

# *Fordham International Law Journal*

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*Volume 28, Issue 4*

2004

*Article 6*

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## Constitutional Control of European Elections: The Scope of Judicial Review

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# Constitutional Control of European Elections: The Scope of Judicial Review

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## **Abstract**

The subject of this Article is the judicial review of elections at the European level, that is, judicial review of elections to the European Parliament. I will focus in particular on the division of jurisdiction between the European Court of Justice ("ECJ") and the European Court of Human Rights ("ECHR"). Since the organization and conduct of those elections falls partly within the competence of the Member States and partly within the competence of the European Community ("EC") Institutions, the subject provides a good illustration of the emerging system of constitutional review in Europe and of the respective functions within that system of the ECJ and the ECHR.

# CONSTITUTIONAL CONTROL OF EUROPEAN ELECTIONS: THE SCOPE OF JUDICIAL REVIEW

*Francis G. Jacobs\**

The subject of this Article is the judicial review of elections at the European level, that is, judicial review of elections to the European Parliament. I will focus in particular on the division of jurisdiction between the European Court of Justice (“ECJ”) and the European Court of Human Rights (“ECHR”). Since the organization and conduct of those elections falls partly within the competence of the Member States and partly within the competence of the European Community (“EC”) Institutions,<sup>1</sup> the subject provides a good illustration of the emerging system of constitutional review in Europe and of the respective functions within that system of the ECJ and the ECHR.

More generally, the judicial review of elections on the European level, as on the national level, can be seen as having a vital constitutional function, namely to ensure that elections conform to proper democratic standards and that the system gives adequate expression to the wishes of the electorate.<sup>2</sup> The subject is of course a particularly appropriate one for the Venice Commission (the European Commission for Democracy through Law), since the concern of the subject is precisely “democracy through law.”<sup>3</sup>

First, I will outline the role of the ECJ in the European Union (“EU”). In the broadest terms, the ECJ’s role includes,

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\* Advocate-General, Court of Justice of the European Communities (“ECJ”). This is a revised version of my contribution to the conference organized by the Venice Commission in Sofia on May 28-29, 2004. It has been updated to take account of the text of the Treaty establishing a Constitution for Europe. Various citations in the footnotes have been added by the editorial staff of the *Fordham International Law Journal*.

1. See European Parliament Fact Sheets, 1.3.4. The European Parliament: electoral procedures, available at [http://www.europarl.eu.int/factsheets/1\\_3\\_4\\_en.htm](http://www.europarl.eu.int/factsheets/1_3_4_en.htm) (last visited Mar. 30, 2005) [hereinafter Fact Sheet 1.3.4].

2. See *Parti Ecologiste Les Verts v. European Parliament*, Case 294/83, [1986] E.C.R. 1339, ¶ 53, [1987] 2 C.M.L.R. 343, 378.

3. See Council Resolution 90(6), 85th Sess., May 10, 1990 (On a Partial Agreement establishing the European Commission for Democracy Through Law), available at <http://conventions.coe.int/Treaty/EN/partialagr/Html/Venise9006.htm> (last visited Mar. 30, 2005).

on the one hand, ruling on the interpretation of the Treaties and of EC legislation at the request of the courts of the Member States — and the ECJ's rulings on such references from national courts have sometimes had a constitutional aspect, as when it has ruled on the direct effect and the primacy of EC law. On the other hand, the ECJ's role includes legality review of measures of the EU institutions, and of Member States where they act within the field of EU law.<sup>4</sup> The ECJ is not a specialized constitutional court; the EU has no written constitution to date; and the Treaty establishing a Constitution for Europe agreed at the European Summit on June 18, 2004 must be ratified by all Member States before it enters into force.<sup>5</sup> However, the ECJ itself has described the EC Treaty (first in 1986 in its judgment in *Parti Ecolo-giste Les Verts v. European Parliament*)<sup>6</sup> as the Community's "constitutional charter;" and certainly some aspects of its jurisdiction, both over Member States and over Community Institutions are, in substance, constitutional in character.

