EP. In *Eman and Sevinger*, the Advocate General first chastised the referring court for posing irrelevant questions on electoral rights of persons residing in another Member State and electoral rights of non-EU citizens: the case clearly only involved the rights of EU citizens in the Member State of origin or in an OCT. Instead, he formulated the real issue which emerged from the questions of the referring court: whether Community law allows "a Member State which grants voting rights … in the European elections to its own citizens residing in the European territory of the State and to those residing in non-member countries, may withhold that right from its own citizens who, in contrast, reside in a part of the State which is an overseas territory that has an association with the Community." More in particular the issue arose whether exclusion from voting rights for the mere fact of residing in a particular OCT, compared with residence elsewhere in the world, is lawful. The Advocate General held that it is in general lawful to exclude nationals from electoral rights on the basis of criteria of residence, but that withholding them only from those nationals who are resident in one particular country and not withholding them from nationals resident anywhere else in the world constitutes an infringement of the general principle of equal treatment and is therefore unlawful under Community law.

4. Judgments of the European Court of Justice

4.1. Spain v. UK

The Court first explained that the disputed British legislation was implemented to comply with the judgment of the ECtHR in *Matthews*. The Court recalled that "for reasons connected to its constitutional traditions" the United Kingdom had chosen, both for United Kingdom national elections and for elections to the Gibraltar House of Assembly, to grant the right to vote and to stand for election to QCCs satisfying conditions expressing a specific link with the area in respect of which the elections are held (para 63). Then the Court examined Spain's claim that in Community law there is such a close link between citizenship and voting rights that these rights are to be restricted to EU citizens only. It found no such link in the 1976 Act, nor in Articles 189 and 190 EC. The words "representatives in the European Parliament of the *peoples of the States* brought together in the Community" in Articles 189 and 190 EC does not, according to the Court, lead to clear conclusions "since the term 'peoples', which is not defined, may have different meanings in the Member States and languages of the Union" (para 71; literally repeated in para 44 *Eman & Sevinger*). The Court also asserted that the provisions on citizenship cannot lead to the conclusion that only EU citizens are entitled to the rights of the Treaty under Article 189 and 190 EC. It specified that the right to petition the European Parliament and the European Ombudsman is not granted to EU citizens only, but to any natural or legal person residing or registered in a Member State. The Court recalled its citizenship statement, originating in *Grzelczyk*, that "citizenship of the Union is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to receive the same treatment in law irrespective of their nationality,

subject to such exceptions as are expressly provided for". It added that this statement does not necessarily mean that the rights recognized by the Treaty are limited to citizens of the Union (para 74). The Court specified that *Kaur* only concerned the scope of the provisions of the EC Treaty which refer to the concept of "national", such as the provisions relating to the freedom of movement of persons, at issue in that case, and not to all the provisions of the Treaty.

The Court found that Articles 19(1) and (2) EC, which relate to equal treatment of EU citizens residing in other Member States than their own, cannot be interpreted as meaning that "a Member State in a position such as that of the United Kingdom is prevented from granting the right to vote and to stand for election to certain persons who have a close link with it without however being nationals of that State or another Member State" (para 76). Also, since the number of seats for a Member State is determined in the Treaty, while elections are held on the basis of national legislation, extending the right to vote to non-EU citizens "affects only the choice of the representatives elected in that Member State and has no effect either on the choice or on the number of representatives elected in the other Member States" (para 77).

All these considerations bring to the Court to the conclusion that in the current state of Community law, the definition of the persons entitled to vote and to stand as a candidate in elections to the European Parliament falls within the competence of each Member State in compliance with Community law. Articles 189 EC, 190 EC, 17 EC and 19 EC do not preclude the Member States from granting that right to vote and to stand as a candidate to certain persons who have close links to them, other than their own nationals or citizens of the Union resident in their territory (para 78).

> "For reasons connected to its constitutional traditions, the United Kingdom chose to grant the right to vote and to stand for election to QCCs who satisfy conditions expressing a specific link with the territory in respect of which the elections are held. In the absence in the Community treaties of provisions stating expressly and precisely which persons have the right to vote and to stand as a candidate in elections to the European Parliament, it does not appear that the United Kingdom's decision to apply to the elections to that Parliament held in Gibraltar the rules governing the franchise and eligibility for election laid down by its national legislation both for national elections in the United Kingdom and for elections to the Gibraltar House of Assembly is contrary to Community law" (para 79).

As to the complaint that the UK legislated with regard to elections in Gibraltar as such, the Court emphasized that this was in compliance with *Matthews* and other case law of the ECtHR on electoral matters, and concluded (para 95) that

> "the United Kingdom 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."

The Court thus concluded that also this plea in law was unfounded.

4.2. Eman and Sevinger in the ECJ

The Court was very brief in deciding that any person with the nationality of a Member State, also those living in OCTs or elsewhere, can invoke the rights conferred on EU citizens in Part Two of the EC Treaty. Residence in an OCT is "irrelevant in that regard" (para 27). Next, and in greater detail, the question was addressed whether Article 19(2) in relation to Articles 189 and 190 EC mean that an EU citizen living in an OCT has electoral rights in elections for the EP. The Court first concluded from these Treaty provisions that in the current state of Community law it falls "within the competence of Member States in compliance with

Community law" to determine who has to right to vote and stand for election. The Court, however, immediately added a question which was *not* posed by the referring court but which was at the heart of the case brought by Eman and Sevinger, also as was presented during the hearing in Luxembourg,[8] i.e. "whether that law precludes a situation such as that in the main proceedings, in which Netherlands nationals residing in Aruba do not have the right to vote and to stand as a candidate[9] in elections to the European Parliament" (para 45).

