OPINION OF ADVOCATE GENERAL TIZZANO delivered on 6 April 2006 [1]

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1 — Original language: Italian.

1. In Case C-145/04, brought under Article 227 EC, the Kingdom of Spain accuses the United Kingdom of Great Britain and Northern Ireland of having infringed Community law by virtue of the arrangements made by it for the inhabitants of Gibraltar to vote in European Parliament elections and in particular because it arranged for voting by people who reside in that territory but do not possess the nationality of a Member State or, therefore, citizenship of the Union.

2. In Case C-300/04, on the other hand, the Nederlandse Raad van State, by order of 13 July 2004, submitted five questions to the Court of Justice under Article 234 EC for a preliminary ruling as to whether a Member State (in this case, the Netherlands) must grant the right to vote in European elections to persons who, although possessing its nationality, reside in an overseas territory (in this case, Aruba) which is covered by special association arrangements with the Community.

3. Although each case clearly has its own specific features, I consider it appropriate to deal with both at the same time because it seems to me that they coincide in raising, albeit from different, if not opposing, standpoints, important questions concerning the right to vote in European elections and, in particular, entitlement to that right and the conditions for exercising it.

I — Legal background

A — *International law*

4. For the purposes of these cases, reference must first be made to Article 3 of Protocol No 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter 'ECHR Protocol No 1'), which states as follows:

'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.'

B — *Community law*

5. Reference must also be made to three groups of Community provisions concerning citizenship of the Union, the election of the European Parliament and the territorial scope of the EC Treaty.

1. European citizenship

6. Article 17 EC provides as follows:

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

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

7. In that connection, it should also be noted that 'the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned. Member States may declare, for information, who are to be considered their nationals for Community purposes by way of declaration lodged with the Presidency and may amend any such declaration when necessary'. [2]

8. Article 19(2) EC provides:

'Without prejudice to Article 190(4) and to the provisions adopted for its implementation, every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.' [3]

2. Election to the European Parliament

9. Pursuant to Article 189(1) EC:

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

10. Article 190 EC adds:

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

...

2 — Declaration (No 2) on nationality of a Member State, annexed to the Maastricht Treaty (OJ 1992 C 191, p. 45).

3 — In accordance with that provision, the Council adopted Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals (OJ 1993 L 329, p. 34)

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

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

11. In order to allow direct universal suffrage in elections to the European Parliament (then known as the Assembly) it will be recalled that a decision was adopted by the representatives of the Member States meeting in the Council (76/787/ECSC, EEC, Euratom) relating to the Act concerning the election of the representatives of the Assembly by direct universal suffrage, [4] most recently amended by Council Decision 2002/772/EC, Euratom [5] (hereinafter 'the 1976 Act'). It will also be remembered that that decision did not introduce a uniform electoral procedure but merely laid down certain 'principles common to all Member States' relating in particular to proportional representation (Article 1), the duration of the legislature (Article 5), incompatibility in relation to elected members (Article 7), the period in which elections are to be held (Article 10) and the time when counting is to begin (Article 11).

12. With regard to 'aspects not governed' by the 1976 Act, the Member States remain free 'to apply their national provisions' (first recital in the preamble to Decision 2002/772).

13. Article 8 of the 1976 Act provides:

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

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

4 — OJ 1976 L 278, p. 1.

5 — Council Decision 2002/772/EC, Euratom of 25 June and 23 September 2002 amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Decision 76/787/ECSC, EEC, Euratom (OJ 2002 L 283, p. 1).

14. Finally, note must be taken of Annex II to the 1976 Act, which states as follows:

'The United Kingdom will apply the provisions of this Act only in respect of the United Kingdom.'

3. The territorial scope of the EC Treaty

15. Article 299 EC defines the territorial scope of the Treaty, indicating in general terms that it is to apply to the Member States (paragraph 1).

16. For the purposes of this case, Article 299(3) and (4) are of interest; they provide:

'3. The special arrangements for association set out in part four of this Treaty shall apply to the overseas countries and territories listed in Annex II to this Treaty.

...

4. The provisions of this Treaty shall apply to the European territories for whose external relations a Member State is responsible.'

17. For the purposes of Case C-145/04, it should also be noted that Gibraltar is a European territory for which the United Kingdom assumes representation as regards external relations; therefore, under Article 299(4) EC, as a general rule the Treaty applies to Gibraltar. [6]

18. With regard to Case C-300/04, it should emphasised, on the other hand, that Aruba is an overseas territory for the purposes of Article 299(3) EC, and is included in Annex II to the Treaty.

6 — For a complete survey of the Community legislation concerning Gibraltar, I would refer to my Opinion in Case C-30/01 *Commission* v *United Kingdom* [2003] ECR I-9481, in particular at I-9483.

C — *National law*

1. Case C-145/04

(a) The status of Gibraltar

19. Gibraltar was ceded by the King of Spain to the British Crown under Article X of the Treaty of Utrecht 1713 and since 1830 it has had the status of Crown Colony (British Overseas Territory). [7] The city is governed by the Gibraltar Constitution Order 1969, which in its preamble defines Gibraltar as 'part of her Majesty's dominions'. Following a significant transfer of powers of self-government to the democratically elected local institutions of the colony, the Crown retains powers regarding external relations, defence and security.

(b) The European Parliament Representation Act 2003

20. On 8 May 2003, the United Kingdom enacted the European Parliament (Representation) Act 2003 ('EPRA 2003').

21. To enable the inhabitants of Gibraltar also to participate in the European Parliament elections (for reasons to be discussed shortly, in point 31 et seq.), section 9 of that act introduced an electoral constituency (known as a 'combined region') which includes Gibraltar and an electoral district existing in England and Wales. Then, more specifically, the European Parliamentary Elections (Combined Region and Campaign Expenditure) (United Kingdom and Gibraltar) Order 2004 linked Gibraltar to the South West Region in England. [8]

22. For the same purpose, sections 14 and 15 established an electoral register for Gibraltar, to be maintained by a local official (the Clerk of the House of Assembly of Gibraltar), which is required to list all qualifying persons intending to participate in the elections.

23. Section 16 provides that persons who meet all the following conditions are entitled to be entered on the register:

— being a resident in Gibraltar;

7 — Regarding the colonial situation of Gibraltar, see United Nations Resolution 2429 (XXIII) of 18 December 1968.

8 — SI 2004/366.

— not being subject to a legal incapacity to vote;

— being at least 18 years of age;

— being a citizen of the European Union or a Qualifying Commonwealth Citizen or a citizen satisfying certain conditions ('QCC').

24. Pursuant to section 16(5) the following are considered to be QCCs:

— those who do not, under the law of Gibraltar, require a permit or certificate to enter or remain in Gibraltar; or

— those who have (or are by virtue of any provision of the law of Gibraltar to be treated as having) a permit or certificate entitling them to enter or remain in Gibraltar.

25. QCCs are not citizens of the United Kingdom.

2. Case C-300/04

(a) Constitutional arrangements in the Kingdom of the Netherlands

26. The Kingdom of the Netherlands is made up of three State entities, each of which has its own constitution and organises its own institutions. They are the Netherlands, the Netherlands Antilles and Aruba.

27. However, within the Kingdom of the Netherlands, thus subdivided, there is only one nationality, shared by all citizens of the Kingdom, namely Netherlands nationality.

(b) Netherlands electoral law

28. In the Kingdom of the Netherlands, elections to the European Parliament are held only in the continental region (the Netherlands) and not in the island regions (the Antilles and Aruba). The electoral

procedure is governed by the Nederlandse Kieswet (Netherlands electoral law), which defines the persons entitled to vote by reference to provisions concerning national parliamentary elections.

29. With regard to elections to the national parliament of the Netherlands, Article B1 provides:

'1. The members of the Tweede Kamer der Staten-Generaal shall be elected from persons who are Netherlands nationals on the day of lodgement of their candidatures and who, on the day of the elections, have reached their 18th year of age, with the exception of those who, on the day of lodgement of their candidatures, are actually resident in the Netherlands Antilles or Aruba.

2. This exception shall not apply to:

(a) Netherlands nationals who have lived for at least 10 years in the Netherlands;

(b) Netherlands nationals who work in the Netherlands civil service in the Netherlands Antilles or Aruba, or their spouses, partners, companions or registered children, provided that they live with that person.'

30. With regard to elections to the European Parliament, Article Y3 provides:

'The following shall be entitled to vote:

(a) those who are entitled to vote in elections of members of the Tweede Kamer der Staten-Generaal;

(b) citizens of another Member State of the European Union, who are not Netherlands nationals, provided that they:

1. are actually domiciled in the Netherlands on the date of lodgement of their candidatures;

2. have attained their 18th year on the day of the vote,

and

3. have not been divested of their right to vote in the Netherlands or in the Member State of which they are citizens.'