Thus, to take first the review by the ECJ of Community measures, the Treaty has always given the ECJ power to review the compatibility of Community legislation with the Treaty, a power which can be compared with review of the constitutionality of legislation — the essence of constitutional jurisdiction.

In the exercise of this jurisdiction, the ECJ may also be called upon to decide whether the measure is within the competence of the Community, or of the Member States. Such jurisdiction is necessary because the EU is a divided power system, with legislative and executive competences divided between the Union and the Member States. The nature of the system imposes the need for adjudication on the limits of competence of the EU and the Member States respectively — a further archetype of constitutional jurisdiction, familiar in federal systems.

A further dimension is the division of powers within the EU's own institutional structure among the "political institutions" — especially the European Parliament, the Council, the Commission. This structure requires the Court to adjudicate on

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4. *See id.* at 44-45.

5. *See* Draft Treaty establishing a Constitution for Europe, Dec. 16, 2004, O.J. C 310/1 (2004) (not yet ratified) [hereinafter Draft Treaty].

6. [1986] E.C.R. at 1339, ¶ 23, [1987] 2 C.M.L.R. at 371.

the respective competences of those institutions, again a form of constitutional adjudication.

Turning now to the jurisdiction of the ECJ over the Member States, we find that some aspects of the jurisdiction are also of a constitutional character. Broadly speaking, where matters fall within the competence of the EU, they are within the jurisdiction of the ECJ; where matters fall within the competence of the Member States, they are outside the jurisdiction of the ECJ. However, the dividing line between the competence of the EU and that of the Member States has to be drawn by the ECJ. Often, matters are partly regulated by EU law, and partly regulated by the national law of Member States. The law governing elections illustrates this point. While elections to national parliaments and local elections are largely matters for national law, some aspects of local elections are governed by EU law. For instance, every citizen of the EU residing in a Member State of which he is not a national has the right, under Article 19(1) of the Treaty, to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State.<sup>7</sup> The interpretation of that provision — one of some political and also symbolic significance — falls within the jurisdiction of the ECJ.

Moreover, in the exercise of their competence, Member States may not act contrary to EC law. Outside the field of electoral law, taxation provides a good example. While some aspects of indirect taxation are within the Community's competence, direct taxation remains within the competence of the Member States.<sup>8</sup> But the exercise of that competence remains subject to the constraints of Community law.<sup>9</sup> For example, in exercising their competence in matters of direct taxation, Member States may not impair freedom of movement, or the right of establishment for companies.<sup>10</sup> Interpreting those limits on Member States' competence is, necessarily, a matter for the ECJ.

The division of competence between the EC and the Member States can be found in European electoral law, and in particular in the law governing elections to the European Parliament.

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7. See Treaty Establishing the European Community, art. 19(1), O.J. C 325/33 (2002) [hereinafter E.C. Treaty].

8. See *Manninen v. Finland*, Case C-319/02, [2004] E.C.R. \_\_, ¶ 19.

9. See *id.* at ¶¶ 27-28.

10. See *id.* at ¶ 55.

The original European Economic Community Treaty provided that the European Parliament (or “Assembly” as it was then called) should consist of delegates designated by the respective national parliaments from among their members in accordance with the procedure laid down by each Member State.<sup>11</sup> However, the original Treaty also envisaged that the European Parliament should subsequently be directly elected, and it provided that the Assembly was to draw up proposals for elections by direct universal suffrage in accordance with a uniform procedure in all Member States.<sup>12</sup> The Council, acting unanimously, was then to lay down the appropriate provisions, which it was to recommend to Member States for adoption in accordance with their respective constitutional requirements.<sup>13</sup>

Although agreement could not be reached on a uniform procedure, direct elections were introduced by a decision of the Council in 1976, to which was annexed the Act of September 20, 1976, concerning direct elections — an act of an unusual, perhaps unique character.<sup>14</sup> While it took the form of an Act annexed to a Decision of the Council, the nature of the Act was not clear from the Act itself or from the classification in the Treaty of Community measures. Moreover, it has the appearance of a hybrid or mixed Act; although annexed to a decision of the Council, it carries the signatures of representatives of the Member States.<sup>15</sup>

Elections to the European Parliament were first held, pursuant to the 1976 Act, in 1979.<sup>16</sup> Since then, elections have been held at five-year intervals, most recently in June 2004. But even now such elections are, broadly, organized by the Member States, and largely in accordance with national rules.<sup>17</sup> Both the

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11. See Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, art. 138(1) & (2) [hereinafter EEC Treaty].