The Court made it clear that because the EC Treaty provisions (apart from those on the OCTs) do not apply in Aruba, no elections for the EP need to be held pursuant to Articles 189 and 190 EC, nor does Article 3 of the First Protocol to the ECHR require such elections. The Court also held that the influence of Community law on the law in Aruba is not a valid reason for holding elections for the EP there. The Court stated: "That influence may flow from the provisions of Community law which are rendered applicable to the OCTs within the framework of the association"; it found that with respect to other provisions of EC law, this influence is only indirect and the impact "is not sufficient for them to be regarded as affecting the population in the same way as the measures emanating from a local legislative assembly" (para 49). That other Member States hold elections in OCTs was not decisive either: "In the absence of specific provisions in that regard in the Treaty, it is for the Member States to adopt the rules which are best adapted to their constitutional structure." (para 50)

Furthermore, the Court concluded from the provisions of EC law and from the case law of the ECtHR that the criterion of residence "does not appear, in principle, to be inappropriate to determine who has the right to vote and to stand as a candidate[10] in elections to the European Parliament" (para 55).

The Court then examined the complaint that the Netherlands Electoral Act infringes the Community law principle of equal treatment, in that it confers the right to vote in elections to the European Parliament on all Netherlands nationals resident in a non-member country, while such a right is refused to Netherlands nationals resident in the Netherlands Antilles or Aruba. The Court stated (para 57):

> "In that regard, it must be observed that the principle of equal treatment or non-discrimination, which is one of the general principles of Community law, requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04 *ABNA and Others* [2005] ECR I-10423, paragraph 63, and Case C-344/04 *IATA and ELFAA* [2006] ECR 1-403, paragraph 95)."

The Court set out that the comparator for Netherlands citizens resident in Aruba and the Netherlands Antilles is the Netherlands citizen residing outside the EU. They have in common that they reside outside the EU. Yet they are treated differently, because Netherlands citizens residing in the Netherlands Antilles and Aruba do not have electoral rights, whereas Netherlands citizens residing elsewhere in a non-member country do have voting rights for the EP. The Court rejected the justification presented by the Netherlands Government at the hearing that those other Netherlands citizens are assumed to have retained ties with the Netherlands. It remarked that a Netherlands citizen who moves his residence away from Aruba to a third country acquires voting rights for the EP. It found that the objective of conferring electoral rights on Netherlands citizens who have or have had links with the Netherlands "falls within the legislature's discretion", but decided that "the Netherlands

[8] As reported in the Dutch newspaper *NRC Handelsblad*, 7 July 2005, p. 7.

[9] The ECJ makes a error of law: the right to stand for elections is open to a Dutch national wherever he resides, see note 7 *supra*.

[10] The right to stand as a candidate is irrelevant to the case at hand, see note 7 *supra*. The mistake is made several times.

Government has not sufficiently demonstrated that the difference in treatment observed between Netherlands nationals resident in a non-member country and those resident in the Netherlands Antilles or Aruba is objectively justified and does not therefore constitute an infringement of the principle of equal treatment." (para 60)

The Court remarked on the fourth question, which was whether electoral rights can be conferred on non-EU citizens, that it has no connection with the case referred, which concerns EU citizens, and refers, "if need be", to the judgment of the same day in *Spain* v. *UK* on voting rights in Gibraltar.

As to the issue of EC requirements regarding legal redress, it pointed out this is a matter of national law. However, there is Member State liability for damages under Community law, and also the principles of effectiveness and equivalence apply.

5. *Sevinger and Eman* in the European Court of Human Rights

In December 2007, the *Raad van State* integrally adopted the views expressed in the judgment by the ECJ in *Eman and Sevinger*, although we shall see below that the ECJ failed to give guidance on one important constitutional issue with which it was faced.

In the meantime, however, Mr Sevinger later joined by Mr Eman, had started a second law suit at the *Raad van State*. This time it concerned their failed attempt to register for the anticipated elections for the Netherlands Lower House which were to be held in November 2006. The Electoral Act contains exactly the same requirements for the right to vote for the Lower House as for the European Parliament: it equally excludes nationals who reside in the Netherlands Antilles or Aruba from the right to vote for the Lower House. For Aruba this was the real test case. Sevinger and Eman thought they had the ECJ judgment in their favour. Their case was all the more likely to succeed as the EP does not legislate for Aruba, while the Lower House legislates in a binding manner also for Aruba in so-called affairs for the whole Kingdom. These comprise such highly important affairs as matters of defence, international relations, nationality, nationality of ships, safety and navigation of ships, expulsion, general conditions and supervision of migration, as well as the guarantee of human rights and good governance. It should be noted that relevant legislation on these matters may concern and affect the Caribbean parts of the Kingdom only and be valid only in these parts of the Kingdom, yet it is only the Netherlands Lower and Upper House who decide on the passing of this legislation.[11] At present, a process for the dismantling of the Netherlands Antilles is underway, which has as a consequence that the power of the Lower House to legislate for the Caribbean parts of the Kingdom is further extended to comprise the direct supervision of public finance, police and justice. The right to be represented in parliament and to vote for such a legislative power can only become more important in the years to come.

One might expect the case to be dealt with in accordance with what the ECJ judged in *Eman and Sevinger*, but the judicial branch of the *Raad van State* found otherwise. It found it enough that the local parliaments of Aruba and the Antilles have the right to voice an opinion on the relevant bills and that an unelected Aruban or Antillean government representative forms part of the Netherlands Council of Ministers and can speak in the Lower House when relevant bills are being discussed. In the view of the *Raad van State*, there is no need for a right to take part in the vote on legislation for the overseas territories, nor is there a need to give the Netherlands citizens of the Caribbean parts of the Kingdom the right to vote for the

[11] This is particularly true with regard to the conclusion of treaties which are only binding for the Netherlands Antilles and Aruba on affairs within their autonomous powers; it is the States General which have to give parliamentary approval, not the parliaments of the Antilles and Aruba.

