

# European Parliament Elections and the Uniform Election Procedure

## Introduction

As early as 1960 the European Parliament<sup>1</sup> (EP) adopted proposals for a “uniform procedure” of its members’ elections, to be used by all member states. Over four decades later, the European Parliament is still far from a uniform procedure for elections. In some states voters can choose only a party list, while in the others they can cast a vote for an individual candidate; in some they can rank the candidates, while in the others they can choose to split the vote between two or more parties or candidates. Voting age varies from 18 to 19 to 21. Some states require a balance between the number of male and female candidates while the law in other states is gender-blind. Since the European Union (EU) cannot agree on a common election day, British, Danish and Dutch voters vote on Thursday, the Irish vote on Friday, and most of the rest of Europe votes on Sunday. While some voters cast their votes using simple paper ballots, several member states use various types of electronic voting devices. Although we constantly hear European leaders stressing the importance of the harmonisation of the EP election procedure, this harmonisation has hardly been successful.<sup>2</sup> It remains true, as one of the first studies carried out after the elections of 1979 underlined, that these are not “European” elections but rather “separate elections in each of the Member States organized according to nationally determined electoral laws and principles.”<sup>3</sup>

This article provides an overview of the law governing elections in Europe and specifically the elections to the European Parliament. I begin by describing the relationship between the three levels of the law governing elections in Europe – the law of European Convention of Human Rights, the law of European Union and the national law of individual

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<sup>1</sup> European Parliament was first constituted as the Assembly of the European Coal and Steel Community in 1952. The 78 members were deputies from the national parliaments of the six participating states. The assembly only had advisory function. In 1958 the Assembly extended to all three communities (ECSC, EEC, EURATOM) and in 1962 it started using the name “European Parliament”.

<sup>2</sup> The fact that elections are governed by 25 national laws, which have not even been translated in a common language, tells a great deal (tells its own tale?) about the efforts to harmonise the election law and about the state of European research in the area in general.

<sup>3</sup> An unnamed study quoted by Luciano Bardi in Luciano Bardi. “The Harmonisation of European Electoral Law”. In: Serge Noiret (Ed.). *Political Strategies and Electoral Reforms: Origins of Voting Systems in Europe in the 19th and 20th Centuries*. Baden-Baden: Nomos Verlagsgesellschaft. 1990, 503-528, p. 519.

member-states. I then present the principles set out by European Convention of Human Rights (ECHR), as interpreted by European Court of Human Rights (ECtHR). While the Court has traditionally left “a wide margin of appreciation” to the states in the area of election law, it recently took a more active role by ruling that ban on prisoners’ right to vote violates the convention.

In the second part of this article, I present an overview of the attempts to harmonise law governing elections to the European Parliament. I describe how the initial and optimistic goal of “uniform procedure” was replaced by the goal of “common principles.” I present these principles. I emphasize the issues that are at the center of political debate and academic research. These are: preferential voting, female quotas, party finance and the election of members at the European level.

## **The Council of Europe, the European Union, and the states’ national law**

In addition to the election principles set out by the United Nations<sup>4</sup> and other international organizations<sup>5</sup>, there are three levels of law governing elections in Europe.

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<sup>4</sup> The Universal Declaration of Human Rights (UDHR) of 10 December 1948 as well as International Covenant on Civil and Political Rights (ICCPR) of 16 December 1966 contains provisions dealing with elections. Article 21 of the UDHR reads in part:

"(...) 3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."

Article 25 of the ICCPR reads in part:

"Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

a) To take part in the conduct of public affairs, directly or through freely chosen representatives;  
b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (...)."

For the excellent overview of the case-law and standards set by the above cited provisions see two publications published by Markku Suksi: Hinz, Veronika U. and Markku Suksi. *Election Elements: On the International Standards of Electoral Participation*. Turku/ Åbo: Institute for Human Rights, Åbo Akademi University, 2003; Lindblad, Janne and Markku Suksi. *On the Evolution of International Election Norms: Global and European Perspectives*. Turku/ Åbo: Institute for Human Rights, Åbo Akademi University, 2005.

<sup>5</sup> The OSCE 1990 Copenhagen Document deserves to be mentioned here. Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe (known as the "Copenhagen Document") adopted on 29 June 1990 was agreed upon in order "to strengthen the respect for, and enjoyment of, human rights and fundamental freedoms, to develop human contacts and to resolve issues of a related humanitarian character." It enlists numerous democratic rights, freedoms and principles and relevant to elections and exercise of voting right. Constitutional and Supreme courts, European Court of Human Rights, the Venice Commission and other bodies often rely on the Copenhagen Document. See, for example, European Commission for Democracy Through Law (Venice Commission). *Draft Recommendations on the*

The first level is that of the Council of Europe — set out in the European Convention of Human Rights and interpreted by the European Court of Human Rights — to guarantee basic election principles. Article 3 of the First Protocol of the Convention assures “free elections,” the “right to vote” and a “secret ballot.” As of July 2006, 43 states have ratified the First Protocol to the Convention.<sup>6</sup>

Twenty-seven of the Convention parties have united in the European Union. The European Union has its own rules on election procedures and these constitute the second level of law. For the most part, European Union law regulates local elections and elections to the European Parliament but it also addresses national parliamentary elections. European Union election law is regulated by the EU treaties and directives as well as by the jurisprudence of the European Court of Justice.

The third level of election law is national law. This, naturally, must conform to the wording of the Convention and decisions of the ECtHR in 43 of the Council of Europe member states and to the European Union election rules in 27 EU member states.