12. See EEC Treaty, *supra* note 11, art. 138(3).

13. See *id.*

14. See Council Decision No. 76/787/ECSC, O.J. L 278/1 (1976).

15. See John Forman, *Direct Elections to the European Parliament*, 2 EUR. L. REV. 35, 37 (1977).

16. See European Parliament Fact Sheets, 1.3.1. The European Parliament: historical background, available at [http://www.europarl.eu.int/facts/1\\_3\\_1\\_en.htm](http://www.europarl.eu.int/facts/1_3_1_en.htm) (last visited Mar. 30, 2005) [hereinafter Fact Sheet 1.3.1]; see also Richard Cracknell & Bryn Morgan, *European Parliament Elections — 1979 to 1994*, House of Commons Library — Research Paper 99/57 at 7 (June 2, 1999), available at <http://www.parliament.uk/commons/lib/research/rp99/rp99-057.pdf> (last visited Mar. 30, 2005).

17. See European Parliament Fact Sheets, 2.4.0. Voting rights and eligibility, *availa-*

existing Treaty, and the draft Constitution, envisage that a European law should lay down uniform election procedures, but this is still only an aspiration.

Since 1982, the European Parliament has drafted four reports in attempts to establish uniform procedures, of which three have been considered by the Council.<sup>18</sup> Only the most recent was approved by the Council.<sup>19</sup> That report, adopted by the Parliament in 1998, contained a draft Act in which election of Members by a list system of proportional representation was a central proposal.<sup>20</sup>

A Council Decision of June 25, 2002 and September 23, 2002, accepted certain common principles which the Council recommended to Member States, in application of Article 190(4) of the EC Treaty, for adoption in accordance with their respective constitutional requirements.<sup>21</sup> The main aspects of the Decision are as follows: a proportional-type ballot with some room for manoeuvre for the Member States which may allow balloting for a preferential list;<sup>22</sup> a choice of the type of constituency by the Member State without adversely affecting the proportional nature of the vote;<sup>23</sup> a series of incompatibilities with the other institutions and bodies of the EU and with national Parliaments;<sup>24</sup> and constraints with regards to the timetable for elections, while complying with traditions concerning the day of the week and the publication of the results of the elections.<sup>25</sup>

Otherwise, a few measures governing elections to the European Parliament have, however, been passed. Citizens of an EU Member State have the right to stand for election in their State of residence without regard to national citizenship. Furthermore, under a Council Directive, such a resident has the right to stand for election under the same conditions as national citizens

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*ble* at [http://www.europarl.eu.int/factsheets/2\\_4\\_0\\_en.htm](http://www.europarl.eu.int/factsheets/2_4_0_en.htm) (last visited Mar. 30, 2005); see also *Parlement européen: Fiches techniques 2.4.0, Voting rights and eligibility, available* at [http://www.europarl.eu.int/facts/2\\_4\\_0\\_en.htm](http://www.europarl.eu.int/facts/2_4_0_en.htm) (last visited Mar. 30, 2005).