II — Facts and procedure

A — *Case C-145/04*

31. Following an application lodged by Mrs Matthews, a British citizen residing in Gibraltar, the European Court of Human Rights declared by judgment of 18 February 1999 that, by failing to organise European Parliament elections in Gibraltar, the United Kingdom had infringed Article 3 of ECHR Protocol No 1. [9]

32. Wishing to comply with that judgment, in 2002 United Kingdom proposed an amendment to Annex II to the 1976 Act in order to remove the obstacle deriving from the fact that, as has been seen (see point 14 above), that annex requires the United Kingdom to apply the relevant provisions only within the United Kingdom itself.

33. However, strong opposition by Spain prevented the adoption of the United Kingdom proposal.

34. At the Council meeting of 18 February 2002, the United Kingdom caused the following statement to be entered in the minutes, of which the Council and the Commission took note:

'Recalling Article 6(2) of the Treaty on European Union, which states that "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", the United Kingdom will ensure that the necessary changes are made to enable the Gibraltar electorate to vote in elections to the European Parliament as part of and on the same terms as the electorate of an existing United Kingdom constituency, in order to ensure the fulfilment of the United Kingdom's obligation to implement the judgment of the European Court of Human Rights in the case of *Matthews versus United Kingdom*, consistent with European law.' [10]

9 — Eur. Court H.R., *Matthews* v *United Kingdom* [GC], No 24833/94, ECHR 1999-I.

10 — Footnote not relevant to the English version.

35. After making that statement, the United Kingdom proceeded to adopt the EPRA 2003, as mentioned earlier (see point 20 et seq. above).

36. However, the Kingdom of Spain promptly reacted by objecting that, in its opinion, that act was contrary to Community law by reason of the arrangements for the participation of the inhabitants of Gibraltar in the European Parliament elections and in particular the fact of granting the vote to people who resided in that territory but did not possess the nationality of a Member State or, therefore, citizenship of the Union.

37. Since its comments were not acted upon, on 28 July 2003 Spain decided to address itself to the Commission under Article 227 EC.

38. The Commission, after giving the Member States concerned an opportunity to submit written and oral observations in each other's presence, released the following statement:

'The Commission considers, following an in-depth analysis of the Spanish complaint and an oral hearing held on 1 October, that the UK has organised the extension of voting rights to residents in Gibraltar within the margin of discretion presently given to Member States by EU law. However, given the sensitivity of the underlying bilateral issue, the Commission at this stage refrains from adopting a reasoned opinion within the meaning of Article 227 of the Treaty and invites the parties to find an amicable solution.' [11]

39. Dissatisfied with the Commission's statement, by application received at the Court on 18 March 2004 Spain claimed that the Court of Justice should declare that:

'by enacting the European Parliament (Representation) Act 2003, the United Kingdom has failed to fulfil its obligations under Articles 189, 190, 17 and 19 EC and under the 1976 Act concerning the Election of the Representatives of the European Parliament by Direct Universal Suffrage annexed to Decision 76/787/ECSC, EEC, Euratom of 20 September 1976 relating to the Act concerning the election of the representatives of the Assembly by direct universal suffrage'.

40. By order of 8 September 2004, the President of the Court of Justice granted leave to the Commission to intervene in Case C-145/04 in support of the form of order sought by the United Kingdom.

41. The Spanish Government, the United Kingdom and the Commission presented oral argument at the hearing on 5 July 2005.

11 — Footnote not relevant to the English version.

B — *Case C-300/04*

42. Messrs Eman and Sevinger are Netherlands citizens actually resident in the island of Aruba.

43. Wishing to take part in the European Parliament elections, on 31 March 2004 they applied to be entered on the electoral register kept in the Netherlands.

44. By decision of 3 May 2004, the College van burgemeester en wethouders van Den Haag, on the basis of the combined provisions of the first and second paragraphs of Article B1 and Article Y3(a) of the Kieswet, rejected that application on the ground that, despite being Netherlands citizens, the applicants were actually resident in Aruba and had not resided for at least 10 years in the Netherlands.

45. On 28 May 2004 Messrs Eman and Sevinger instituted proceedings against that decision before the Raad van State, claiming that the Netherlands electoral law infringed the Treaty provisions on Union citizenship, read in conjunction with Article 3 of ECHR Protocol No 1. In their view, those provisions granted the right to vote in European Parliament elections to all citizens of Member States, including those residing in overseas countries and territories ('OCT').

46. Although it had not been able to give a decision before the European elections were held in June 2004, the Raad van State nevertheless submitted to the Court of Justice five questions setting out its doubts as to the legality of denying Messrs Eman and Sevinger the right to vote (see point 137 below for the text of the questions).

47. In addition, by letter of 13 July 2004 it requested the Court, in view of the possibility of a referendum in the Netherlands on the draft Treaty for a European Constitution [12] and in view of the risk that the applicants might also be excluded from that consultation of the people, to examine those questions under the accelerated procedure provided for in Article 104a of the Rules of Procedure.

48. By order of 23 August 2004, the President of the Court of Justice rejected that application on the ground that it related to a matter (conditions for participating in a referendum on the Constitution) unconnected with the main proceedings (which related to the right to vote in European

12 — OJ 2004 C 310.

Parliament elections) and took for granted an event (the passing of a law on the referendum) which had not yet taken place at that time.

49. By letter of 22 February 2004, the Raad van State informed the Court of Justice of the entry into force of the Law on the referendum concerning the Treaty adopting a Constitution for Europe [13] and therefore again requested examination of the questions under the accelerated procedure. The new law, like that on European Parliament elections, provided that only those entitled to vote in elections for the Netherlands national parliament would be entitled to take part in the referendum.

50. Since the request for recourse to the accelerated procedure again related to a matter unconnected with the main proceedings, by order of 18 March 2005 the President of the Court of Justice rejected the second request as well.

51. In case C-300/04, written observations were submitted by the Netherlands, French, Spanish and United Kingdom Governments, and by the Commission.

13 — Wet raadplegend referendum Europese Grondwet (Stbl. 2005, p. 44).

52. At the hearing on 5 July 2005, oral argument was presented by Mr Eman, the Netherlands, French, Spanish and United Kingdom Governments, and the Commission.

III — Legal analysis

A — *Preliminary remarks*

53. As I have already pointed out, as well as the issues specific to each case, Cases C-145/04 and C-300/04 display a number of common features which prompt me to consider them together.

54. In Case C-145/04, brought by Spain under Article 227 EC, the Court is requested, among other things, to determine whether the United Kingdom was legitimately entitled to grant the right to vote in European elections to persons residing in Gibraltar (a European territory in which Community law is applicable) but not possessing the nationality of a Member State or, therefore, citizenship of the Union. On the other hand, in Case C-300/04, the national court seeks a ruling, essentially, as to whether a Member State is required to

allow the participation in elections of persons who possess the nationality of that State, and are therefore citizens of the Union, but reside in a territory, such as Aruba, which is an overseas territory that has a special association with the Community.

55. Both cases therefore, albeit from different standpoints, call for an interpretation of the Treaty provisions on citizenship of the Union and on elections to the European Parliament, with particular reference to voting rights and the exercise of such rights.

B — *Case 145/04*

1. Introduction

56. This case is connected with the age-old dispute between Spain and the United Kingdom regarding sovereignty over Gibraltar and, in a way, is the natural sequel to the abovementioned *Matthews* case before the European Court of Human Rights (see point 31 above). In that judgment, as I mentioned, that court, upholding the application by a British citizen residing in Gibraltar, found that the United Kingdom had infringed Article 3 of ECHR Protocol No 1 by failing to arrange for European Parliament elections to be held in Gibraltar.

57. The Strasbourg Court emphasised that, following the changes brought about by the Maastricht Treaty, the European Parliament 'is sufficiently involved in the specific legislative processes leading to the passage of legislation under Articles 189b and 189c of the EC Treaty [now Articles 251 EC and 252 EC] and is sufficiently involved in the general democratic supervision of the activities of the European Community to constitute part of the "legislature"' of territories such as Gibraltar [14] in which measures adopted, with a fundamental contribution from that Parliament, have a 'direct impact' [15] in the sense that they 'affect' the local population, who are 'directly affected' by them in the same way as measures passed by the local legislative assemblies. [16]

58. For that reason, the Strasbourg Court continued, European parliamentary elections should also have been organised in Gibraltar. Because that did not happen, 'the applicant, as a resident of Gibraltar, was completely denied any opportunity to express her opinion in the choice of the members of the European Parliament'. In that way, the court concluded, 'the very essence of the applicant's right to vote, as guaranteed by Article 3 of Protocol No 1, was denied'. [17]

14 — Eur. Court H.R., *Matthews*, § 54.
15 — Eur. Court H.R., *Matthews*, § 53.
16 — Eur. Court H.R. *Matthews*, §§ 34 and 64.
17 — Eur. Court H.R. *Matthews*, §§ 64 and 65.