Thus two levels of law govern elections in about 16 of the European democracies and three levels of such law in 27 states. The remaining European countries, such as Switzerland, are bound neither by the “right to free elections” protocol of the European Convention of Human rights nor by the EU law. Most, however, adhere to the principles set by the European Court of Human Rights, though some, such as Belarus, do not.

There is considerable variety in the type of elections held in these European democracies. At the national level, every country runs parliamentary elections and some conduct presidential or other types of election. Every country also conducts elections at one local level at least and most at two levels — the regional and the municipality. The federations usually have three. But in addition to these national and local elections, voters in 27 EU member-states choose representatives to the European Parliament. In these countries, elections are thus held on four or even five levels of government: elections of European parliament members, elections of national officials, elections at one or two local levels and, in the case of federations, elections at the federal unit level.

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*Electoral Law and the Electoral Administration in Moldova: Opinion No. 272/2004.* CDL-EL(2003)015. Strasbourg, 3 March 2004 (claiming that Moldova’s ballot access legislation could be in odds with the Copenhagen Document).

<sup>6</sup> Out of 46 parties to the Convention, three states are not bound by the First protocol. Monaco and Switzerland have signed but never ratified this protocol. Andorra has neither signed nor ratified.

Overall, then, there are several different levels of law governing elections in each European democracy and several different types of elections. Each of these types is regulated by a distinct group of rules from a distinct level of law.

For the time being, the regulation of presidential elections remains within the jurisdiction of each state. Neither EU legal order nor the ECHR jurisprudence set any rules regarding the election of presidents. Nor does EU law yet address national elections. But national parliamentary elections, although they are within the jurisdiction of each of the states, must comply with ECHR jurisprudence. And local elections are not fully within the jurisdiction of the states and local entities either: the European Union has set certain rules regarding local elections and the states must abide by these rules. For instance, the European Union requires member states to allow each EU citizen, regardless of his or her national citizenship, to vote and stand for election in local elections in the place of his or her residence.<sup>7</sup> For example, a German citizen residing in Barcelona can vote in Barcelona's local elections or run for the office of the Barcelona's mayor, but cannot vote or run in Spanish parliamentary elections. The relationship between ECHR law and local elections is even more complicated. ECHR jurisprudence only governs some of the local elections. The European Convention of Human Rights applies to local elections to collective bodies at the regional level only where these bodies might be considered as "legislatures." It does not apply, therefore, to elections at the municipal level or to any elections to individual offices.

Elections to the European Parliament are largely regulated by national rules although European Union law establishes certain principles. Every few years representatives from various member states agree on harmonizing one or two additional elements of the European election law. Although the European Union is not party to the European Convention of Human Rights, its member states are. Since the EU member states must respect decisions of the European Court of Human Rights, the Court can also indirectly regulate elections to the European Parliament, and it does. As I will show in the following section, the court is becoming increasingly active and its decisions markedly affect European parliamentary election law. Consequently, elections to the European Parliament are governed by three levels of law: Council of Europe jurisprudence, European Union law, and national legislation of each of the 27 EU member states.

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<sup>7</sup> See Art. II-100 of the proposed Treaty establishing a Constitution for Europe entitled "Right to vote and to stand as a candidate at municipal elections" reads: "Every citizen of the Union has the right to vote and to stand as a candidate at municipal elections in the Member State in which he or she resides under the same conditions as nationals of that State." Similarly, the European Union citizen has the right to vote or to stand for election to the European Parliament in the state of his residence regardless of his state citizenship: "Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State." Art. II-99, § 1 of the proposed Treaty.

## **European Convention of Human Rights and its jurisprudence**

The Council of Europe plays an active role in setting electoral standards. It does so through three of its bodies – the Parliamentary Assembly, the Venice Commission, and the European Court of Human Rights.

The European Commission for Democracy through Law, better known as the Venice Commission, is the Council of Europe's advisory body on constitutional matters. Since its creation, the Venice Commission in particular has been active in the electoral field through the adoption of opinions on draft electoral legislation. The Venice Commission has also taken part in drafting the wording of electoral legislation for various European democracies. The resolutions of the Parliamentary Assembly have also played an important role in influencing the electoral legislation in the Council of Europe's 46 member states. But the European Court of Human Rights in Strasbourg has been the most influential of the three bodies when it comes to setting electoral and voting standards. This it does by interpreting the European Convention of Human Rights and in particular the convention's first protocol.

While the Council of Europe member states agreed on the Convention wording regarding most of the rights, they had considerable difficulty agreeing on the words guaranteeing rights to property, education, and free elections. Consequently, these rights were later included in a protocol to the Convention. Article 3 of the First protocol reads:

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.

The wording was carefully tailored after the United Kingdom ruled out the phrase “free and fair elections,” since this could entail the institution of some form of proportional representation to ensure a fair balance of representation.<sup>8</sup> During the preparation process “[i]t has been held repeatedly that, whilst this means that electors must be free from any form of duress or influence, and political parties must be free to mount campaigns and put up candidates, there is

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<sup>8</sup> J. A. Andrews. *The European Jurisprudence of Human Rights*, 43 Maryland L. Rev. 463, 478 (1984).

no guarantee that every vote will be equal.”<sup>9</sup> Consequently, the Protocol does not guarantee any principle of equality in elections or anything similar to the American principle of “one person, one vote.”

Many member states have chosen to ratify the protocol later than they ratified the basic text of the Convention and, as mentioned, three of the Convention parties still have not ratified the protocol.<sup>10</sup>

### **Scope of the “free elections” Article**

While the European Court of Human Rights has interpreted most of the other parts of the Convention in numerous decisions,<sup>11</sup> the Court has not discussed a “free elections” article in many cases.