18. See RICHARD CORBETT ET AL., *THE EUROPEAN PARLIAMENT 22-24* (4th ed. 2000).

19. See Fact Sheet 1.3.4, *supra* note 1 (noting Council Decision of June 25 and September 23, 2002).

20. See CORBETT, *supra* note 18, at 24.

21. See Council Decision No. 2002/772/EC, Euratom, O.J. L 283/1 (2002).

22. See *id.* ¶ 2.

23. See *id.* ¶ 3.

24. See *id.* ¶ 7(b).

25. See *id.* ¶ 9.

of a Member State.<sup>26</sup> Treaty amendments have also provided for an increase in the number of Members.<sup>27</sup>

The constitutional jurisdiction of the ECJ in this area is well illustrated by the Court's 1986 ruling in *Les Verts*<sup>28</sup> on the admissibility and on the substance of the case. Here a political group, Les Verts, challenged a financing scheme set up by the European Parliament in connection with the 1984 elections.

A fundamental issue was that of the admissibility of the action. The Treaty did not at that time give the ECJ jurisdiction over measures of the European Parliament, which then lacked law-making powers: Article 173 (now 230) provided for judicial review of acts only of the Council and Commission. The Parliament had, however, acquired very significant budgetary powers, the exercise of which, was also challenged in separate cases brought both by the Council and by the United Kingdom.<sup>29</sup>

The background to the *Les Verts* case was that the Parliament had allocated funds from its own budget to the political parties for an "information campaign" leading up to the direct elections to the Parliament to be held in 1984.<sup>30</sup> The new French environmentalist or "Green" party complained that by reserving only a limited proportion of funds to parties putting up candidates for the first time in 1984 the Parliament was discriminating in favour of parties already represented in Parliament.<sup>31</sup>

The Court held, in a judgement of great constitutional significance, and in which it may also have had the budget cases in mind, that proceedings could be brought against the Parliament under Article 173.<sup>32</sup> The Court emphasised that "the EEC is a Community based on the rule of law, inasmuch as neither its

26. See Council Directive No. 93/109, O.J. L 329/34 (1993).

27. See also amendments to the 1976 Act made by, for example, Council Decision No. 93/81/Euratom, ECSC, EEC, O.J. L 33/15 (1993).

28. See *Parti Ecologiste Les Verts v. European Parliament*, Case 294/83, [1986] E.C.R. 1339, [1987] 2 C.M.L.R. 343.

29. See *Council of the European Communities v. European Parliament*, Case 34/86, [1986] E.C.R. 2155. *United Kingdom v. European Parliament* was withdrawn after judgment was given against the Parliament in Case 34/86, but not before the United Kingdom had obtained an interim Order from the President of the Court partially suspending the exercise by the Parliament of its budgetary powers. See *United Kingdom v. European Parliament*, Case 23/86, [1986] E.C.R. 1085.

30. See *Les Verts*, [1986] E.C.R. at ¶ 6, [1987] 2 C.M.L.R. 366-67.

31. See *id.*, [1986] E.C.R. at ¶¶ 35-41, [1987] 2 C.M.L.R. 374-75.

32. See *id.*, [1986] E.C.R. at ¶ 25, [1987] 2 C.M.L.R. 372.

Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty."<sup>33</sup> This was a very explicit assertion of the Court's constitutional jurisdiction. Although Article 173 as originally worded referred only to acts of the Council and the Commission, the "general scheme" of the Treaty was to make a direct action available against "all measures adopted by the institutions . . . which are intended to have legal effects."<sup>34</sup> The Parliament was not expressly mentioned, according to the Court, because, in its original version, the Treaty merely granted it powers of consultation and political control rather than the power to adopt measures intended to have legal effect *vis-à-vis* third parties.<sup>35</sup> An interpretation of Article 173 which excluded measures adopted by the Parliament from those which could be contested would lead to a result contrary both to the spirit of the Treaty as expressed in Article 164 (now Article 220) and to its system.<sup>36</sup> As the Court put it:

Measures adopted by the European Parliament in the context of the EEC Treaty could encroach on the powers of the Member States or of the other institutions, or exceed the limits which have been set to the Parliament's powers, without its being possible to refer them for review by the Court. It must therefore be concluded that an action for annulment may lie against measures adopted by the European Parliament intended to have legal effects *vis-à-vis* third parties.<sup>37</sup>

Having accepted the application as admissible,<sup>38</sup> the Court held on the substance that the scheme set up by the European Parliament to finance an information campaign was tantamount to a scheme for reimbursing election campaign expenses, a matter which at that time, under the 1976 Act, remained within the competence of the Member States.<sup>39</sup> Accordingly, the measures

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33. *See id.*, [1986] E.C.R. at ¶ 23, [1987] 2 C.M.L.R. 371.