Lower House which legislates for those citizens.[12] An advisory role in legislation governing these parts of the Kingdom is enough.

As to the claim of discrimination, the judicial branch of the *Raad van State* stated laconically that this is not substantiated, because Netherlands nationals who live in Aruba have the right to vote for the Aruban parliament [*Staten van Aruba*], and Netherlands nationals who do not or no longer live in Aruba do not have that right; "in this sense the cases are not equal and therefore there is no unjustified unequal treatment".

Sevinger and Eman next brought their case on elections for the Lower House to Strasbourg. Their complaints were dismissed as manifestly ill-founded. The reasons of the European Court of Human Rights for this decision differ partly from those of the *Raad van State*, but are nevertheless very similar. For the ECtHR it was enough that Netherlands nationals residing in Aruba can vote for the local parliament of Aruba, whose delegates are allowed to make their views known to the Lower House in Kingdom affairs. Thus, they "are able to influence decisions taken by the Lower House"; the "relatively small amount" of legislation passed by the Lower House which is binding on Aruba, compared to the internal matters decided by this House, means according to the ECtHR that Arubans are not "affected to the same extent" as Netherlands nationals residing in the Netherlands.[13]

On the issue of discrimination, on which *Eman and* Sevinger won at the ECJ, the ECtHR held that all Netherlands citizens "have the right to vote for the members of a representative body … regardless of where they reside." As nationals residing in Aruba are entitled to vote for the Aruban local parliament, their situation "is not relevantly similar" to nationals who live elsewhere outside the Netherlands. From this it is concluded that "the impugned difference in treatment is justified". The ECtHR adds that the case for elections of the Lower House is "significantly different" from that for the European Parliament: in the latter case

> "the applicants were completely denied any opportunity to express their opinion in the election of members of the European Parliament. In the case at issue, however, the applicants do have a say in respect of Kingdom matters, albeit indirectly, in the Netherlands Parliament; namely via special delegates of the Parliament of Aruba, in whose election the applicants were entitled to participate."[14]

6. Comment

6.1. Beyond juxtaposed constitutional orders

The ECJ judgments discussed here are revealing of the manner and degree to which constitutional orders interact. Often it is assumed that the constitutional interaction within the European Union is one between juxtaposed legal orders, legal orders which operate on the basis of an assumed mutual autonomy, with one outranking the other. Many authors approach this in terms of federal or quasi-federal political systems, highlighting the primacy or even "supremacy" of European law.[15] Others emphasize the pluralist aspects of this relation

[12] Afdeling Bestuursrechtspraak Raad van State, 21 Nov. 2006, case numbers 200607567/1 and 200607800/1, www.rechtspraak.nl, LJN number AZ3201.

[13] ECtHR (Third Section), 6 Sept. 2007, Applications Nos. 17173/07 and 17180/07 by Oslin Benito Sevinger and Michiel Godfried Eman against the Netherlands.

[14] Ibid., p. 10.

[15] To the extent that this is made explicit, it had been a standard view among EC lawyers in the 1980s. It is the tacit assumption behind the Cappeletti, Weiler and Seccombe project on Integration through law, where the natural comparator for the development of European integration was only taken to be found in federal states. In a

between autonomous orders.[16] At best the two orders counterbalance each other when one system touches on the constitutional fundamentals of the other, as was the case in the 1970s and 1980s when national courts forced the ECJ to take the protection of fundamental rights more seriously than it was prepared to do on its own initiative; hence the analysis of constitutional relations in terms of a "dialogue" between constitutional courts.

Both approaches hinge on the mere juxtaposition of constitutional orders. Quite to the contrary, the ECJ cases discussed here show that neither the federalist approach, nor the pluralist approach is sufficient to explain the present situation with regard to the most crucial of all fundamental rights in a democracy, the right to vote and stand for election. The ECJ cases show that constitutional relations within the European Union go well beyond simple juxtaposition. The constitutional issue of electoral rights in the EU reveals how constitutional relations mutually assume each other's simultaneous applicability. The case law reinforces the point that in the EU constitutional orders of the Member States, the EU, and the ECHR do not merely assume each other's existence, nor do they merely influence each other: they *determine* each other, and this not in the 1960s and 1970s hierarchical *top-down* manner of "supremacy" of EC law overriding national constitutional law, but in a much more complex, non-hierarchical manner.

As far as the right to vote is concerned, the Court in *Spain* v. *UK* points out twice that the way in which the UK chose to comply with the decision of the ECtHR in *Matthews* was based on "reasons connected with its constitutional traditions", and that this is not contrary to Community law (paras. 63 and 79); and in *Eman and Sevinger* it states "it is for the Member States to adopt the rules which are best adapted to their constitutional structure" (para 50). The question of who is given the right to vote and to stand for election, and hence who is represented in a major institution of the EU, is not determined by the EU constitution but by the various constitutions of the Member States in accordance with their constitutional structure as this has evolved in the various political histories of the Member States. These histories include their colonial past, and the different forms which the former colonial relationships have taken in the present: the Crown Colony of Gibraltar and the autonomy of Aruba and the Netherlands Antilles within the Kingdom of the Netherlands.