When the Court faced the Article for the first time in 1987,<sup>12</sup> it deliberately went far beyond the case and explained the meaning of the article in considerable detail. The highlights of the *Mathieu-Mohin* decision are:

1. The Court recognized that the Protocol protects the citizens’ right to vote and the right to stand for election even where the Protocol does not explicitly mention them;
2. The Court recognized an individual’s right to complaint under this section;

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<sup>9</sup> J. A. Andrews. *The European Jurisprudence of Human Rights*, 43 Maryland L. Rev. 463, 478 (1984). See also *The Liberal Party and Others v. U.K.*, 1981 Y.B. Eur. Conv. On Human Rights 320 (Eur. Commission of Human Rights), appl. no. 8765/79, 4 E.H.R.R. 106 (1980). However, the Court held that this article contains an implicit recognition of an individual right to “equality of treatment of all citizens in the exercise of their right to vote and their right to stand for election” Case of *Mathieu-Mohin and Clerfayt v. Belgium*, judgment of 2 March 1987, Series A no. 113, § 54.

<sup>10</sup> See the Footnote 3\_\_ *supra*.

<sup>11</sup> For instance, as of July 2006, there were over 5000 decisions concerning the “fair trial” article of the Convention. Source: ECHR HUDOC Case-Law Database <[www.echr.coe.int/](http://www.echr.coe.int/)>

<sup>12</sup> *Mathieu-Mohin and Clerfayt v. Belgium*, judgment of 2 March 1987, Series A no. 113. The case was brought before the Court by two French-speaking members of the Belgian national Parliament. They were both elected in mixed French-Flemish districts. Under Belgian law, the Representatives who took the parliamentary oath in French had different competencies than the ones that took oath in Flemish. If they are elected, members may take the parliamentary oath in French or Dutch as they wish, irrespective of the language they personally speak. Since the two members took the parliamentary oath in French, they could not decide on some issues important for their voters. Applicants argued that, under such system, they cannot adequately represent their voters. They argued this violates rights of the voters as well as rights of the representatives. The Government rejected these arguments, pointing out that a French-speaking representative could represent his constituents if he took his parliamentary oath in Dutch. *Mathieu-Mohin and Clerfayt v. Belgium*, judgment of 2 March 1987, Series A no. 113.

3. The Court set the conditions that must be met by the contracting states in order to comply with the Protocol;
4. The Court defined the Protocol's term, "legislature";
5. The Court determined what types of elections are covered by the Protocol
6. The Court stressed that the Protocol does not require any specific electoral system to be used by the member states.
7. The Court gave its interpretations of the terms "equal treatment of the voters" and "equal voting weight."

The Court set the standards for the determination of whether there has been a violation of the Protocol 1, Art. 3:

- The conditions examined should not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness;
- The limitations of the rights have to be imposed in pursuit of a legitimate aim;
- The means employed should not be disproportionate; in particular, the conditions present must not thwart the free expression of the opinion of the people in the choice of the legislature.

The judges also defined the meaning of the word "legislature" as used in the article. Relying on the article's preparatory documents<sup>13</sup>, it held that the article "applies only to the election of the "legislature", or at least of one of its chambers if it has two or more. The word "legislature" does not necessarily mean only the national parliament, however; it has to be interpreted in the light of the constitutional structure of the State in question."

Although this was not at all the issue in the present case, the Court explained that the article does not create any "obligation to introduce a specific system" such as proportional representation or majority voting with one or two ballots.<sup>14</sup> Here too the Court explicitly recognized that "the Contracting States have a wide margin of appreciation, given that their legislation on the matter varies from place to place and from time to time."<sup>15</sup>

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<sup>13</sup> "Travaux Préparatoires", vol. VIII, pp. 46, 50 and 52.

<sup>14</sup> *Mathieu-Mohin and Clerfayt v. Belgium*, judgment of 2 March 1987, Series A no. 113, § 54. Court cites "Travaux Préparatoires", vol. VII, pp. 130, 202 and 210, and vol. VIII, p. 14.

<sup>15</sup> *Mathieu-Mohin and Clerfayt v. Belgium*, judgment of 2 March 1987, Series A no. 113, § 54.

The Court then touched on the issue of “equal treatment of the voters,” “equal voting weight,” “equal ballot access,” “equal impact on electoral outcomes” and “equal chances of victory”:

Electoral systems seek to fulfill objectives which are sometimes scarcely compatible with each other: on the one hand, to reflect fairly faithfully the opinions of the people, and on the other, to channel currents of thought so as to promote the emergence of a sufficiently clear and coherent political will. In these circumstances the phrase "conditions which will ensure the free expression of the opinion of the people in the choice of the legislature" implies essentially - apart from freedom of expression (already protected under Article 10 of the Convention) (art. 10) – the principle of equality of treatment of all citizens in the exercise of their right to vote and their right to stand for election.

It does not follow, however, that all votes must necessarily have equal weight as regards the outcome of the election or that all candidates must have equal chances of victory. Thus no electoral system can eliminate "wasted votes".<sup>16</sup>

The standard that evolved from this description of the article's meaning was vague in the extreme:

Any electoral system must be assessed in the light of the political evolution of the country concerned; features that would be unacceptable in the context of one system may accordingly be justified in the context of another, at least so long as the chosen system provides for conditions which will ensure the "free expression of the opinion of the people in the choice of the legislature.