34. *Commission v. Council (ERTA)*, Case 22/70, [1971] E.C.R. 263, ¶ 42.

35. *See Les Verts*, [1986] E.C.R. at ¶ 24, [1987] 2 C.M.L.R. 371-72.

36. *See id.*, [1986] E.C.R. at ¶ 25, [1987] 2 C.M.L.R. 372.

37. *Id.*

38. The additional problem of admissibility, overcome by the Court but not discussed here, was whether the applicant satisfied the requirement of "individual concern" laid down by Article 173 of the Treaty. *See id.*, [1986] E.C.R. at ¶¶ 13-38, [1987] 2 C.M.L.R. 368-74.

39. The second paragraph of Article 191 of the Treaty (added by the Treaty of Nice) currently provides that the Council shall lay down the regulations governing po-

were annulled.<sup>40</sup>

Two subsequent legislative developments should be mentioned here. First, the Treaty was amended by the Maastricht Treaty to bring it into line with the Court's case-law, and indeed following the exact language of that case-law. Article 173 as amended gave the Court jurisdiction to review acts of the European Parliament intended to produce legal effects *vis-à-vis* third parties.<sup>41</sup> Secondly, and far more significantly in constitutional terms, the Maastricht Treaty gave the European Parliament significant legislative powers: in many important sectors, legislation was no longer to be adopted by the Council after consulting the Parliament, or in cooperation with the Parliament, but instead to be enacted jointly by the European Parliament and the Council.<sup>42</sup> In addition, Article 173 accordingly gave the Court jurisdiction to review the legality of such acts — i.e. a constitutional jurisdiction to review the legality of legislation in which the European Parliament had acted as co-legislator.<sup>43</sup>

Since *Les Verts*, the Court has rarely considered cases concerning elections to the Parliament, and where it has, jurisdiction limitations in this area have not been further clarified. An application from a party in the European Parliament, the Group of the European Right, seeking by way of interim measures pending final judgment, the suspension of a similar financing scheme in the 1986 elections held in Spain and Portugal after their accession to the Community was admitted by the Court but was dismissed on the grounds that the threat of serious and irreparable damage to the applicant was not proved.<sup>44</sup> In *Liberal Democrats v. Parliament*,<sup>45</sup> the Court found no need to decide an action for a declaration of failure to act, based on the Parliament's failure to draw up proposals for a uniform electoral procedure.<sup>46</sup> Since the start of the proceedings, the proposals required under the Treaty had been produced. The Court was

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litical parties at European level and in particular the rules regarding their funding. See E.C. Treaty, *supra* note 7, art. 191, O.J. C 325/33 (2002), at 61.

40. See *Les Verts*, [1986] E.C.R. at ¶ 55, [1987] 2 C.M.L.R. 365.

41. See E.C. Treaty, *supra* note 7, art. 230, O.J. C 325/126 (2002).

42. See E.C. Treaty, *supra* note 7, art. 251, O.J. C 325/126 (2002).

43. See E.U. Treaty, *supra* note 7, art. 230, O.J. C 325/126 (2002).

44. See R Group of the European Right & National Front Party v. European Parliament, Case 221/86, [1986] E.C.R. I-2969.

45. Case C-41/92, [1993] E.C.R. 3153.

46. See *id.* ¶ 1.

therefore not required to consider whether or not the action for failure to act was admissible.<sup>47</sup>

Next the jurisdiction of the ECHR must be considered, and in particular the nature and extent of its jurisdiction over EU measures or measures adopted by Member States within the framework of EU law. Since the topic currently under discussion is constitutional jurisdiction, two reservations should be made. First, formally the jurisdiction of the ECHR is not a constitutional jurisdiction. The ECHR does not annul legislation but tests legislation for compliance with the European Convention on Human Rights. Secondly, the ECHR has no jurisdiction yet over the EC or the EU, but only over its Member States. To that extent, there is a gap in the system of judicial protection.