The constitutional freedom to determine electoral rights, and hence the composition and the representative nature of the European Parliament is, however, regulated by Article 3 of the First Protocol of the European Convention on Human Rights – another constitutional document which is a source of European law located outside the autonomy of the EU.[17] The *Matthews* judgment of the ECtHR clarified that the ECHR provisions mean that EP elections must be available for citizens resident in Gibraltar, while for the Netherlands Antilles and Aruba they imply that *no* EP elections in those autonomous countries are necessary. This is because in Gibraltar EC law applies, while in the Netherlands Antilles and Aruba it does not apply (directly) (para 49, *Eman and Sevinger*). So: the territorial scope of EC law determines the applicability of Article 3 First Protocol ECHR in the Member States' regulation of electoral rights for the EP. Moreover, the Court of Justice presents it as an obligation under EC law for the UK to carry out the *Matthews* judgment of the ECtHR (*Spain* v. *UK*, paras. 90-96), although we will see that there is some doubt about whether this is under Article 307 EC

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sense, much analysis from the "multi-level" perspective by lawyers is bases on this view as well; cf. *pro multis* Pernice, "Multilevel constitutionalism and the Treaty of Amsterdam: European Constitution-making Revisited", 36 *CML Rev.* (1999), 703-750; id. "Multilevel Constitutionalism in the European Union", 27 EL Rev. (2002), 511-529. For a somewhat broader conceptual critique of this approach, see Besselink, *A Composite European Constitution* (Europa Law Publishing, Groningen 2007).

[16] On the whole – but in different forms, with elaborations in various directions, different shades and nuances – this can be sensed in pluralist approaches by e.g. Matthias Kumm, Jan Komárek, Julio Bacquero Cruz.

[17] Arguably, this changes after the EU has acceded to the ECHR in conformity with the Reform Treaty signed in Lisbon.

or under Article 6(2) TEU. However that may be: obligations under ECHR law determine obligations under EC law.

Finally, *Eman and Sevinger* makes it clear that it is the EC legal principle of equal treatment which determines the manner in which Member States apply the ECHR right to vote in and stand for election for the European Parliament (para 56). Thus, EC law principles determine the rights under national constitutional law.

To sum up: Member State constitutional law determines the nature and scope of representation in the EU institution, the European Parliament; EC law determines the scope of the ECHR rights involved as well as the freedom of Member States to determine electoral rights for the EP; while the ECHR rights determine the same electoral rights for the EP.

The result of this composite constitutional arrangement is not a monolithic European concept of citizenship: the question of who is to be considered a citizen enjoying the democratic political right to vote is answered differently from one Member State to another. Political citizenship is a "pluralist" concept in as much as it means something different from one State to another: a person in one Member State may have the right to vote for the EP, whereas in another Member State a person in the same position does not have that right. For example, an inhabitant of an OCT in the sense of Part Four of the EC Treaty may not be considered a EU citizen with the right to vote, due to national constitutional arrangements, as is the case in the British Virgin Islands (a British OCT); whereas an inhabitant of a Dutch OCT may have to be considered an EU citizen enjoying that right, due to the national legislation in combination with principles of EU law.

Similarly, the democratic political right to vote for the European Parliament may be exclusive in the sense of only pertaining to nationals, as is the case in some Member States such as France, whereas the right to vote is inclusive of non-nationals in some other Member States, as is the case with qualifying commonwealth citizens in the UK and Gibraltar. Being a national of a Member State may according to the law of that Member State - and hence under EU law - mean that one has the right to vote for the European Parliament although one has never lived in the Member State or in Europe at all (as is the case under the electoral law of the Netherlands), whereas EU law (on the basis of ECHR law) also allows the right to vote for the European Parliament to be made dependent on criteria of residence.

In short, the ECJ judgments under discussion confirm that European citizenship is dependent on national citizenship, not only formally but also substantively.[18] National law determines who is an EU citizen, and hence who enjoys the EU rights pertaining to citizenship; however, this national law must live up to legal requirements set by EU law and the ECHR as determined by the ECtHR (*Eman and Sevinger*). National law determines who is to enjoy citizenship rights; even if these persons do not formally acquire citizenship, they can still partake of the privilege to carry the rights pertaining to citizenship as a matter of EC law (*Spain* v. *UK*).

6.2 Juxtaposed and discrete constitutional orders in Europe: The ECtHR

Sevinger and Eman at the ECtHR shows the limits of the image of the European order as a composite legal order in which constitutions presuppose and reinforce each other in mutual dependence. The European Court of Human Rights wished to salvage the autonomy of metropolitan countries of post-colonial States to withhold voting rights from national citizens of (former) colonial territories. This is done on the basis of a reasoning which compartmentalizes constitutional orders in two respects.

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[18] See "Editorial - Dynamics of European and national citizenship: inclusive or exclusive?" 3 *European Constitutional Law Review* (2007) 1–4.

Firstly, it compartmentalized constitutional orders by declaring the issue of discrimination of voting rights in the ECJ's *Eman and Sevinger* judgment as irrelevant to national voting rights. This was accomplished by distinguishing the European Parliament from the national parliament, by distinguishing the case of the unlawfulness of lack of voting rights in the EP from the lack of voting rights in the national parliament, by stating that in the case of the EP, Aruban citizens lacked all means of influence, while for the national parliament there was some indirect advisory influence (thus, conveniently ignoring the fact that the European Parliament does not pass any legislation applicable in Aruba or the Netherlands Antilles, whereas the national parliament does indeed do so and on highly important issues).

Secondly, the reasoning is compartmentalized by holding that representation in a local legislature (the Aruban parliament) is a justification for withholding voting rights in a superior legislature, even if this superior legislature passes legislation which overrules that local law – one might think of a return to the days that the EEC passed superior legislation which trumped conflicting national law, but there was no directly elected European parliament, or even worse. We will return to this below.