### **European Convention’s jurisdiction over European Parliament elections**

While member states of the European Union are parties of the Convention, the European Union itself is not.<sup>17</sup> It had been thus held that European Union legislation could not be subject to review by the European Court of Human Rights. Moreover, when asked to decide on matters related to European Parliament elections, the Court has consistently held that the European Parliament was not a “legislature” in the Convention’s interpretation of that word,<sup>18</sup> because it lacked legislative powers.<sup>19</sup>

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<sup>16</sup> *Mathieu-Mohin and Clerfayt v. Belgium*, judgment of 2 March 1987, Series A no. 113, § 54.

<sup>17</sup> It is expected that European Union will become a party to the ECHR. The proposed Constitution for Europe includes the following provision: “2. The Union shall seek accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Constitution.” A Treaty establishing a constitution for Europe, Art II-7, § 2.

<sup>18</sup> See, e.g. *Lindsay v. the United Kingdom* (No. 8364/78, Dec. 8.3.1979, D.R. 15, p. 247) (founding that at that time (1979) the European Parliament had no legislative power in the strict sense and was merely an advisory organ as to legislation, enjoying certain budgetary and control powers.); *Alliance des Belges de la Communauté Européenne v. Belgium* (No. 8612/79, Dec. 10.5.1979, D.R. 15, p. 259) (founding that the Parliament had no legislative powers in the strict sense); *Tête v. France* (11123/84, Dec. 9.12.1987, D.R. 54, p. 52) and *Fournier v.*

In the *Matthews v. United Kingdom*<sup>20</sup> decision, however, the Court extended its jurisdiction over cases concerning European Parliament elections. The legislation of the European Union that governs elections to the European Parliament states that elections should be held in the United Kingdom but not in its dependant territories.<sup>21</sup> Gibraltar is a dependent territory of the United Kingdom. It forms part of Her Majesty the Queen's Dominions, but is not part of the United Kingdom. People of Gibraltar are British nationals.<sup>22</sup> Most of the European Union legislation is, through the United Kingdom, directly applicable in Gibraltar as it is anywhere else within EU territory, with some areas of the EU law being exempted from the application in Gibraltar.<sup>23</sup>

A Gibraltar voter, who was a British citizen but not allowed to vote in European Parliament elections, brought to the European Court of Human Rights a suit for the right to vote.<sup>24</sup>

The British government's principal submission was that the Commission has no jurisdiction to consider the case. They submitted that the law governing EP elections is a EU legal order and not part of national law. Since the EU is not party to the European Convention, its law escapes review by the Convention organs. The government also argued that it is EU legislation that bans Gibraltar population from voting and the UK has no control over that legislation. The Court nevertheless determined that the United Kingdom is responsible under the Convention for securing in Gibraltar the rights guaranteed by the Article, regardless of whether

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*France* (No. 11406/85, Dec. 10.3.1988, D.R. 55, p. 130) (these cases were decided after the coming into effect of the Single European Act which conferred additional powers on the European Parliament, but the Commission nevertheless found that the European Parliament did not yet constitute a "legislature" within the ordinary meaning of the term.). Consider also *André v. France* (No. 27759/95, Dec. 18.10.95, unpublished)(leaving open the question of the status of the European Parliament as the application was inadmissible on other grounds).

<sup>19</sup> European Parliament cannot adopt laws by itself but only in a co-decision process with the Council of the European Union. Since it cannot initiate laws, its powers can only be compared to veto power, according to the Government.

<sup>20</sup> *Matthews v. the United Kingdom* [GC], no. 24833/94, ECHR 1999-I.

<sup>21</sup> The specific provisions were set out in an Act Concerning the Election of the Representatives of the European Parliament by Direct Universal Suffrage of 20 September 1976 ("the 1976 Act"), signed by the respective foreign ministers, which was attached to the Council Decision. Article 15 of the 1976 Act provides that "Annexes I to III shall form an integral part of this Act". Annex II to the 1976 Act states that "The United Kingdom will apply the provisions of this Act only in respect of the United Kingdom".

<sup>22</sup> "Although Gibraltar is not part of the United Kingdom in domestic terms, by virtue of a declaration made by the United Kingdom government at the time of the entry into force of the British Nationality Act 1981, the term "nationals" and derivatives used in the EC Treaty are to be understood as referring, inter alia, to British citizens and to British Dependent Territories citizens who acquire their citizenship from a connection with Gibraltar." *Matthews v. the United Kingdom* [GC], no. 24833/94, ECHR 1999-I, § 14.

<sup>23</sup> *Matthews v. the United Kingdom* [GC], no. 24833/94, § 11-13, ECHR 1999-I.

<sup>24</sup> United Kingdom extended the Convention to Gibraltar by declaration dated 23 October 1953 pursuant to former Article 63 of the Convention. Protocol No. 1 applies to Gibraltar by virtue of a declaration made under Article 4 of Protocol No. 1 on 25 February 1988. *Matthews v. the United Kingdom* [GC], no. 24833/94, § 19, ECHR 1999-I.

the elections were purely domestic or European.<sup>25</sup> As to the contention that the sphere of activities of the European Parliament falls outside the scope of Article, the Court held that taking such view “would risk undermining one of the fundamental tools by which “effective political democracy” can be maintained.”<sup>26</sup>