However, that gap has been partly filled in two ways. In the first place, the ECJ has developed its own fundamental rights jurisprudence.<sup>48</sup> According to the case law of the ECJ, the Court must apply fundamental rights as general principles of law, and the European Convention on Human Rights has a special importance here.<sup>49</sup> Subsequently that principle was incorporated in the Treaty (in the Maastricht Treaty, and then further strengthened in the Treaty of Amsterdam). Article 6(2) of the Treaty on European Union now specifies that the Union shall respect fundamental rights, as guaranteed by the European Convention on Human Rights and as they result from the constitutional traditions common to the Member States, as general principles of Community law. Thus, the EU is not formally bound by the Convention, but in practice, the result is the same. The ECJ regularly cites, and follows, the case-law of the ECHR.<sup>50</sup>

However, the EU is not at present a party to the Convention or subject to the jurisdiction of the ECHR.<sup>51</sup> The question, therefore, arises to what extent EU measures can be challenged in the ECHR indirectly. The question whether proceedings

47. *See id.* ¶ 4.

48. *See* *Strauder v. City of Ulm, Sozialamt*, Case 29/69, [1969] E.C.R. 419, [1970] C.M.L.R. 112 (announcing that fundamental human rights, enshrined in the general principles of Community law, would be protected by the ECJ).

49. *See* *Nold v. Commission*, Case 4/73, [1974] E.C.R. 491, ¶¶ 12-13.

50. *See, e.g.*, *Secretary of State for the Home Department v. Hacene Akrich*, Case C-109/01, [2003] E.C.R. I-9607, ¶ 60; *see also* *Dieter Krombach v. Andre Bamberski*, Case C-7/98, [2000] E.C.R. I-1935, ¶ 39.

51. *See* *Opinion 2/94, Re the Accession of the Community to the European Human Rights Convention*, [1996] E.C.R. 1759, [1996] 2 C.M.L.R. 265, 291.

could be brought against the Member States collectively was raised in *Senator Lines GmbH v. the Fifteen Member States of the EU*, but the case was ultimately withdrawn.<sup>52</sup>

Secondly, where EU measures are implemented by the Member States individually, the Member State's measures may be open to challenge before the ECHR. To take an example, once again, from outside the field of electoral law, a good illustration is provided by *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Minister for Transport, Energy & Communications* ("Bosphorus Airways").<sup>53</sup> In *Bosphorus Airways*, an aircraft owned by the Yugoslav national airline was impounded at Dublin airport by the Irish authorities pursuant to U.N. Resolutions imposing sanctions on the Federal Republic of Yugoslavia (Montenegro and Serbia).<sup>54</sup> The U.N. Resolutions were implemented within the EU by an EC Regulation.<sup>55</sup> Bosphorus Airways, a Turkish company which leased and operated the aircraft, challenged the seizure before the Irish courts.<sup>56</sup> The Irish High Court quashed the decision of the Minister, but on appeal by the Minister the Irish Supreme Court referred to the ECJ issues on the interpretation of the EC Regulation. One of the contentions of Bosphorus Airways was that the seizure of the aircraft infringed its fundamental rights, in particular its right to peaceful enjoyment of its property and its freedom to pursue a commercial activity. The ECJ did not accept those arguments, and thus by implication rejected the claim based on, among other things, the European Convention on Human Rights and Article 1 of the First Protocol. Subsequently, an application in relation to the seizure of the aircraft by the Irish authorities was brought before the ECHR but no ruling has yet been published.<sup>57</sup>

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52. See Press Release, Registrar of the European Court of Human Rights, Cancellation of hearing in the case *Senator Lines GmbH v. the Fifteen Member States of the EU* (Oct. 16, 2003), available at <http://www.echr.coe.int/Eng/Press/2003/oct/Senator-Linescancelled.htm> (last visited Mar. 30, 2005).