59. Following that judgment, as we have seen (point 34), the United Kingdom gave a commitment, by a declaration of 18 February 2002, to take the necessary steps 'to enable the Gibraltar electorate to vote in elections to the European Parliament as part of and on the same terms as the electorate of an existing United Kingdom constituency'.

60. Not only that: giving effect to that declaration, it then passed the EPRA 2003. By that law, as we have seen (point 20 et seq.), a new electoral district was established which includes Gibraltar in an existing constituency within England and Wales (a so-called 'combined region'); and an electoral register was established to be kept by a local official (the Clerk of the House of Assembly of Gibraltar), in which all persons entitled to vote were to be recorded. The latter include QCCs (Qualifying Commonwealth Citizens), who are not required to hold a residence permit to enter and stay in Gibraltar or who possess a permit or certificate authorising them to enter Gibraltar (see point 24 above).

61. By its action under Article 227 EC, the Spanish Government criticises the EPRA 2003 in two respects:

— first, it claims that extending voting rights in European elections to people such as QCCs who are not United Kingdom citizens is contrary to Articles 17, 19, 189 and 190 EC;

— second, it criticises that extension of rights and the inclusion of Gibraltar in an existing electoral district of England and Wales as being in breach of Annex II to the 1976 Act and of the commitments given by the United Kingdom in its declaration of 18 February 2002 (see point 34 above).

2. The first criticism

(a) Background

62. By this criticism, the Spanish Government submits that Articles 17, 19, 189 and 190 EC, read systematically, grant voting rights only to citizens of the European Union and therefore prohibit the Member States from extending them to other persons. It follows that, by granting the right to vote in European Parliament elections to persons such as QCCs, who are not its citizens, the United Kingdom infringed those provisions.

63. The United Kingdom Government rejects that criticism, objecting that the decision as to who is to be granted the voting rights in question is a matter left entirely to the Member States. In its opinion, in the European elections, 'in respect of aspects not covered' in a uniform manner by Community law, the 'national provisions' of the individual Member States are to apply (see the first recital in the preamble to Decision 2002/772 and Article 8 of the 1976 Act). In the absence of Community legislation, it is therefore the responsibility of the Member States to decide who may participate in European voting procedures and therefore also to extend such participation to persons such as QCCs who are citizens of non-member countries. In short, it is a legitimate exercise of the discretion which Community law grants to Member States in this matter.

64. For my part, like the Spanish Government and the Commission, I do not feel inclined entirely to subscribe to the thesis that the Member States enjoy absolute freedom in the area under review. I believe that, although the relevant rules remain fairly limited at the moment, it is possible to infer from Community law a number of precise and useful indications in that regard and in particular to identify certain limitations on the power of Member States to grant (or not grant) the right to vote in European Parliament elections.

65. In my opinion, those indications are twofold: on the positive side, they impose limits on the freedom of Member States to withhold that right; on the negative side, they impose limits on their freedom to grant it.

66. Although in the present case (in contrast to Case C-300/04) more importance attaches to the second aspect, I shall refer very briefly to the first, in particular in order to include an analysis of both aspects (and of both cases) in a more comprehensive overview of the system and the principles by which it is inspired.

(b) The right of Community citizens to vote in European elections

67. Starting therefore with the positive limitations, I consider 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 question to citizens of the Member States and, consequently, to citizens of the Union.

68. It is true that no Community provision openly and directly states that that right is included among those enjoyed by citizens of

the Union under Article 17(2) EC. I might point out however that Article 19(2) EC, by allowing the citizens of a Member State to vote in European elections in another Member State in which they reside on the same basis as citizens of that State, in any event takes it for granted that the right in question is available to citizens of the Union. I could likewise base the same argument on Articles 189 and 190 EC, which provide that the European Parliament is to be made up of representatives of the 'peoples' and therefore (at least) of the citizens 'of the States brought together in the Community'.

69. But 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, [18] 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 [20] and therefore, at least in principle, to all citizens of a State.

70. That general guidance is also confirmed by the fact that the right in question is a fundamental right safeguarded by the European Human Rights Convention, and in particular Article 3 of ECHR Protocol No 1, which requires '[t]he High Contracting Parties ... 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'. It is therefore 'one of the fundamental tools by which "effective political democracy" can be maintained' [21] and, more precisely, a 'subjective right' that is crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law'. [22]

71. It can therefore, I believe, be affirmed, merely on the basis of the fundamental

18 — Article 6(1) EU provides: '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.'

19 — Eur. Court H.R., *Mathieu-Mohin and Clerfayt* v. *Belgium*, judgment of 2 March 1987, Series A, No 11, pp. 22 and 23, § 51; Eur. Court H.R., *Hirst* v. *United Kingdom* (No 2), 74025/01, 30 March 2004.

20 — Eur. Court H.R., *Mathieu-Mohin*, § 51; and *Hirst*, § 59.

21 — Eur. Court H.R., *Matthews*, § 43.

22 — Eur. Court H.R., *Hirst*, § 58.

principles and provisions referred to above,[23] that the citizens of the Union are, as it were, 'necessary' vestees of the right to vote in the European Parliament, in the sense that, at least in principle, they can all claim that right. That is without prejudice to any limitations usually and lawfully imposed (age, residence, conditions for eligibility, disqualification, etc.) or even the recurrence of particular situations (of the kind discussed below: see point 153).

(c) The possibility of extending voting rights to citizens of non-member countries

72. That said, we should now consider any negative limitations which may derive from the same Community provisions.

73. In the present case, the Spanish Government infers from the legislation a limitation of that kind. In particular, it asserts that the Member States are not allowed to grant voting rights to persons (such as, in this case, QCCs) who do not possess the nationality of a Member State or, therefore, citizenship of the Union.

74. It bases its argument to that effect on Articles 17, 19, 189 and 190 EC, and on Annex II to the 1976 Act, to which I have referred several times. I must, however, make it clear that those Treaty articles are relied on in connection with the first criticism, whereas Annex II is invoked in connection with the second. In the remainder of this discussion I too will maintain that distinction, not only to conform with the structure of the application but also, and above all, because, as we shall see, neither the terms of the problem nor its solution coincide in the two cases.

75. In the first place, then, the Spanish Government objects that in establishing that citizens of the Member States are citizens of the Union and that the latter enjoy the rights provided for by the Treaty, Article 17 EC introduces a strict link between citizenship of the Union and nationality of a Member State, on the one hand, and, on the other, enjoyment of the rights provided for by the Treaty. By virtue of that link, the right to vote in European Parliament elections can, in its view, be granted only to citizens of the Union. That link is confirmed also by Article 19(2) EC, which allows only 'citizens of the Union' to vote in European elections in the Member State in which they reside but of which they are not citizens.

76. In the second place, according to the Spanish Government, where Articles 189 and 190 EC provide that the European Parliament is to be composed of representatives of the 'peoples of the States brought

23 — It need merely be borne in mind that under Article 6(2) EU '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.'

together in the Community', they are not intended to refer generically to the population residing in a given territory but rather to those persons who share the same nationality, that is to say the citizens of those States. The use of the word 'people' in the sense of 'nation' in many constitutions of the Member States is clear evidence of that fact.

77. For my part, disregarding for the moment the specific question of QCCs (on which, as we shall see below, I in fact consider the Spanish objections to be well founded), I do not think it can be inferred from the general rules and principles of the Treaty, as contended by the applicant government, that extension of voting rights to persons other than the citizens of the Member States is absolutely precluded. I shall endeavour to set out the reasons for this.

78. To begin with, I do not consider to be very persuasive the inferences which, as has just been seen, the Spanish Government draws from the expression 'peoples of the States brought together in the Community' in Articles 189 and 190 EC.

79. First of all, considerable doubts are raised by the attempt to interpret that expression as embodying a choice of an ideological nature, as it were, identifying the 'peoples' to which those articles refer with the concept of 'nation'. Without going into a long theoretical disquisition here, suffice it to observe that the term 'nation' is normally used to describe the totality of individuals linked by the fact of sharing traditions, culture, ethnicity, religion and so on, regardless of whether they belong to the same organised State (and therefore regardless of their status as citizens thereof). But if that is the case, it then seems clear to me that that cannot be the meaning attributed by those Treaty articles to the term 'people'. If that were the case, first, it would necessarily include people who are not citizens of the Member States, since all individuals who share the abovementioned values form part of it, even if, as a result of historical and political circumstances, they belong to other State entities. Second, it would be necessary to exclude those individuals (or entire communities!) who do not belong to the 'nation' even though they are citizens of the State (consider, for example, ethnic and linguistic minorities). And that clearly, other considerations apart, is not the aim of the Treaty; it is not a result that is found in practice, nor do I believe it to be the result intended by the applicant government.