The British Government also contended that the European Parliament is, in any event, not a “legislature,” since it does not have power to initiate or adopt laws. The Court acknowledged that, for the same reasons that, in all the earlier cases, it had held that the European Parliament was not a legislature. However, it held that the European Parliament’s powers in the legislative process have expanded since those decisions were issued. Since the Commission last considered the question of the status of the European Parliament, the Treaty on European Union has entered into force. That Treaty has given the European Parliament new competences. In particular, the Treaty not only repealed the words “advisory and supervisory” which previously qualified the reference to the powers of the Parliament in Article 137 of the EC Treaty but enacted the new procedure in Article 189b of the Treaty, which conferred on the Parliament a power of co-decision in addition to its pre-existing powers under the basic or consultative procedure and co-operation procedure. These new powers, according to the Court, rendered the European Parliament a “legislature.”<sup>27</sup>

The British Government submitted that, even if the Article did apply to the European Parliament, the absence of elections in Gibraltar did not give rise to a violation of Article but instead fell within the State’s margin of appreciation. They referred to the traditional separation of the Gibraltar and the United Kingdom electoral systems, and to the difficulties in creating a new constituency for Gibraltar in the European Parliament. It would have distorted the electoral process to constitute Gibraltar as a separate constituency, since its population of approximately 30,000 was less than 5% of the average population per European Parliament seat in the United Kingdom. United Kingdom would also need to obtain the consent to the amendment of all other member States of the Union in order to add Gibraltar to the European electorate. The Court rejected these arguments and held that the applicant “was completely denied any opportunity to

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<sup>25</sup> Court relied on Article 1 of the Convention, which requires the High Contracting Parties to “secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention”. “Article 1 makes no distinction as to the type of rule or measure concerned, and does not exclude any part of the member States’ “jurisdiction” from scrutiny under the Convention.” *Matthews v. the United Kingdom* [GC], no. 24833/94, § 26-35, ECHR 1999-I.

<sup>26</sup> *Matthews v. the United Kingdom* [GC], no. 24833/94, § 43, ECHR 1999-I.

<sup>27</sup> *Matthews v. the United Kingdom* [GC], no. 24833/94, § 45-54, ECHR 1999-I.

express her opinion in the choice of the members of the European Parliament.”<sup>28</sup> By finding a violation of the Convention it required the UK to include Gibraltar voters in its electorate.

This judgment has put Britain into an unenviable situation. The Court required Gibraltar voters to be included in the electorate, while European Union legislation excludes Gibraltar voters from elections. The European Union, as said, is not party to the Convention and therefore not directly bound by its decisions. The UK faced a dilemma: whether to follow the judgment and violate EU legislation or follow EU rules and violate the Convention. They opted for the former but there was absolutely no agreement on which region Gibraltar should be combined with. After two years of lively debate, the *European Parliament (Representation) Act*<sup>29</sup> left it to the Electoral Commission and the Lord Chancellor to decide on the proper region.<sup>30</sup> Finally, the *European Parliament (Representation) Act 2003* combined Gibraltar with the South-West constituency in the UK and extended the right to vote to European and Commonwealth citizens legally resident in Gibraltar. By extending the right to vote also to Commonwealth citizens who are not European citizens, some 95 Pakistanis, Indians and Bangladeshis residing in Gibraltar became enfranchised. In 2004 Spain decided to take the new British legislation to the European Court of Justice because of the alleged violation of the EU legislation. Spain argued that while the UK might need to extend the franchise to EU citizens residing in Gibraltar, it did not have the authority to extend it to non-EU-nationals. In 2006 the European Court of Justice ruled that European Union legislation did not exclude the right of non-EU-citizens to vote. The Court held that, in the current state of Community law, it was for the member states to define franchise and eligibility for European elections. The UK's *European Parliament (Representation) Act 2003* was therefore not contrary to European Community Law.<sup>31</sup>

## **European Union Law Governing European Parliament Elections**

### **Past attempts to unify the European Parliament election law**

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<sup>28</sup> *Matthews v. the United Kingdom* [GC], no. 24833/94, § 64, ECHR 1999-I.

<sup>29</sup> The Act calls the region “The combined region”. See *European Parliament (Representation) Act*, Part 2 (“Gibraltar”).

<sup>30</sup> See Electoral Commission, *Gibraltar and the European Parliament – Final Report*, available at [http://www.electoralcommission.org.uk/files/dms/Gibraltarfinalreport\\_10552-8480\\_E\\_N\\_S\\_W\\_.pdf](http://www.electoralcommission.org.uk/files/dms/Gibraltarfinalreport_10552-8480_E_N_S_W_.pdf)

<sup>31</sup> *Spain v. UK*, (C-145/04), Judgment of the Court (Grand Chamber) of 12 September 2006. <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004J0145:EN:HTML>>

A European assembly directly elected by its citizens was first spoken of at the Hague Conference of 1948.<sup>32</sup> About a decade later, the 1957 Treaty of the European Community provided for a European Parliament to be elected by “universal suffrage according to a uniform procedure in all the Member States.”<sup>33</sup> Soon after the treaty was signed the definition of “uniform procedure” started to arouse controversy. Opinions on what the term should denote varied widely. Already in 1960 the European Parliament working group published a report<sup>34</sup> stressing that “uniformity” did not mean “sameness” and that the 1957 Treaty of Rome did not require that an identical electoral system be adopted by every member state of the Community.<sup>35</sup> The next report — the so called Patij report<sup>36</sup> — required a measure of uniformity between the various national laws to an even lesser extent than was indicated by the 1960 Dehousse report, requiring of the first elected Parliament that it decide only as much as was “absolutely necessary.”<sup>37</sup> The result was the *Act Concerning the Election of the Representatives of the European Parliament by Direct Universal Suffrage of 20 September 1976* (“the 1976 Act”). This act asked national legislators to observe some very limited general election criteria such as duration of the parliamentary mandate, the incompatibility of mandates and the period within which elections should be held. The remainder of the law governing election was left to the member states. The first direct election was scheduled for 1978 but due to the delays in adapting the national legislations to the 1976 Act the elections eventually took place in 1979.<sup>38</sup>

During the decades that followed the first direct elections, each term of the Parliament saw at least one proposal for uniform electoral law. None met with any real success.