53. Case C-84/95, [1996] E.C.R. I-3953.

54. See *id.* ¶ 4.

55. See *id.* ¶ 13; see also S.C. Res. 757, U.N. SCOR, 47th Sess., 3082nd mtg., U.N. Doc. S/757 (1992); S.C. Res. 787, U.N. SCOR, 47th Sess., 3137th mtg., U.N. Doc. S/787 (1992).

56. See *id.* ¶ 3.

57. See Press Release, Registrar of the European Court of Human Rights, Grand Chamber Hearing "Bosphorus Airways v. Ireland" (Sep. 29, 2004), available at <http://www.echr.coe.int/eng/press/2004/Sept/HearingGCCBosphorusAirways290904.htm> (last visited Mar. 30, 2005).

So, as the *Bosphorus Airways* case demonstrates, decisions and measures of the Member States, even within the field of EU law, may be subject to the jurisdiction of the ECHR.

In the field of elections to the European Parliament, implementation is for the Member States, but the measures adopted by Member States under EU law may be subject to the jurisdiction of the ECHR. This point is illustrated in the context of elections to the European Parliament by the *Matthews v. United Kingdom* case.<sup>58</sup> The applicant was a British citizen living in Gibraltar, a dependent territory of the United Kingdom.<sup>59</sup> When the United Kingdom joined the EC in 1973, Gibraltar was included as one of the European territories for whose external relations the United Kingdom was responsible.<sup>60</sup> Thus, the EC Treaty applied to Gibraltar, but the operation of parts of the Treaty is excluded.<sup>61</sup> The 1976 Act (a decision of the Council, not a U.K. Act) provided for elections to take place in the United Kingdom but not in Gibraltar.<sup>62</sup> Denise Matthews was unable to vote, and took the case to the ECHR.<sup>63</sup> The ECHR found a violation of Article 3 of the First Protocol.<sup>64</sup> It rejected the United Kingdom's argument that the European Parliament, although it had certain powers within the process of EU legislation, was not a legislature.<sup>65</sup> After analyzing the powers of the European Parliament and their impact upon Gibraltar, the ECHR concluded that the European Parliament constitutes "part of the 'legislature' of Gibraltar for the purposes of Article 3 of Protocol No. 1."<sup>66</sup>

The United Kingdom sought to comply with the judgment and accordingly made provision for direct elections in the European Parliament Representation Act 2003.<sup>67</sup> Although this is a

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58. See *Matthews v. United Kingdom*, [1999] 28 Eur. H.R. Rep. 361.

59. See *id* at 361, ¶¶ 1, 8.

60. See *id* at 361, ¶ 1.

61. See *id* at 368, ¶¶ 11-12.

62. See *id* at 367, ¶ 7.

63. See *id* at 367, ¶¶ 7, 20.

64. See *id* at 361, ¶ 1.

65. See *id* at 365, ¶ 2.

66. *Id.* It is interesting to note that one year previously the Court had declined to rule whether or not elections to the European Parliament were covered by Article 3 of Protocol No. 1, in the case of *Ahmed & Others v. United Kingdom*, [2000] 29 Eur. H.R. Rep. 1, 45, ¶ 76. In that case, however, it took that position on the basis that no violation had occurred.

67. See European Parliament (Representation) Act, 2003, ch. 7, § 28 (Eng.).

matter for Member States, they must act according to EC law; and the U.K. measure has now been challenged in the ECJ by the Kingdom of Spain.<sup>68</sup> Spain contends that the right to vote in elections to the European Parliament cannot be granted to those who are not U.K. nationals and therefore not citizens of the EU.<sup>69</sup>

Regarding future developments, reference must now be made to the Treaty establishing a Constitution for Europe, approved by the Intergovernmental Conference in June 2004.<sup>70</sup> It would be premature to seek to establish the full implications of the Constitution at this stage, but the following points may be briefly sketched.