For the moment we conclude that *Sevinger and Eman* proves there are important exceptions to the constitutional interdependence which is inherent in an approach to the constitutional reality of Europe in terms of a set of mutually interdependent and communicating constitutions within an overarching composite constitutional order which renders these constitutions coherent. This seems to prove that legal outcomes are determined by the manner and extent to which one is *willing* to look at constitutional relations as essentially one of autonomy of discrete legal orders or one of constitutional interdependence.

6.3 The right to vote and citizenship in late-colonial context

The right to vote is the most preeminent political right pertaining to citizenship. Without the right to determine who is to be one's representative with legislative power, there can be no citizenship in a truly political sense. This political right does not fully exhaust citizenship rights. The political right to vote is in a sense logically preceded by the minimum right to reside in the political community of which one is a citizen. In EU law, this last right has been one of the core rights of EC law and of EU citizenship: the right to remain in another EU Member State and enjoy its rights on an equal footing to this State's own citizens. The case law of the ECJ on citizenship suggests that this aspect of equal treatment is a decisive (perhaps the most decisive) feature of EU citizenship in legal terms. Nearly all cases concern the right to be treated equally to other EU citizens in the State of residence.[19]

Although certain conditions are still posed on the exercise of this right, and the political right to vote is limited to elections for the European Parliament and local elections, these rights are in an authentic sense citizenship rights.

Under European law, EU citizenship is conditional on nationality of a Member State. However, the importance of *Spain* v. *UK* is that citizenship rights are not exclusive: they can also be extended by national law to non-nationals, in the case of the UK to Qualifying Commonwealth Citizens. In Gibraltar, this concerns only the relatively small number of 200 voters, but in the UK itself it concerns more than a million voters in each of the EP elections held in the UK since 1978 (paras. 46 and 47, *Spain* v. *UK*). In this context, the Court had to qualify its eschatological doctrinal formula of EU citizenship as "destined to be the

[19] The exception is Case C-148/02, *Garcia Avello*, which concerns the right *not* to be treated the same as citizens of the Member State of residence, but rather the same as citizens of the Member State of origin.

fundamental status of nationals of the Member States"[20] (*Grzelczyk*). This doctrinal formula could easily be understood as indicating an exclusive relation between the rights of EU citizenship and Member State nationality, leaving non-nationals outside the equation. However, substantive citizenship rights can be conferred on non-nationals as well, thus making the notion of citizenship in a substantive sense independent from the formal qualification of nationality. The special links which certain residents have with a Member State can be a legitimate justification to extend political rights to non-nationals.

It may seem somewhat ironic that this should be concluded in the context of late-colonial relations – those between the UK and the Crown Colony of Gibraltar, where EC law applies. The non-exclusive approach to citizenship rights which is borne out by *Spain* v. *UK* can be considered to be "cosmopolitan", in as much as metropolitan political rights are being conferred also on the inhabitants of the colony. In a sense, this is paralleled in EC law, which has contributed to the conferral of citizenship rights also on non-nationals of Member States without thus bestowing nationality. Simple forms of this are the other political citizenship rights conferred by the EC Treaty on EU citizens in Article 21 EC, i.e. the right to petition the European Parliament and the European Ombudsman, which pertain also to non-EU citizens as is evident from Article 194 and 195 EC.[21] Also that other major citizenship right, the right of EU citizens to reside in another Member State, with all the subsequent rights flowing from that residence, is an example of the relatively cosmopolitan nature of EU law. Much more differentiated are the free movement and residence rights and rights pertaining to such free movement and residence for third country nationals within the scope of Community law, such as the rights of family members of EU nationals, and other privileged third country nationals under some of the association agreements, the EEA and Schengen *acquis*. As far as this highly differentiated personal status in law is concerned, the EU certainly has features of the imperial arrangements under which various groups of inhabitants of the empires each enjoyed a different personal status.

Eman and Sevinger confirms this impression to the extent that, according to the Court, Member States are allowed to exclude some of their own nationals from citizenship rights if they are not resident within the territory of the Member State in which EC law applies directly; it "falls within the discretion" of the national legislature to make electoral rights dependent on the links which a national has or has had with the Member State in question. While in *Spain* v. *UK*, it is within the constitutional discretion of Member States to base the political notion of citizenship on a specific link between non-national inhabitants and the Member State, this discretion also goes the other way in that Member States may indeed discriminate between its own nationals in conferring democratic political rights depending on the presumed "links" of a particular citizen with the Member State (para 60, *Eman and Sevinger*). In colonial areas, citizens are not *necessarily* granted metropolitan political rights – EU law is not *that* cosmopolitan. Whereas under the Court's "eschatological doctrine" of EU citizenship, equal treatment is the essence of the "fundamental status" of EU citizenship,

[20] The civil theology of the Court's language is not the same in all language versions. Whereas the Italian follows the English, the French version does not use the word "destiny" as the English does, but still has an eschatological ring to it by speaking of the European citizenship's "vocation to be the fundamental status" of Member States' citizens: *le statut de citoyen de l'Union a vocation à être le statut fondamental des ressortissants des États membres*. The Spanish follows the French. In the Dutch version, on the contrary, citizens already enjoy the fullness of time, for it has immanentized the *eschaton*; in Dutch, it states that the "quality of Union citizenship should be the primary quality of the subjects of the Member States" (*de hoedanigheid van burger van de Unie dient immers de primaire hoedanigheid van de onderdanen van de lidstaten te zijn*).

[21] In a very limited sense, the EU citizenship right of diplomatic and consular protection of Art. 20 EC is by definition not dependent on nationality, in as much as it only applies to non-nationals of the Member State providing that protection. But this is the case also for the right to vote extended to non-national EU citizens in other Member States of Art. 19 EC.