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<sup>32</sup> Luciano Bardi. “The Harmonisation of European Electoral Law”. In: Serge Noiret (Ed.). *Political Strategies and Electoral Reforms: Origins of Voting Systems in Europe in the 19th and 20th Centuries*. Baden-Baden: Nomos Verlagsgesellschaft. 1990, 503-528, p. 504.

<sup>33</sup> Article 138, par. 3 of the Treaty of the European Community.

<sup>34</sup> This report – Dehousse Report – was named after the working group chairman Ferdinand Dehousse. See for instance Luciano Bardi. “The Harmonisation of European Electoral Law”. In: Serge Noiret (Ed.). *Political Strategies and Electoral Reforms: Origins of Voting Systems in Europe in the 19th and 20th Centuries*. Baden-Baden: Nomos Verlagsgesellschaft. 1990, 503-528, p. 504-505; Guido van den Berghe “What is a Uniform Procedure”, in Christian Sasse et al., *The European Parliament: Towards a Uniform Procedure for Direct Elections*, Florence, European University Institute, 1981, pp. 7-21.

<sup>35</sup> Birke, Wolfgang. *European elections by direct suffrage : a comparative study of the electoral systems used in Western Europe and their utility for the direct election of a European Parliament*. Leyden : A.W. Sythoff , 1961, p. 27, note 4, cited in Luciano Bardi. “The Harmonisation of European Electoral Law”. In: Serge Noiret (Ed.). *Political Strategies and Electoral Reforms: Origins of Voting Systems in Europe in the 19th and 20th Centuries*. Baden-Baden: Nomos Verlagsgesellschaft. 1990, 503-528, p. 505.

<sup>36</sup> Report doc. 368/74.

<sup>37</sup> See Luciano Bardi. “The Harmonisation of European Electoral Law”. In: Serge Noiret (Ed.). *Political Strategies and Electoral Reforms: Origins of Voting Systems in Europe in the 19th and 20th Centuries*. Baden-Baden: Nomos Verlagsgesellschaft. 1990, 503-528, p. 506.

<sup>38</sup> See the detailed overview of the characteristics of national voting procedures for 1979 European Parliamentary elections and for domestic elections at that time in Reif, K. (1984). *Transnational problems of a uniform procedure for European elections*. In *Choosing an electoral system. Issues and alternatives* (pp. 231 – 245). New York: Praeger, pp. 243-240.

In 1982 the European parliament exercised once again its right of initiative and put before the Council a proposal for a uniform electoral procedure. This report, known as the Seitlinger Report, proposed the introduction of proportional representation system based on D'Hondt formula in all the European Union member states.<sup>39</sup> After the Seitlinger proposal had been considered by a working party set up by the Council of Ministers, it became obvious that it was not possible to obtain the required unanimous support.<sup>40</sup> “Essentially two points of dissent led to the rejection of the Seitlinger proposal by the Council: First, the principle of the proportional system as well as the modalities proposed. Second, the right to vote and to be elected irrespective of the place of residence.”<sup>41</sup> The Council decided to postpone the adoption of a uniform electoral procedure and the proposal was never re-considered.

In 1985 a new proposal was prepared under the German Christian-Democrat Bocklet. The Bocklet report did away with the division of a national territory into more than one constituency, which had been a part of the Seitlinger draft. Apart from this, nothing much changed, although the general impression left by the proposal was that it was less rigid and that it allowed more freedom for national legislators.<sup>42</sup> Britain strongly dissented to the introduction of proportional representation and the European Parliament failed to adopt the Bocklet proposal.<sup>43</sup> The so-called de Gucht proposal, prepared by the parliament's third term (1989-1994), was even looser as to the requirements put on the member states but met a similar fate to all the previous drafts.<sup>44</sup>

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<sup>39</sup> See EP Working document 1-988/81 of 26 February 1982 (Report drawn on behalf of the Political Affairs Committee “on a draft uniform electoral procedure for the election of Members of the European Parliament; Rapporteur: Mr. J. Seitlinger). Cited in Thomas Grunert. “The European Parliament in Search of a Uniform Electoral Procedure” In: Serge Noiret (Ed.). *Political Strategies and Electoral Reforms: Origins of Voting Systems in Europe in the 19th and 20th Centuries*. Baden-Baden: Nomos Verlagsgesellschaft. 1990, 487-502, 493.

<sup>40</sup> Thomas Grunert. “The European Parliament in Search of a Uniform Electoral Procedure” In: Serge Noiret (Ed.). *Political Strategies and Electoral Reforms: Origins of Voting Systems in Europe in the 19th and 20th Centuries*. Baden-Baden: Nomos Verlagsgesellschaft. 1990, 487-502, 494.

<sup>41</sup> Thomas Grunert. “The European Parliament in Search of a Uniform Electoral Procedure” In: Serge Noiret (Ed.). *Political Strategies and Electoral Reforms: Origins of Voting Systems in Europe in the 19th and 20th Centuries*. Baden-Baden: Nomos Verlagsgesellschaft. 1990, 487-502, 494, referring to speech of Mr. Genscher (President of the Council) to the European Parliament on 8 March 1983, cf.: Proceedings of the EP, No. 1-296/52 (08.03.83).