First, the Constitution increases still further the areas in which the European Parliament is co-legislator.<sup>71</sup>

Second, there is little change to the provisions on elections to the European Parliament.<sup>72</sup> The Constitution states that the members of the European Parliament shall be elected for a term of five years by direct universal suffrage of the citizens of the Union<sup>73</sup> and envisages the enactment (by the Council, on a proposal from the Parliament) of a European law laying down uniform election procedures<sup>74</sup> — as has been seen above, a long-standing aspiration.

Third, Article 39 of the EU Charter of Fundamental Rights, which will become legally binding as Part II of the Constitution, provides that every citizen of the Union has the right to vote (and to stand as a candidate) at elections to the European Parliament in the Member State in which he resides.<sup>75</sup> It is not clear however whether that provision is intended to go further than the existing rights, already mentioned, under Article 19(2) of the EC Treaty.

Fourth, the provisions on the jurisdiction of the ECJ are significantly amended. While the basic scheme is preserved, the

68. *Spain v. United Kingdom*, Case C-145/04, O.J. C 106, 30/04/2004, at 43 (introduced in the English language on March 18, 2004).

69. *See id.* at 43, ¶ 1(a).

70. *See* Draft Treaty, *supra* note 5, O.J. C 310/1 (2004).

71. *See id.* art. I-34, O.J. C 310/1 (2004).

72. *See id.* art. I-20, O.J. C 310/1 (2004).

73. *See id.* art. I-20(3), O.J. C 310/1 (2004).

74. *See id.* art. I-20(2), O.J. C 310/1 (2004).

75. *See* Charter of Fundamental Rights of the European Union, O.J. C 364/01 (2000).

three-pillar scheme of the Maastricht Treaty is abolished and the Court's jurisdiction is extended to cover new fields of EU activities; the standing of individuals to challenge regulatory measures is enlarged;<sup>76</sup> and the Court will have jurisdiction not only over the Institutions but over all EU bodies.<sup>77</sup>

Fifth and finally, the Constitution transforms the relationship between the EU and the European Convention on Human Rights. Under the existing Treaties the EC was not competent to accede to the Convention.<sup>78</sup> Article I-7(2) of the draft Constitution stated that the Union shall "seek accession" to the European Convention on Human Rights. An amendment accepted at a late stage goes further and states: "The Union shall accede" to the European Convention on Human Rights.<sup>79</sup> Meanwhile the Fourteenth Protocol to the Convention, which provides among other things for accession to the Convention by the EU, has just been opened for signature within the Council of Europe.<sup>80</sup>

Accession by the EU to the Convention would subject all EU measures to control by the ECHR. Such accession might reinforce compliance of European elections with the European Convention on Human Rights, and in particular, with Article 3 of the First Protocol. But there is still some way to go before this can be achieved. Not only must the Constitution first be ratified by all Member States, but in addition, accession to the European Convention on Human Rights has to be successfully negotiated, and the accession provisions ratified by all (currently 45) member States of the Council of Europe.<sup>81</sup> In the meantime, the ECJ will no doubt continue to derive inspiration from the European Convention on Human Rights and from the case law of the ECHR and continue to develop its own constitutional review of European elections.

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76. See Draft Treaty, *supra* note 5, art. III-365(4), O.J. C 310/1 (2004).

77. See *id.* art. III-365(1), O.J. C 310/1 (2004).

78. See Opinion 2/94, Re the Accession of the Community to the European Human Rights Convention, [1996] E.C.R. I-1759, [1996] 2 C.M.L.R. 265 (1996).

79. See Draft Treaty, *supra* note 5, art. I-9(2), O.J. C 310/1 (2004).

80. See Council of Europe Explanatory Report, Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention (discussing the principal stages in the preparation of Protocol No. 14), available at <http://conventions.coe.int/Treaty/EN/Reports/Huml/194.htm> (last visited Mar. 30, 2005).

81. See Member States of the Council of Europe, available at <http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG> (last visited Mar. 30, 2005).