80. If therefore it is actually intended that the expression 'peoples of the States brought together in the Community' should have a precise legal meaning (and, in truth, I find that doubtful), it is much more plausible to take the view that it purports to refer to the concept of 'people' as such, that is to say a community of individuals politically organised within a specific territorial area and linked by the legal bond of citizenship. In other words, it can be considered that, in principle, the concepts of 'people' and 'citizens' overlap.

81. However, that says little or nothing regarding the matter in hand, namely the limitation of the right to vote in European elections. That is because that overlap cannot be regarded as automatically extending, by a kind of transitiveness, to the relationship between a 'people' and an 'electorate', in such a way that the two concepts are strictly coterminous and the meaning of the second term cannot be extended beyond the boundaries of the first.

82. Many reasons for ruling out such a conclusion could be cited. I shall merely observe that, if it were correct, it would be rather difficult to justify the restrictions which, as we have also seen, are normally applicable in electoral matters, just as, conversely, it would be difficult, if not impossible, to justify the more generous approaches sometimes taken by the same Member States. Not to mention the paradox whereby, on the one hand, the State would be recognised as enjoying wide discretion in deciding upon the criteria, limits and methods for granting its citizenship, and therefore also the extent of the status of Union citizenship in all its plenitude, yet on the other it would be denied the possibility of granting just one (even if it is perhaps the most important) of the rights associated with that status.

83. If that is the position, then it must be concluded that the coextensiveness of 'people/citizens' and 'electorate' cannot be regarded as an absolute and indispensable rule. It certainly implies, as I have already pointed out, that in principle citizens must be granted the right to vote; that does not however also mean either that such a right must be exercised by all of them or that it must necessarily be their exclusive reserve.

84. In other words, as well as not constituting an absolute rule, that coextensiveness may fail to operate in both directions. Admittedly, the discrepancy normally derives from a restriction of the range of citizens who can claim the right in question, given that the Member States usually are concerned (specifically with respect to their citizens) to determine the conditions for the exercise of voting rights and therefore for membership of the 'electorate' (see point 71 above, and in particular point 148 et seq. below, in relation to Case C-300/04). The possibility cannot however be excluded that, by reason of specific national situations or political choices made by the legislature, it may also manifest itself in the form of a widening of the electoral base.

85. That, moreover, is confirmed, as correctly pointed out by the United Kingdom and the Commission, by the experience of a number of Member States. Although the tendency to reserve the right to vote only to citizens (subject to certain exclusions) is largely prevalent, there is no shortage of cases in which the electorate is in fact defined in wider terms.

86. That is what happens for example in the United Kingdom, where in all elections voting is allowed not only by British citizens but also — if they are residents — by Irish citizens and also QCCs — in other words citizens of the Commonwealth countries — who are not required to hold any permit or certificate to enter and remain in the United Kingdom or who hold a permit or certificate authorising them to enter the United Kingdom and stay there.

87. But I may also refer to the debate going on (and perhaps even to the proposals made) in more than one Member State concerning the appropriateness of granting, under certain conditions, voting rights to (non-Community) foreigners who have resided for a certain period in the State.

88. All the foregoing prompts me to conclude that, where they provide that the European Parliament is 'to consist of representatives of the peoples of the States brought together in the Community', Articles 189 and 190 EC clearly do not purport to say (for the reasons set out just above) that *all* the citizens of those Member States are actually entitled to vote and be represented in that assembly, but, on the other hand, they do not necessarily limit that right to citizens.

89. That said, and moving onto the other arguments put forward by the Spanish Government, I must add that the conclusion just reached is not contradicted, as contended by that government, by the fact that Article 19(2) EC allows only 'citizens of the Union' to vote in European elections in the Member State in which they reside, even if they are not citizens of it. That is in fact a special favourable regime which is granted only (in this case yes) to citizens of the Union, and which is not therefore available to other persons. But that has nothing to do with the possibility of a State granting the right to vote to those other persons *in its own territory.*

90. Nor does it seem to me, moving on to a more general level, that Article 17 EC runs counter to what I have suggested. As has been observed by the United Kingdom and the Commission, where it provides that '[c]itizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby', that provision may indeed approve the grant to those persons of a series of rights specified elsewhere (in particular in Articles 18 EC to 21 EC) but that does not in fact imply that only citizens of the Union can enjoy those rights.

91. That is moreover clear from the Treaty in itself, which explicitly extends some of those rights beyond the sphere of Union citizens. Suffice it to note, by way of example, that for the purposes of Articles 194 and 195 EC, the rights to petition the European Parliament and to submit complaints to the

European Ombudsman are granted to 'any natural or legal person residing or having its registered office in a Member State'.

92. The extension of the rights listed in Articles 18 to 21 to persons not having citizenship of the Union is not therefore — as the Spanish Government contends — an exceptional phenomenon which 'dismembers' the unicity of the concept of citizenship. On the contrary, the fact that some of those rights, considered as defining the legal position of Union citizens, are on the other hand extended by Community law itself beyond those confines confirms that those rights do not necessarily constitute an exclusive prerogative of citizens. Not only that, but it can further be deduced that if, in some cases, it is Community law itself which extends them, the possibility cannot in principle be ruled out that for others (such as, specifically, the right to vote) a Member State may do so independently.

93. Furthermore, that extension is clearly consistent with the democratic principle of universal suffrage upon which the European Union is based. That principle militates — as seen earlier (point 69) — in favour of recognising voting rights for the largest possible number of persons, [24] and therefore possibly also for foreigners established in a particular State, [25] who, like citizens, are effectively subject to the measures approved by the national and Community legislative authorities.

(d) The conditions for extending that right

94. That said, it nevertheless remains to establish by whom and under what conditions that right to vote may possibly be extended.

95. The Spanish Government considers that, if it were allowed, it would necessarily fall within the exclusive competence of the Community and would be apparent in terms from the Treaty itself or from secondary Community law. Otherwise, it adds, within the Community legal order there could be up to 25 different sets of legislation defining the European Parliament electorate and therefore affecting the attribution of a right of Community origin, such as the right to vote.

24 — Eur. Court H.R., *Matthews-Mohin*, § 51; and *Hirst*, § 59

25 — See the Code of good practice in electoral matters adopted by the European Commission for democracy through law of the Council of Europe (known as the Venice Commission) at its 52nd session (Venice, 18 and 19 October 2002) (paragraph 1) and its explanatory report (paragraph 1).

96. I do not find that objection by the Spanish Government convincing either. It overlooks the fact that the diversity of legislation complained of is first and foremost the result of a situation which is, so to speak, legitimised both by the Treaty and by the Community legislature.

97. The Treaty, as we know, entrusted to the European Parliament the task of drawing up a proposal to enable it to be elected by direct universal suffrage 'in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States', which then had to be approved by the Council and recommended to the Member States for adoption under their respective constitutional rules (Article 190(4) EC).

98. It is well known, however, that, for the time being at least, no uniform procedure has come into being. The 1976 Act concerning the election of representatives to the European Parliament, as most recently amended by Decision 2002/772, opted for the second possibility under Article 190(4) EC and thus limited itself to laying down a number of 'common principles',[26] concerning, in particular, proportional representation (Article 1), the duration of the legislature (Article 5), incompatibilities affecting members (Article 7), the period for holding elections (Article 10) and the timing of counting (Article 11).

99. With regard to all the other 'aspects not governed' by that act, the Member States remain 'free to apply their national provisions' (first recital in the preamble to Decision 2002/772). Pursuant to Article 8, '[s]ubject to the provisions' of the act in question, 'the electoral procedure shall be governed in each Member State by its national provisions', which 'may if appropriate take account of the specific situation in the Member States'.

100. It follows that to date there has been and is no consistency among the Member States concerning the rules which define entitlement to the right to vote in European Parliament elections, just as there is likewise no agreement concerning the persons who may be elected as members, since Article 7 of the 1976 Act lists certain grounds of incompatibility affecting the post of member of the European Parliament, but for the rest leaves it to individual Member States to indicate other possible causes of incompatibility (and also ineligibility).

101. It seems to me that, in those circumstances and until a uniform electoral law is actually passed, it is not possible to dispute a

26 — The original version of Article 138(3) of the Treaty did not expressly provide for that second option, merely stating that '[t]he European Parliament shall draw up proposals for elections by direct universal suffrage in accordance with a uniform procedure in all Member States'.