Member State nationals among themselves do not necessarily need be treated equally. This may be one explanation for the apparent paradox that the Court found it necessary to refer to "citizenship doctrine" of *Grzelczyk* in the *Gibraltar* case, which did *not* concern EU citizens or their equal treatment; and why it was not used in the context of *Eman and Sevinger,* which in essence *did* concern EU citizens.

However, the exclusion of a Member State's own nationals must not be discriminatory, as the Court found was the case with the Netherlands electoral law in question. This is a considerable EC law restriction on the freedom of Member States to withhold political rights from their own nationals.

6.3. Voting rights and non-discrimination as a matter of administrative law

Curiously, the principle of equal treatment as applied by the Court in *Eman and Sevinger* is *not* applied as a constitutional principle of EU law. The Court does not adduce the prohibition of discrimination of Article 14 ECHR in connection with Article 3 First Protocol ECHR, as one would have expected, nor Article 26 ICCPR[22] (nor, for that matter, Art. 1 of the Twelfth Protocol ECHR, which has only been ratified by few Member States).

Instead of constitutional fundamental rights, the Court refers to purely administrative case law.[23] Apparently, for the ECJ the issue should not be regarded a matter of constitutional rights, but of administrative arrangements. This is surprising, given that we are dealing with the most fundamental democratic rights. As a matter of fact, the context of the prohibition of discrimination in *Eman and Sevinger* is presented by the Court as one in which it becomes a matter of prohibiting arbitrariness. Equal treatment here approximates reasonableness. It is unreasonable that a Netherlands national who lives in Aruba cannot vote, but when he decides to cross the sea for some twenty miles and emigrate from Aruba to Venezuela he suddenly acquires the right to vote. A Netherlands citizen who lives in the French part of the Antillean island of St. Maarten has the right to vote, but if he moves less than a kilometre to the Netherlands part of that island, he loses his right to vote. This is an arbitrary result which cannot be justified.

6.4 Electoral rights in EP elections not an EU fundamental right

In *Spain* v. *UK* the Court remained silent – like the Advocate General, who otherwise strongly emphasized the fundamental rights nature of electoral rights – on the issue of electoral rights under the EU Charter of Fundamental rights (and its counterpart in the abortive Constitutional Treaty), although the relevant provisions were invoked by Spain and responded to by both the UK and the Commission. Article 39(1)[24] of the Charter provides:

> "1. Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State."

If read as a provision on who has the right to vote, this might be read as limiting that right to EU citizens, and as prohibiting non-EU citizens from participating in EP elections. The

[22] The ECJ has repeatedly stated that the ICCPR forms part of the international human rights treaties which it has to take into account as general principles of Community law, lastly in Case C-540/03, *Parliament* v. *Council* (Family Reunification Directive), [2006] ECR I-5769, para 37.

[23] In the form of Joined Cases C-453/03, C-11, 12 & 194/04, *ABNA and Others,* [2005] ECR I-10423, para 63, and Case C-344/04, *IATA and ELFAA,* [2006] ECR 1-403, para 95.

[24] Which is Art. II-99 (1) of the Constitutional Treaty, to which Spain made reference.

Spanish Government wished to read it that way, but it is not the most evident reading of the provision. The Charter provision seems merely to state what is already in Article 19(2) EC: that EU citizens residing in a Member State other than their own, have the right to vote for the EP in the Member State of residence on the same terms as the nationals of that Member State.[25] That Article 19(2) EC adds that this is subject to secondary implementing legislation and to the other provisions on EP elections under the EC Treaty makes no significant difference . Be that as it may, the UK and the Commission in return relied on Article 53 of the Charter:

> "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions."

Spain, however, held that the right for a non-national to vote in EP elections is neither a human right nor a fundamental right, and could therefore not profit from the "maximum" level of protection under Article 53 of the Charter (*Spain* v. *UK*, paras. 42 and 56).

Whereas a few months earlier in the *Family Reunification* judgment,[26] the Court referred to the Charter in its findings, it preferred here to pass over the matter in silence. Perhaps this is because the Charter is of later date than all the relevant EC law provisions invoked. Under such a circumstance, referring to the Charter would give it more legal status and rank than could accrue to a document which is not legally binding. Yet, the omission to mention, let alone consider, the Charter is striking in light of the exchange of views between parties and the intervention of the Commission.

In *Spain* v. *UK* the Court did consider the matter at hand in terms of Article 3 First Protocol ECHR and the case law of the ECtHR on this provision. Yet again, and strikingly so, this was not related to the classic *locus* of Article 6(2) TEU.[27] The Court may have considered the matter strictly as beyond the jurisdiction of the ECJ, as *Matthews* was, and hence as a matter of an obligation the UK has under public international law as a consequence of the European Convention rules; although it would therefore not find that complying with *Matthews* was a matter of complying with fundamental rights obligations under Article 6(2) TEU, but of complying with anterior obligations under public international law in the sense of Article 307 EC.[28] This may raise doubts as to whether the ECJ did consider the matter one of fundamental rights under EU law or not.

Wittingly or unwittingly, in *Eman and Sevinger* too the ECJ avoided considering the right to vote in terms of fundamental rights. This may perhaps be less surprising than it seems at first sight, as this case concerns a right to vote for the European Parliament for EU citizens for whom EU and EC law does not (directly) apply. However fundamental voting rights must of necessity be in any democracy, voting rights in circumstances as in *Eman and Sevinger* are – to borrow a term from moral philosophy – supererogatory rights: just as it is not always immoral not to be extremely virtuous, it is not always unlawful for a State not to grant a

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[25] Art. 19(2) EC was paralleled by Art. III-126 of the Constitutional Treaty. Art. 19(1) EC provides similarly for the right to vote in local elections for EU citizens of other Member States.

[26] Case C-540/03, *Parliament* v. *Council*, [2006] ECR I-5769, para 38.