<sup>42</sup> Christiaan Ziccardi. An analysis of the European Parliament's electoral arrangement(s): A uniform procedure for the elections to the European Parliament? Dissertation submitted to obtain the degree of Master in European Politics and Policies, 2004-2005, Katholieke Universiteit Leuven. Available online at <[http://www.thesis.net/european\\_parliament/ep.htm](http://www.thesis.net/european_parliament/ep.htm)> (last visited on March 10, 2007).

<sup>43</sup> On this topic see more in De Vries, G. (1996). La procedure électorale uniforme du Parlement européen: un pas pour rapprocher l'Europe des citoyens. *R.M.C.U.E.*, nr. 399, pp. 417 – 421, p. 419; Westlake, M. (1994). *A modern guide to the European Parliament*. London: Pinter. p. 81; Reif, K. (1984). Transnational problems of a uniform procedure for European elections. In *Choosing an electoral system. Issues and alternatives* (pp. 231 – 245). New York: Praeger, p. 241.

<sup>44</sup> See more on this proposal in Christiaan Ziccardi. An analysis of the European Parliament's electoral arrangement(s): A uniform procedure for the elections to the European Parliament? Dissertation submitted to obtain the degree of Master in European Politics and Policies, 2004-2005, Katholieke Universiteit Leuven. Available online at <[http://www.thesis.net/european\\_parliament/ep.htm](http://www.thesis.net/european_parliament/ep.htm)> (last visited on March 10, 2007).

Despite strenuous efforts to develop a uniform procedure, European leaders were unable to find a procedure that all the member states could agree on. The principal issues raised in the debate over the decades can be grouped into three categories: a) questions of a constitutional nature, b) questions of a political nature, c) questions of electoral tradition.<sup>45</sup> Electoral tradition should be mentioned especially in regards to the United Kingdom, where plurality first-past-the-post system had been the rule for centuries. In three other countries —France, Italy and West Germany — constitutional obstacles needed to be removed before the election procedure could be made uniform. Most of the other states could not agree on the common procedure for political reasons. First, each state’s ruling party naturally weighed how much it would gain or lose with the change of the electoral system. In cases where the politicians believed the change could hurt them, they opposed it. The second and more important reason for careful consideration of each change to the European Parliament electoral procedure, was the possible Trojan Horse effect of such change. Any introduction of a new measure at the European level might open the way to similar reform at the national level.<sup>46</sup>

Academia has been consistently critical of the slow harmonization process and the definitions of the “uniform electoral procedure” put forward by the European politicians. There are slight differences among the researchers — both the legal and political scientists — about the definition and understanding of the “uniformity” of the electoral procedure, but these differences are not substantial. Thomas Grunert, for instance, lists as essential the following elements of the uniform electoral procedure suggested by Stein Rokkan:<sup>47</sup>

- entitlement to vote
- the weight attaching to each vote
- standardization of procedures and freedom of choice
- the type of constituency
- the degree of choice offered to the voter
- the procedure for calculating how the votes are transformed into seats

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<sup>45</sup> Compare Luciano Bardi. “The Harmonisation of European Electoral Law”. In: Serge Noiret (Ed.). *Political Strategies and Electoral Reforms: Origins of Voting Systems in Europe in the 19th and 20th Centuries*. Baden-Baden: Nomos Verlagsgesellschaft. 1990, 503-528, p. 507 (distinguishing political and constitutional issues in the debate over uniform electoral procedure in the 1980s).

<sup>46</sup> Cf. Bardi, 513.

<sup>47</sup> Stein Rokkan, Electoral System, International Encyclopedia of Social Sciences, Vol. V, New York, 1968, cited in Thomas Grunert. “The European Parliament in Search of a Uniform Electoral Procedure” In: Serge Noiret (Ed.). *Political Strategies and Electoral Reforms: Origins of Voting Systems in Europe in the 19th and 20th Centuries*. Baden-Baden: Nomos Verlagsgesellschaft. 1990, 487-502, 489.

In 1985 the Legal Affairs Committee of the European Parliament, interpreted the requirement of uniformity with similar strictness:

“As a matter of law, the requirement for “a uniform electoral procedure” means not merely that principles, objectives or results of the electoral systems shall be uniform, but that the actual procedures by which those principles, objectives and results are put into effect shall be uniform.”<sup>48</sup>

According to this Legal Affairs Committee opinion, no provision should be made for derogations. However, if necessary, provision could be made for the deferred application of the provisions of the convention in certain countries.<sup>49</sup>

After numerous unsuccessful attempts, it became clear that the European Union institutions and the member states were unable to enact the uniform electoral procedure as required by the Treaty. In 1997, consequently, it was time to amend the provision of the Treaty that required the introduction of the uniform electoral procedure. Instead of requiring the introduction of the “uniform electoral procedure”, the Treaty of Amsterdam, signed on 2 October 2007, provided instead for the introduction of “uniform electoral procedure or a procedure based on common principles.” This proved to be the amendment that allowed the harmonization of European electoral procedure step by step.

As one researcher of the process observes, “[t]he year 1997 proved to be a very positive one for the EP electoral procedure.”<sup>50</sup> After the United Kingdom agreed to install a proportional electoral system in the UK for elections to the European Parliament,

“the biggest obstacle on the path to a uniform procedure was eliminated as it became clear now that all EU Member States were about to use a system of proportional representation in the upcoming 1999 EP elections. Furthermore, there was also the agreement on the provision of an alternative possibility to the uniform procedure. The Treaty of Amsterdam introduced the possibility of drawing up a proposal for elections in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States. These two events changed the landscape completely and a solution looked within reach.”