Member State's right to define its own electorate for European elections, if necessary even extending (or, as we shall see, restricting), by reference to the circle of its own citizens and having regard to the particular features of its own legal order, the range of persons entitled to vote.

(e) The limits on extending voting rights

102. Naturally, the exercise of that power cannot be unlimited: both, in general, because the election of the European Parliament is not the concern of a single Member State but affects and has repercussions on the entire Union; and, in particular, because the Community texts so far considered clearly show that the 'normal' case is that the right to vote is granted to the citizens of the Union.

103. I consider therefore that that power may be exercised only exceptionally and within limits and under conditions that are compatible with Community law. That implies that it is necessary in each case to ensure compliance with the general principles of the legal order — such as, in particular, in this case the principles of reasonableness, proportionality and non-discrimination — as well as, of course, any specific and relevant Community provisions (such as, for example, those concerning the United Kingdom set out in Annex II to the 1976 Act, regarding which see point 112 et seq. below).

104. In that sense, it seems to me for example to be consonant with those principles to exclude the possibility of extending voting rights to persons who have no actual link with the Community, having regard inter alia to the logic of the system and, I would say, in harmony with the provisions which, as seen above (point 91), extend the rights of citizens to other persons on the basis of that very criterion.

105. I think it is also necessary, again to be consistent with the criteria mentioned above, to limit the extension of the right in question to cases in which it is also made available for elections to the national parliament.

106. All that will not admittedly reduce the irregularities deriving from the continuing absence of comprehensive Community legislation. There will therefore be Member States in which resident foreigners and/or citizens residing in third countries may vote, whereas in others either one or the other or both those possibilities may be excluded. Just as, on the other hand, in some Member

States it will be the case, and in others not so, that citizens who are of a certain age may be able to vote or be elected and certain conditions of incompatibility or ineligibility may be laid down.

107. But all this, let me say again, is a negative consequence of the incompleteness of the relevant Community legislation, but in neither case does it amount to an infringement of that legislation.

108. For all those reasons, I consider that Articles 17, 19, 189 and 190 EC do not in principle prevent the United Kingdom — in accordance with the provisions applicable to national legislative elections — from granting the right to vote in European Parliament elections to persons, such as QCCs, who are citizens neither of the United Kingdom nor of other Member States but reside in the United Kingdom or in a territory such as Gibraltar for which it assumes representation in external affairs.

109. Naturally, that conclusion also negates the Spanish Government's objection that in the 1982 declaration the United Kingdom did not include QCCs among the categories of persons who are to be regarded as 'United Kingdom citizens' for the purposes of Community law. [27] That is because the discussion so far relates to the actual grant of voting rights to persons other than those citizens.

110. I consider therefore that on this point I can conclude that Spain's criticism that it is illegal to extend voting rights to persons such as QCCs because to do so infringes Articles 17, 19, 189 and 190 EC cannot be upheld.

111. At this stage, it remains to establish whether that criticism might be well founded as regards the alleged infringement of Annex II to the 1976 Act. From that standpoint, however, as I have already observed (see point 74 above), the question does not arise in the same terms and in fact in the application it is closely linked with Spain's second criticism; I shall therefore examine it below when I examine that criticism.

27 — In the 1982 'New declaration by the Government of the United Kingdom of Great Britain and Northern Ireland on the definition of the term "nationals"' (OJ 1983 C 23, p. 1) which, as from 1 January 1983, replaced the analogous declaration of 1972 annexed to the Final Act of the Treaty on the Accession of the United Kingdom, the following is stated: 'As to the United Kingdom of Great Britain and Northern Ireland, the terms "national", "nationals of Member States" or "nationals of Member States and overseas countries and territories", wherever used in the Treaty establishing the European Atomic Energy Community or the Treaty establishing the European Coal and Steel Community or in any of the Community acts deriving from those Treaties, are to be understood to refer to: (a) British citizens; (b) persons who are British subjects by virtue of part IV of the British Nationality Act 1981 and who have the right of abode in the United Kingdom and are therefore exempt from United Kingdom immigration control; (c) British Dependent Territories citizens who acquire their citizenship from a connection with Gibraltar.'

3. The second criticism

112. By its second criticism, Spain objects that, by bringing Gibraltar into an existing United Kingdom electoral district, the EPRA 2003 infringed the 1976 Act and the statement made by the United Kingdom Government on 18 February 2002.

113. In that connection, the Spanish Government states first of all that, by virtue of Annex II, the United Kingdom is entitled to apply the provisions of the 1976 Act on elections to the European Parliament 'only in respect of the United Kingdom', and therefore not also to Gibraltar which is not and never has been part of the United Kingdom. That does not mean that the United Kingdom should not comply with the *Matthews* judgment and therefore organise European elections in the colony as well; according to Spain, however, it should have done so on the terms indicated by the United Kingdom Government itself in the statement of 18 February 2002, in other words 'enabl[ing] the Gibraltar *electorate* to vote in elections to the European Parliament as part of ... an existing United Kingdom constituency'. [28]

114. In other words, in the opinion of the applicant government, in order to give effect to the *Matthews* judgment without infringing the Annex and the 2002 statement, the United Kingdom should have included within an existing electoral district not the *territory of Gibraltar* but only the *members of the Gibraltar electorate who possess United Kingdom nationality*, and it should have done so without in any way involving the authorities of the colony in the electoral process.

115. In short, according to the applicant government, the United Kingdom should *not* have:

— created for European elections a new electoral district bringing Gibraltar into a district of England and Wales (section 9 EPRA) and therefore de facto annexed the territory of the colony to the territory of the United Kingdom;

— allowed voting in Gibraltar (section 15);

— extended that vote to electors not possessing the nationality of the United Kingdom or of other Member States of the Union (section 16);

— established in Gibraltar an electoral register kept by a local official (sections 13 and 14);

28 — Emphasis added.

— granted any jurisdiction to the courts of Gibraltar.

116. In response, United Kingdom, supported by the Commission on this point, states that Annex II to the 1976 Act must be interpreted in harmony with fundamental rights, as guaranteed by the Human Rights Convention and interpreted by the Strasbourg Court in the *Matthews* judgment. Furthermore, in a system like the British one, based on regional electoral districts, it would not have been possible to organise the elections in Gibraltar (and therefore safeguard the exercise of that right) except by creating a combined region linking the colony to a constituency existing in the United Kingdom. For the same reason, it continues, it also became necessary to establish an electoral register in Gibraltar, and to accept the possibility of electoral proceedings being brought before the courts of the colony. To grant such jurisdiction to authorities in the United Kingdom, thousands of kilometres away, would have run counter to basic requirements of practicality and transparency of the procedure.

117. For my part, I would observe first of all that it is common ground that, before the *Matthews* judgment, Annex II (see point 113) allowed the United Kingdom to organise European Parliament elections only in the territory of the United Kingdom. Nor is it disputed, however, that, following that judgment, the United Kingdom Government was required to organise European elections in Gibraltar as well and was therefore obliged to pass the legislation needed for that purpose.

118. That said, the first question to be asked is whether the United Kingdom was entitled to take that course without a formal amendment being made to the abovementioned Annex II. I consider that an affirmative answer to that question is beyond doubt, having regard to the privileged position accorded to the protection of fundamental rights by the Community legal order.

119. Of course, implementing almost to the letter a clear requirement laid down by case-law, already incorporated in the preamble to the Single European Act, Article F(2) of the Treaty on the European Union (which has become Article 6(2) EU) states that '[t]he 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 may result from the constitutional traditions common to the Member States, as general principles of Community law'.

120. In the same way, consistent and long-standing Community case-law has made it clear that 'fundamental rights form an integral part of the general principles of law the observance of which the Court ensures' and the Court 'draws inspiration from the

constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories'. In that regard, the ECHR 'has special significance'. [29]

121. It follows that in the Community legal order 'both the Community and its Member States are required to respect fundamental rights', *on a primary basis*, [30] and that therefore, in that legal order, 'measures which are incompatible with observance of [those] ... rights' are not acceptable. [31]

122. I must add that that is particularly true in the present case, since the starting point is a pronouncement of the Strasbourg Court, which dealt with the very question of the right to vote in European Parliament elections having regard to the status of Gibraltar, after making a finding of 'violation of the Convention' deriving from the 'annex to the 1976 Act, entered into by the United Kingdom' [32] and consisting in the fact that 'the applicant, as a resident of Gibraltar, was completely denied any opportunity to express her opinion in the choice of the members of the European Parliament'. [33]

123. Consequently, as is in essence recognised also by the parties to the proceedings, notwithstanding the failure to amend Annex II, the United Kingdom not only was entitled, but was also required, to take all steps necessary to guarantee the full and effective upholding of that fundamental right.