[27] "The Union 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."

[28] Art. 307(1) EC: "The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty."

certain right to citizens. In this case, voting rights are not inherent rights, but in Hohenfeldian terms merely a privilege – a nice thing to have, but a privilege which does not of necessity have to be granted by law.

6.5. Redress by courts, by the administration or by the legislature?

The issue of legal redress raised by the referring court, the judicial division of the Netherlands *Raad van State*, is dealt with along predictable lines by the ECJ. The referring court, however, foresaw much more far-reaching problems than it succeeded in putting forward in its preliminary questions on the issue, unfortunately. Quite clearly the *Raad van State* wondered what was to happen in the not unlikely case that the ECJ would reach the conclusion that excluding Aruban electors from the right to vote was unlawful. The ECJ's reference to liability for damages, effectiveness and equivalence in electoral cases is clearly insufficient in this regard. Reopening the ballot in cases such as these is legally impossible; there are no damages which can be expressed in monetary terms; so equivalence to what is possible in national cases means in practice that there is no legal redress.

The major and controversial problem which the *Raad van State* was able to foresee, was one in which potentially the ECJ could have given some guidance, but did not for failure of the *Raad van State* to pose its questions adequately: is a national court under EC law competent or obliged to give an injunction to the effect that in the next elections voters who were excluded from the vote in a manner contrary to EC law, are to be registered as voters in the electoral register? Or is the competent administrative authority at municipal level, should it be willing to do so, competent to register them on its own initiative? Or is it up to the national legislature to remedy the unlawfulness?

One may say that in the abstract such questions have already been answered in the case law by reference to ideas of priority over conflicting national law including national constitutional law which stands in the way of the direct effect of European law (*Simmenthal II*), and not only courts of law but also municipal administrative authorities should do so (*Fratelli Costanzo*). However, in a situation as in *Eman and Sevinger*, they raise new political and constitutional questions which have never been put to the ECJ: there is more than one manner in which to end the unlawfulness. The choice as to the means of ending this unlawfulness involves political choices which might in a democracy be inappropriate to be made by either an executive authority or by a court of law.

The practical situation was as follows. The electoral law was unlawful in extending the right to vote to Netherlands nationals residing outside the Netherlands, except those who reside in the Netherlands Antilles and Aruba. The exception is the problem. There is more than one solution to the unlawfulness of this exception: the exception could be disapplied (by a court through an injunction or by the municipal administration on its own initiative), thus extending the vote to all Netherlands nationals residing outside the Netherlands. Alternatively, the right to vote could be *restricted* and given only to Netherlands nationals residing in the Netherlands (with or without further conditions as to the duration of residence, etc.) – as the ECJ actually mentioned in so many words in paragraph 55 of *Eman and Sevinger*. There is obviously a political choice to be made in removing the unlawfulness and bringing electoral rights in the Netherlands in line with Community law. Is it to be made by courts? Should courts be considered competent or even obliged to give an injunction to the administrative authorities, or alternatively even to the legislature, as is taboo in all Member States so far?[29]

[29] Compare the Supreme Court of the Netherlands [Hoge Raad der Nederlanden], 21 March 2003, Civil Chamber, Nr. C01/327HR. *Stichting Waterpakt, Stichting Natuur en Milieu, Vereniging Consumentenbond and three others* v. *State of the Netherlands*. Annotated in 41 CML Rev. (2004), 1429-1455. The case involved the

This touches on fundamental issues of the separation of powers. The answers the ECJ might give to these questions could have a tremendous impact on national constitutional arrangements.

The matter has frequently arisen in the Dutch courts, but there is no guidance from the ECJ so far. In fact, it arose again when the ECJ judgment in *Eman and Sevinger* was received by the *Raad van State*. The *Raad van State* concluded that answering the political choices involved was beyond the power of the executive authorities, which have no discretion as to who they can or cannot register as a voter, and hence also beyond the powers of the court itself.[30] Whether this abstinence of the referring court itself to implement the ECJ judgment is lawful under EC law, we do not know.

On 20 March 2008, by letter of the Queen, the Netherlands Government has introduced a bill in the Lower House of the States General of the Netherlands to amend the Electoral Act. This bill proposes to extend the right to vote for the European Parliament also to Netherlands nationals who reside in Aruba and the Netherlands Antilles.[31]

6.6 Eman and Sevinger versus *Sevinger and Eman: The ECJ and the ECtHR at odds*

The decision of the ECtHR in *Sevinger and Eman* is untenable if we look the *ratio decidendi* of *Matthews*, which is that of being affected by the relevant legislature's laws.[32] After all, legislation emanating from the Lower House in affairs of the Kingdom, which concerns highly important issues, not only affects the population of Aruba and the Netherlands Antilles in the same way as legislation which is made exclusively via the parliament of Aruba, but it can also overrule the latter. With the criterion of the "relatively small amount" of legislation binding on Netherlands citizens in the Caribbean which is passed by the Lower House, the ECtHR has stepped on a very slippery slope, particularly as the relevant legislation at issue concerns vital political issues. The ECtHR found that advisory influence, however indirect it may be, is enough and can substitute voting rights; the quantity of legislation binding on a certain section of the citizens in comparison to that binding on other citizens becomes a criterion for deciding which group deserves a right to vote and which citizens can be excluded from voting for the same legislative body; whether one is affected and bound by the decisions of the legislative body is in itself immaterial.