124. That said, it is now necessary to assess specifically the legitimacy of those measures, in the light of the Spanish criticisms.

125. It seems to me that, from this standpoint, the United Kingdom legislation in question deserves support only in part. In other words, it seems to me that the following are consistent with the principles just mentioned and therefore legitimate: the creation of the combined electoral region, the carrying out of polling in Gibraltar, the establishment — again in Gibraltar — of the electoral register and, finally, recognition of the availability of legal proceedings concerning elections before the courts of the colony. However, it seems to me that the granting of votes to people, such as QCCs, who are not citizens of the Union, is unlawful.

29 — Case C-36/02 *Omega* [2004] ECR I-9609, paragraph 33. It represents settled case-law: see, among the more recent cases, Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 41; Case C-274/99 P *Connolly* v *Commission* [2001] ECR I-1611, paragraph 37; Case C-94/00 *Roquette Frères* [2002] ECR I-9011, paragraph 25; and Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 71.

30 — *Schmidberger*, paragraph 74, and *Omega*, paragraph 35.

31 — *Schmidberger*, paragraph 73; *ERT*, paragraph 41; and Case C-299/95 *Kremzow* [1997] ECR I-2629, paragraph 14.

32 — *Matthews*, § 33.

33 — *Matthews*, § 64.

126. Let me explain. As far as the combined region is concerned, I agree with the United Kingdom and the Commission that in a system such as the British one in which the electors vote in proportional regional constituencies, the only possible way of extending voting to electors in Gibraltar was that of reconfiguring one of the electoral districts already existing in the United Kingdom, so as to include the colony in it. Being unable — because of the small number of electors in Gibraltar — to create there an autonomous electoral district, the United Kingdom had no option but to 'extend' to the colony one of the existing districts. The Kingdom of Spain has not rebutted those views, nor has it indicated what specific alternative might be available to the United Kingdom.

127. As regards, next, the other measures relating to voting in the colony (creation of a register, recognition of jurisdiction, polling within the territory of the colony), I consider that the United Kingdom and the Commission are again correct to observe that they are measures needed to guarantee the effectiveness of voting rights. Indeed it also seems to me that full and proper effect would not have been given to the *Matthews* judgment if the electors had been required to go to the United Kingdom or to fulfil voting requirements by post (entry on the electoral register, voting, possible challenges). Had that been the case, exercise of the right in question would have proved excessively difficult and onerous, and perhaps also less transparent. In addition, as the Commission has emphasised, it would be unjustified to require Gibraltarian electors to vote by post when that procedure is generally used when it is the only option (in the case, for example, of people in hospital, in detention or residing abroad). [34]

128. That said, I part company with the United Kingdom and the Commission regarding extension of the right to vote to persons, such as QCCs, who are not citizens of the United Kingdom or of other Member States of the Union. I consider that that extension does not stem from the need to ensure the exercise of a fundamental right and that therefore a derogation from Annex II is not justified.

129. As I said earlier, such an exception can be allowed only to the extent to which it is imposed by a superior rule, such as one designed to protect a fundamental right. In the case before us, however, no such right is at stake.

34 — Regarding the exceptional nature of recourse to postal voting, see the Code of Good Practice in Electoral Matters (paragraph 38), cited in footnote 25.

130. It is indeed true, as I have endeavoured to demonstrate above, that the evolution of modern democratic regimes allows, in certain circumstances, extension of the right to participate in the political process to foreigners established in the State (see point 93 above). However, it is also true that that possibility is still regarded as a result of a freely made political choice, and yet one that, in practice, has so far been opted for to a very limited extent by the Member States. In those circumstances, therefore, the exclusion of citizens of third countries from the right to vote may be entirely legitimately laid down by the national electoral legislation without giving rise, as I also stated earlier, to any risk of conflict with the principles of the ECHR. [35]

131. It follows that if, for the reasons mentioned already, the latter requires participation of the citizens of the Union in the European Parliament elections organised in Gibraltar, allowing a derogation in this respect from Annex II, the same cannot be said, on the other hand, with regard to the participation in those elections of the citizens of third countries, such as QCCs. With regard to the latter, that annex remains prohibitory, rendering unlawful the provision of English law which allows such participation.

132. For that reason, I consider that Spain's second criticism must be upheld to the extent to which it alleges that the grant of voting rights in Gibraltar to people, such as QCCs, who do not possess the nationality of the United Kingdom or of other Member States of the Union (section 16(1) and (5) EPRA 2003) is illegal in that it infringes Annex II.

133. I therefore propose that the Court hold that, by having granted to people such as QCCs who do not possess the nationality of the United Kingdom or of other Member States of the Union the right to vote in European Parliament elections in Gibraltar (section 16(1) and (5) EPRA 2003), the United Kingdom has failed to fulfil its obligations under Annex II to the 1976 Act.

C — *Case C-300/04*

1. Introduction

134. As I have already indicated, the preliminary ruling sought in Case C-300/04 is also concerned with the right to vote in European Parliament elections. The case stems from those special provisions of Netherlands electoral law which regulate the grant of voting rights to people posses-

35 — In that regard, see the Code of Good Practice in Electoral Matters (paragraph 1(1)(b)) and its explanatory report (paragraph1 (1)(b)), cited in footnote 25.

sing the nationality of the State by reference to the part of the State in which they have established their residence.

135. As has been seen earlier (points 26 and 27), the constitutional arrangements in the Kingdom of the Netherlands display two particular features: first, the division of the Kingdom into three State entities, namely the Netherlands, the Netherlands Antilles and Aruba; second, provision for a single nationality, namely Netherlands nationality.

136. Those particular features have an impact on the grant of voting rights to citizens. Under Netherlands electoral law, participation in Netherlands Parliament elections is available only to Netherlands citizens residing in the Netherlands or in third countries, but not to those who reside in the Netherlands Antilles or Aruba [36] (Article B1, first and second paragraphs). The same rule applies to European elections, in that only those entitled to vote in legislative elections in the Netherlands are allowed to participate (Article Y3(a)).

137. Precisely because of those provisions, Messrs Eman and Sevinger, Netherlands citizens residing in Aruba, were not entered in the electoral registers and were therefore excluded from voting in the European elections of June 2004. It was in the context of the proceedings brought as a result of that exclusion that the Nederlandse Raad van State decided to refer the following questions to the Court of Justice under Article 234 EC:

'(1) Does Part Two of the Treaty apply to persons who possess the nationality of a Member State and who are resident or living in a territory belonging to the OCTs referred to in Article 299(3) EC and having special relations with that Member State?

(2) If the answer is no: are the Member States free, in the light of the second sentence of Article 17(1) EC, to confer their nationality on persons who are resident or living in the OCTs referred to in Article 299(3) EC?

(3) Must Article 19(2) EC, read in conjunction with Articles 189 EC and 190(1) EC, be construed as meaning that — apart from the not unusual exceptions in national legal systems relating to, inter alia, deprivation of voting rights in connection with criminal convictions and legal incapacity —

36 — Unless they have lived for at least 10 years in the Netherlands or work in the public service.

even in the case where the persons concerned are resident or living in the OCTs, the status of citizen of the Union automatically confers the right to vote and to stand as a candidate in elections to the European Parliament?

(4) Do Articles 17 EC and 19(2) EC, read together and considered in the light of Article 3 of the Protocol, as interpreted by the European Court of Human Rights, preclude persons who are not citizens of the Union from having the right to vote and to stand as candidates in elections to the European Parliament?

(5) Does Community law impose requirements as to the nature of the legal redress to be provided in the case where the national courts — on the basis of, inter alia, the answers given by the Court of Justice of the European Communities to the above questions — conclude that persons resident or living in the Netherlands Antilles and Aruba and having Netherlands nationality were improperly refused registration for the elections of 10 June 2004?'

2. The first four questions

138. Before analysing those questions, I must observe that the wording of some of them does not seem to me to be particularly clear and therefore leaves room for more than a little doubt as to their real scope.

139. In so saying, I am not referring to the first question, by which the Netherlands court clearly asks whether the second part of the Treaty is applicable to persons who possess the nationality of a Member State and reside or are domiciled in an overseas territory which maintains special relations with that State.

140. However, the Netherlands court immediately goes on to ask whether, in the event of a negative answer to the first question (therefore, literally, in the event of it being considered that the second part of the Treaty does not apply to those persons), the State may grant its own nationality to persons who reside or are domiciled in a territory of the kind indicated (second question).

141. Now, unless I have misunderstood, it seems to me that there are but two possibilities. Either the question refers, as would appear to be the case, to persons who find themselves in the situation described in the first question, in which case the relevance of the question is not apparent because those persons already possess the nationality of the State in question. Or else, despite its word-

ing, the question purports to relate to persons who, although residing in that territory, do not have the nationality of that State and the issue is therefore whether that nationality may be granted to them, together with the consequential rights referred to in the second part of the Treaty. If that is the case, however, I wonder what connection that question has with the present case, since we are concerned here with persons who already possess that nationality.

142. The third question seems to me to be rather unclear, in that the national court wishes to ascertain whether Article 19(2) EC, read in conjunction with Articles 189 and 190(1) EC, must be interpreted as meaning that the status of citizen of the Union residing in an OCT carries with it entitlement to vote and to stand as a candidate for the European Parliament.

143. As the Netherlands, French and United Kingdom Governments have observed, Article 19(2) EC does not cover the present case. I have already pointed out that that provision grants 'every citizen of the Union *residing in a Member State of which he is not a national*' the right to vote and to stand in European Parliament elections in the Member State in which he resides, under the same conditions as citizens of that State. In the present case, however, those claiming voting rights are Netherlands citizens who reside in the Kingdom of the Netherlands (or, rather, in one of the territorial divisions of that Kingdom), that is to say persons who *reside in the State of which they are citizens*. Those people therefore have no right to invoke that provision and the usefulness of asking questions about it is not therefore apparent.

144. Also irrelevant, it seems to me, is the fourth question, by which the Netherlands court seeks to ascertain whether Articles 17 and 19(2) EC, read in conjunction with Article 3 of ECHR Protocol No 1, preclude the grant of entitlement to vote in European Parliament elections and to stand as a candidate to persons *who are not citizens of the Union*. However, as noted earlier and as also observed by the Netherlands Government and the Commission, in the present case the persons seeking entitlement to vote in European elections possess Netherlands nationality and are therefore citizens of the Union. To arrive at a decision in the main proceedings, which have been brought by those persons, it is not therefore necessary to clarify whether that right may possibly be granted also to non-citizens. [37]

145. In reality, quite apart from the doubts so far expressed, one problem emerges from the order for reference in respect of which a response should be given to the Netherlands

37 — I have already given my views on this problem when analysing the first criticism by the Spanish Government in Case C-145/04 (see point 62 et seq. above).

court. The Court of Justice must clarify whether a Member State which grants voting rights in national elections and, consequently, 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.

146. The central issue having been thus defined, it may first of all be observed, with regard to the first question, that persons possessing the nationality of a Member State are citizens of the Union and therefore, in principle and regardless of where they live, enjoy all rights available to such citizens under Community law, including naturally those provided for in the second part of the Treaty.

147. Those rights, as I have endeavoured to demonstrate above when discussing Case C-145/04 (see points 67 to 71), include the right to vote in European Parliament elections; for that reason, citizens of the Member States, and therefore citizens of the Union, must in principle consider themselves thus entitled specifically by virtue of Community law.

148. Again in relation to Case C-145/04, I have tried to show that, within certain limits and under certain conditions, the Community legal order does not prevent the Member States from extending the range of vestees of the right in question and therefore granting the vote also to citizens of non-member countries (see points 72 to 107 above). In the present case, on the other hand, the question to be asked is whether and under what conditions the Member States may on the contrary, and here I would also say exceptionally, limit entitlement to that right by denying it to certain categories of its own citizens.

149. For the reasons which I set out below, I believe that in this case too the answer must be in the affirmative.

150. I start from the premiss, which I believe to be generally accepted, that the Treaty has not removed from the Member States the power to determine the scope of their own citizenship; on the contrary, '[u]nder international law' they retain that power, even though they are required to exercise it 'having due regard to Community law'. [38] It follows that whenever reference is made in the Treaty to 'citizens of the Member States', the question whether a person possesses the nationality of this or that Member State and, consequently, citizenship of the Union cannot, at least as Community law stands at present, be settled on the basis of autonomous criteria forming part of that law but is

38 — Case C-369/90 *Micheletti and Others* [1992] ECR I-4239, paragraph 10; Case C-192/99 *Kaur* [2001] ECR I-1237, paragraph 19; and Case C-200/02 *Zhu and Chen* [2004] ECR I-9925, paragraph 37.

dependent 'solely' on the provisions of the 'national law of the Member State concerned' which may also be amended from time to time. [39]

151. When therefore it states that '[e]very person holding the nationality of a Member State shall be a citizen of the Union' and that '[c]itizens of the Union shall enjoy the rights conferred by this Treaty', Article 17 EC in fact does no more than refer to the domestic law of the Member States regarding definition of the subjective scope of citizenship of the Union. In other words, the existence of that legislation is taken for granted by the Community legal order and as such is assimilated by it for the purpose of defining entitlement to Union citizenship.

152. On close examination, however, that reference concerns not only delimitation of the status of citizen of the Union but also the way in which the rights associated with that status are provided for. This means that reference must be made to the relevant State legislation not only to ascertain whether a person possesses citizenship of the Union but also to establish whether, in accordance with such rules as may be laid down by national law, that person enjoys all the rights associated with that status.

153. In other words, it must be concluded that when the legislation of a Member State places limitations on citizenship rights on the basis of objective criteria (for example, rules connected, as in this case, with the constitutional structure of the State), the Community legal order — without prejudice to observance of its fundamental principles — accepts those limitations also for the purpose of determining the rights associated with citizenship of the Union.

154. In the present case, that means that Community law accepts as a premiss not only the choices made by the Kingdom of the Netherlands regarding the grant of citizenship but also the internal rules governing that right which the State has decided to apply by reason of the special relations which link it to the territories of Aruba and the Netherlands Antilles. Indeed, it could have granted citizenship to mainland citizens only or made further rules drawing a distinction between mainland citizens and inhabitants of the OCTs. However, for reasons relating to its sovereignty, it decided to opt for citizenship which was formally undivided, but in reality was differentiated in regard to the exercise of associated rights (including the right to vote at both national and Community level).

155. Community law cannot therefore decline to accept the rules on citizenship applicable in that State. That is all the more true because those rules do not give rise to

39 — Declaration (No 2) on nationality of a Member State, annexed to the Maastricht Treaty (OJ 1992 C 191, p. 45).

restrictions concerning the exercise (merely) of rights granted by Community law but transposes precisely the limitations existing at national level.

156. I would also point out that the European Court of Human Rights itself has acknowledged that voting rights may be limited according to 'groups or categories of the general population' provided that the limitations imposed are designed to pursue a legitimate objective by proportional means and in any event do not curtail the rights in question 'to such an extent as to impair their very essence and deprive them of their effectiveness'. [40]

157. In particular, the European Court of Human Rights has held that the Contracting States may adopt the criterion of residence in order to identify who is to have the right to vote and therefore grant that right only to 'those with sufficiently continuous or close links to ... the country concerned'. [41] In that connection, it has emphasised that the possibility of excluding non-residents is justified by various 'grounds', such as the fact that a non-resident citizen is not 'directly affected by the acts of the political bodies' to be elected and that, more generally, as compared with residents, he is 'less directly or less continually concerned with his country's day-to-day problems'. [42]

158. Now, it seems to me that the limitations imposed by the Netherlands electoral law are, in general, consistent with those indications. That law defines the right to vote specifically by reference to where Netherlands citizens reside, excluding from elections (in the Netherlands and, consequently, the European elections) those persons who reside in a part of the Kingdom (Aruba and the Netherlands Antilles) which is not directly affected by the measures adopted by the assemblies to be elected, namely the Netherlands Parliament and the European Parliament.

159. However, a different view is taken by Mr Eman. At the hearing, he contended that Aruba is affected by measures to which the European Parliament makes a contribution, since — if I understand the position correctly — the local legislature draws inspiration from those measures when it has to pass laws applicable to the island. Again, if I understand the position correctly, that occurred for example in the sphere of savings. In that sector, the Aruba legislature voluntarily modelled its local legislation on the Community legislation so that, albeit indirectly, the latter is applied in some ways in that territory. Consequently, the European Parliament should be regarded as part of the 'legislative body' of Aruba, in the election of which, pursuant to Article 3 of ECHR Protocol No 1, Netherlands citizens living on the island should also participate.

40 — *Hirst*, § 62.

41 — Eur. Court H.R., *Hilbe* v. *Liechtenstein*, No 31981/96, ECHR 1999-VI; *Melnychenko* v *Ukraine*, No 17707/02, § 56, ECHR 2004-X; and *Hirst*, § 62.

42 — Eur Court H.R., *Melnychenko*, § 56.