Equally worrying is the fact that the ECtHR in *Sevinger and Eman* to all intents and purposes seems to overturn the approach of the ECJ in *Eman and Sevinger* on the issue of discrimination. It is quite clear that the discrimination resides in precisely the same provision of the Netherlands Electoral Act, a provision which applies both to EP and Lower House elections. The manner in which this discriminates is also exactly the same. The fact that European Dutch nationals have the right to vote for the Lower House, the provincial councils, municipal or neighbourhood councils is totally irrelevant for the question whether they have

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application for a court injunction to the legislature to legislate in conformity with Council Directive 91/676, O.J. 1991, L 375/1, which – also according to the ECJ – had not been implemented correctly.

[30] *Afdeling Bestuursrechtspraak Raad van State*, 21 Nov. 2006, cases 200404446/1 and 200404450/1, paragraph 2.3.3, published on www.rechtspraak.nl, case number LJN: AZ3202; and on www.raadvanstate.nl → uitspraken zoeken, last consulted 20 Dec. 2007.

[31] *Kamerstukken TK* [Parliamentary documents of the Lower House] 2007-2008, 31392, Nos. 1-3.

[32] See *Matthews, supra* note 5, para 34: "[T]he Convention is intended to guarantee rights that are not theoretical or illusory, but practical and effective …. It is uncontested that legislation emanating from the legislative process of the European Community affects the population of Gibraltar in the same way as legislation which enters the domestic legal order exclusively via the House of Assembly. To this extent, there is no difference between European and domestic legislation, and no reason why the United Kingdom should not be required to "secure" the rights in Article 3 of Protocol No. 1 in respect of European legislation, in the same way as those rights are required to be "secured" in respect of purely domestic legislation."

the right to vote in EP elections. Similarly, that Aruban Dutch nationals have a right to vote for their local parliaments is totally irrelevant for the question whether they should have the right to vote for the Lower House. This quite simple insight is not shared by the ECtHR. The logic of the ECtHR seems to justify the fictional reasoning that because a group of citizens has a right to vote for a municipal council, this same group can legitimately be withheld the right to vote for the national parliament, particularly if the national parliament passes relatively much legislation which is not relevant to the municipality of those citizens. This logic would sustain the idea that because citizens of a Member State have a right to vote in their national parliament, they can be withheld the right to vote for the European Parliament, particularly if the EP passes relatively much legislation which is relevant to other Member States.

The distinction which the ECtHR attempts between the voting rights for the European Parliament and for the Lower House to the effect that with regard to the former Arubans were completely denied any opportunity "to express their opinion in the election of the EP", whereas for the Lower House they "do have a say ... albeit indirectly", is not credible. The comparison is crooked: "an opportunity to express their opinion in the election of the EP" should be compared to "an opportunity to express their opinion for the Lower House"; Netherlands nationals residing in Aruba have neither, so the distinction fails.

Quite obviously, the ECtHR simply did not wish to follow the approach taken by the ECJ: a Netherlands national residing on Aruba or the Netherlands Antilles should be compared to other Netherlands nationals residing outside (the European part of) the Netherlands. The unequal treatment is blatant. And a justification for it is lacking. The fact that citizens residing on Aruba can vote for the local parliament is totally irrelevant, as this parliament's competence is not at stake; only the competence of the Lower House in The Hague *vis-à-vis* Aruba.

The result of the distinction in this case is completely paradoxical, as we already noticed in passing: Aruban Netherlands nationals may not lawfully be withheld the right to vote for a parliament which does not pass any legislation which is binding on Aruba (the EP),[33] but Arubans may lawfully be withheld the right to vote for the legislative assembly which passes legislation which is immediately binding on Aruba, and which trumps any local legislation. In the EP elections of 2009, the Netherlands citizens of Aruba and the Netherlands Antilles will have the right to vote, although *none* of the legislation passed by the European Parliament is binding there. But the Netherlands citizens of Aruba and the Netherlands Antilles will not have a right to vote for the Lower House which, ever since colonial times, has passed legislation and will be passing ever more and more important legislation which *is* indeed directly binding on them, legislation which outranks their local legislation, including legislation which has constitutional rank and effect in Aruba and the Netherlands Antilles.

The right to vote for the European Parliament was established by the ECJ, thus voiding the relevant provision of the Netherlands Electoral Act; withholding the right to vote for the Lower House on the basis of the very same provision of the Netherlands Electoral Act, was found lawful by the ECtHR. This author cannot but notice a fundamental incompatibility between the two courts. Some commentators have understood the *Bosphorus* judgment of the ECtHR[34] to be a sign of "comity" and deference of the ECtHR for the ECJ. In *Sevinger and Eman*, however, the ECtHR makes no effort whatsoever to tally its case law to that of the ECJ concerning an identical legal provision on the exclusion of a group of citizens from voting rights. It may be expected that when the European Union accedes to the ECHR upon the entry

[33] The European Parliament does not even have any say, consultative or otherwise, concerning the OCT decision based on Art. 187 EC, which does affect Aruba and the Netherlands Antilles.

[34] ECtHR, 30 June 2005, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi* v. *Ireland*, application No. 45036/98.

into force of the Reform Treaty concluded in Lisbon on 14 December 2007, the *Bosphorus* judgment will no longer apply: we may expect the ECtHR fully to scrutinize complaints against any of the institutions of the EU, including the ECJ. Some people thought this would lead to a greater protection of ECHR rights. *Sevinger and Eman* shows that this is by no means certain. Though it refrained from considering voting rights as fundamental human rights, the ECJ has had a keener eye for the arbitrariness of colonial voting arrangements than the ECtHR has shown. Perhaps this is because the EU is more democratic than the Council of Europe, which has neither an executive nor a true parliament with any legislative or quasi-legislative powers. The Council of Europe does have a Court, the ECtHR, but this Court is not held in check nor is it balanced by legislature and executive at the European level, and thus it is lacking all the characteristics required for democratic governance. All this does not augur well for the protection of democracy to be expected from the Strasbourg Court.

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