160. In my opinion that thesis cannot be endorsed.

161. I shall confine myself to pointing out that in the *Matthews* case the Strasbourg Court established that, for it to be possible for the European Parliament to be regarded as a 'legislative body' for a given territory, it is not sufficient for the measures to which that body has made a fundamental contribution to have a merely indirect impact in that territory, as would be the case as far as Community measures are concerned in Aruba. In contrast, it is necessary (as was precisely the case of Gibraltar under review in those proceedings) for such measures to produce their effects directly in that territory and affect the population there in the same way as measures adopted by the local legislative assembly. [43]

162. Now, measures of the European Parliament which produce effects of that kind in Aruba are totally lacking. As rightly pointed out by the Netherlands Government, the United Kingdom and the Commission, as far as Community law is concerned Aruba is an overseas territory to which, as a general rule, neither the Treaty provisions nor the provisions of secondary law apply, [44] whether or not the European Parliament has made a fundamental contribution to their adoption. Under Article 299(3) EC, the only provisions that apply to that island are in fact those of the fourth part of the Treaty which define a special regime for association of the OCTs with the Community (Articles 182 to 188 EC), and the specific measures that the Council has adopted to govern the procedure and the detailed rules for such association (see Article 187 EC). [45]

163. It is thus clear from the foregoing considerations that, having regard to its particular constitutional organisation, a Member State may — in principle — grant the right to vote in national elections and, as a consequence, in European elections to its own citizens residing in the European territory of the State and, on the other hand, withhold that right from its own citizens residing in a part of the State which constitutes an overseas territory associated with the Community.

164. That said, I must nevertheless agree with the Commission that the Netherlands legislation under review also raises a problem of compatibility with Community law. In fact it might be conducive to a breach of a fundamental principle of the Community legal order, namely the principle of equal treatment, according to which citizens of the

43 — *Matthews*, §§ 34 and 64.

44 — See Case C-260/90 *Leplatt* [1992] ECR I-643, paragraph 10, and Case C-100/97 *Netherlands* v *Council* [2001] ECR I-8763, paragraph 49.

45 — See most recently Council Decision 2001/822/EC of 27 November 2001 on the association of the overseas countries and territories with the European Community ('Overseas Association Decision') (OJ 2001 L 314, p. 1).

Union who 'find themselves in the same situation [should] enjoy the same treatment',[46] unless different treatment 'is objectively justified'.[47]

165. On close examination that legislation grants voting rights in European elections not only to Netherlands citizens residing in the Netherlands but also to those who reside in third countries, entirely denying that right only to those who live in Aruba and the Netherlands Antilles. Thus, the legislation grants that right to Netherlands citizens living in countries that are not part of the Netherlands or of the Community but denies it to those who reside in the abovementioned islands, even though they may be in the same situation as the others (they too are Netherlands citizens who reside outside the Netherlands) and may actually claim to reside in territories which maintain special links with the Netherlands and with the Community.

166. Not only that: there is a further and veritably paradoxical consequence of the Netherlands legislation in question. As the Netherlands Government itself conceded at the hearing, whilst on the one hand that legislation withholds voting rights from Netherlands citizens who reside in Aruba and the Netherlands Antilles, on the other hand it grants them that right if they leave those islands and establish their residence in a non-member country. As a result, for example, if he remains on the island, an inhabitant of Aruba will not be able to vote in European Parliament elections but, on the other hand, he will be able to do so if he moves, even permanently, to a non-member country.

167. In those circumstances, it seems to me that it is not possible to invoke, in order to justify the disparity of treatment with which we are concerned here, the fact that the Netherlands legislature thereby pursues the aim of safeguarding voting rights for those Netherlands citizens who, although having left the Netherlands, might subsequently wish to return. That justification sits uneasily with the fact that that right is guaranteed also to Netherlands citizens originating from Aruba who have *never* gone to Europe but nevertheless live on a permanent basis in a non-member country. It is not comprehensible why the right in question should be withheld only from Netherlands citizens who continue to live in that island.

168. The foregoing considerations lead me to conclude that Community law, and in particular the general principle of equal treatment, precludes a Member State which grants the right to vote in national elections and, consequently, in European elections to its own citizens living within the European territory of that State and to those residing in non-Member States, from withholding —

46 — Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 31, and Case C-224/98 *D'Hoop* [2002] ECR I-6191, paragraph 28.

47 — Case C-56/94 *SCAC* [1995] ECR I-1769, paragraph 27; Case C-15/95 *EARL de Kerlast* [1997] ECR I-1961, paragraph 35; Case C-354/95 *National Farmers' Union and Others* [1997] ECR I-4559, paragraph 61; and Case C-292/97 *Karlsson and Others* [2000] ECR I-2737, paragraph 39.

without objective justification — the right to vote in European Parliament elections from its own citizens residing in another part of the State which constitutes an associated overseas territory of the Community.

3. The fifth question

169. Finally, by its fifth question the national court seeks to ascertain whether Community law imposes conditions regarding the 'legal redress' to be provided to a person who, by virtue of a national provision conflicting with Community law, has not been entered on the electoral registers and has thus been excluded from participation in European Parliament elections.

170. I must confess that I find it difficult to understand what the Netherlands court has in mind when it speaks of 'legal redress'. In particular, I wonder whether it is thinking of the possibility of compensation for non-material damage, rectification of the election results, a re-run of the elections or some other course of action.

171. In any event, in the absence of Community rules on the matter, I agree with the Netherlands Government and the Commission that the rules governing possible remedies for cases in which there has been found to be an infringement of the national law are a matter for the legislation of the Member States.

172. However, the well-known limitations which the Court has long since imposed regarding the safeguarding of rights based on Community provisions still apply. In other words, it is necessary for those rules to comply with the principle of equivalence ('such rules must not be less favourable than those governing similar domestic actions') and the principle of effectiveness of protection (it must not be subject to limitations such as to 'render virtually impossible or excessively difficult the exercise' of that right). [48]

173. On the basis of those considerations, I consider that the answer to be given to the referring court must be that, in the absence of Community rules, it is for the legal order of each Member State to determine what legal redress is to be available to a person who, by virtue of a national provision that is contrary to Community law, has not been entered on electoral registers and has there-

48 — Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 12. To that effect, see also Case 33/76 *Rewe* [1976] ECR 1989, paragraph 5; Case 45/76 *Comet* [1976] ECR 2043, paragraphs 12 to 16; Case 68/79 *Just* [1980] ECR 501, paragraph 25; Case 199/82 *San Giorgio* [1983] ECR 3595, paragraph 14; Joined Cases 331/85, 376/85 and 378/85 *Bianco and Girard* [1988] ECR 1099, paragraph 12; Case 104/86 *Commission* v *Italy* [1988] ECR 1799, paragraph 7; Joined Cases 123/87 and 330/87 *Jeunehomme and EGI* [1988] ECR 4517, paragraph 17; Case C-96/91 *Commission* v *Spain* [1992] ECR I-3789, paragraph 12.

fore been excluded from participation in European Parliament elections. Those remedies must be in conformity with the principles of equivalence and effectiveness.

IV — Costs in Case C-145/04

174. Since, in Case C-145/04, I consider that the Kingdom of Spain and the United Kingdom have both been partially unsuccessful, it would seem fair to suggest that they should, in accordance with Article 69(3) of the Rules of Procedure, each bear their own costs.

175. Pursuant to Article 69(4), the Commission, which intervened, should bear its own costs.

V — Conclusion

176. In the light of the foregoing considerations, I propose that the Court of Justice should:

— in Case C-145/04:

(1) declare that, by having granted to people such as Qualifying Commonwealth Citizens, who do not possess the nationality of the United Kingdom or of other Member States of the Union, the right to vote in European Parliament elections in Gibraltar (section 16(1) and (5) of the European Parliament (Representation) Act 2003), the United Kingdom has failed to fulfil its obligations under Annex II to Decision 76/787/ECSC, EEC, Euratom of 20 September 1976 of the representatives of the Member States meeting in the Council relating to the Act concerning the election of the representatives of the Assembly by direct universal suffrage;

(2) for the rest, dismiss the action;

(3) order the United Kingdom and the Kingdom of Spain to bear their own costs;

(4) order the Commission to bear its own costs;

— in Case C- 300/04, rule as follows:

(1) Community law, and in particular the general principle of equal treatment, precludes a Member State which grants the right to vote in national elections and, consequently, in European elections to its own citizens living within the European territory of that State and to those residing in non-Member States, from withholding — without objective justification — the right to vote in European Parliament elections from its own citizens residing in another part of the State which constitutes an associated overseas territory of the Community;

(2) In the absence of Community rules, it is for the legal order of each Member State to determine what legal redress is to be available to a person who, by virtue of a national provision that is contrary to Community law, has not been entered on electoral registers and has therefore been excluded from participation in European Parliament elections. Those remedies must be in conformity with the principles of equivalence and effectiveness.