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<sup>48</sup> Opinion of the Committee on Legal Affairs and Citizen Rights, in: EP – Working Document A2-1/85, p. 18. Cited in Thomas Grunert. “The European Parliament in Search of a Uniform Electoral Procedure” In: Serge Noiret (Ed.). *Political Strategies and Electoral Reforms: Origins of Voting Systems in Europe in the 19th and 20th Centuries*. Baden-Baden: Nomos Verlagsgesellschaft. 1990, 487-502, 497.

<sup>49</sup> Opinion of the Committee on Legal Affairs and Citizen Rights, in: EP – Working Document A2-1/85, p. 28-29. Cited in Thomas Grunert. “The European Parliament in Search of a Uniform Electoral Procedure” In: Serge Noiret (Ed.). *Political Strategies and Electoral Reforms: Origins of Voting Systems in Europe in the 19th and 20th Centuries*. Baden-Baden: Nomos Verlagsgesellschaft. 1990, 487-502, 497.

<sup>50</sup> Christiaan Ziccardi. An analysis of the European Parliament’s electoral arrangement(s): A uniform procedure for the elections to the European Parliament? Dissertation submitted to obtain the degree of Master in European Politics and Policies, 2004-2005, Katholieke Universiteit Leuven. Available online at <[http://www.thesis.net/european\\_parliament/ep.htm](http://www.thesis.net/european_parliament/ep.htm)> (last visited on March 10, 2007).

Following the 1997 amendment of the Treaty, the stage by stage harmonisation of the electoral law became easier. The Anastassopoulos Report (1998) and the Report by José Maria Gil-Robles Gil-Delgado (2002) were relatively successful, resulting in an amendment of the 1976 Act. Among other adaptations, member-states are now bound to use one of the two possible electoral formulas: either list-based proportional representation system or a single-transferable-vote system.

To summarize, over the past four decades European Union has managed to set the following common standards regarding the elections:

- Elections occur every five years on the basis of universal adult suffrage.
- In total 785<sup>51</sup> seats are to be filled and each state is designated an exact number of seats to be filled from that state.
- The system must be a form of proportional representation, under either the party list or Single Transferable Vote system.
- Party lists can be closed or open; preferential voting can be allowed.
- The state may be subdivided into electoral districts if this will not generally affect the proportional nature of the voting system.
- Any election threshold on the national level must not exceed five percent.
- Voters can vote in the place of their residence regardless of their state citizenship.

### **Overview of the legislation governing European Parliament election**

Any overview of the legislation governing European parliamentary elections should mention first the treaty establishing the European Community. This treaty holds that “every person holding the nationality of a Member State shall be a citizen of the Union.”<sup>52</sup> According to the treaty, “every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State.”<sup>53</sup>

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<sup>51</sup> Before Romania and Bulgaria joined the Union on 1 January 2007, there were 732 members of the European Parliament. It is agreed that after the elections in 2009, there would be at most 750 Members of European Parliament, and each member state would have at least five and at most 99.

<sup>52</sup> Art. 1 (ex Article 8) of the *Treaty establishing the European Community*.

<sup>53</sup> Art. 19 (ex Article 8b), § 2, of the *Treaty establishing the European Community*. Similarly, “[e]very 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 at municipal elections in the member State in which he resides, under the same conditions as nationals of that State.” Art. 19 (ex Article 8b), § 1, of the *Treaty establishing the European Community*. Despite the requirement to allow residents who are citizens of other Member States to participate in its municipal elections,

The treaty also sets a term of the parliament to five years and distributes the seats among the member states.<sup>54</sup>

Article 190 (4) calls for a uniform procedure, or more recently for a uniform procedure for common election principles at least. It also defines the procedure to be followed when the election legislation is being enacted:

“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.”<sup>55</sup>

Without major changes, this provision has been transcribed to the proposed new ‘European Constitution.’<sup>56</sup>

The 1979 *Act concerning the election of the representatives of the European Parliament by direct universal suffrage* includes several important standards for elections to the European Parliament. First, it requires that elections shall be by direct universal suffrage and that they shall be free and secret.<sup>57</sup> Each voter may vote only once. It also requires that proportional representation be used and identifies two forms of proportional representation which the member states can choose from. These are ‘the list system’ and the single transferable vote. Member states are also allowed to apply a preferential vote. Thus, they can choose between closed, semi-open or open PR list systems.<sup>58</sup> The states are authorized to establish constituencies. These constituencies,

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Belgium refused to do so for several years. See *Commission of the European Communities v. Kingdom of Belgium* (C-323/97), Judgment of the European Court of Justice, 9 July 1998 (declaring “that, by failing to bring into force within the prescribed period the laws, regulations and administrative provisions necessary to comply with Council Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals, the Kingdom of Belgium has failed to fulfil its obligations under the first paragraph of Article 14 of that directive”).

<sup>54</sup> Art. 190 (ex Article 138) of the *Treaty establishing the European Community*.

<sup>55</sup> Art. 190 (4) (ex Article 138) of the *Treaty establishing the European Community*.

<sup>56</sup> Article III-330 of the proposed Treaty establishing a Constitution for Europe states:

“1. A European law or framework law of the Council shall establish the necessary measures for the election of the Members of the European Parliament 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 act unanimously on initiative from, and after obtaining the consent of, the European Parliament, which shall act by a majority of its component members. This law or framework law shall enter into force after it has been approved by the Member States in accordance with their respective constitutional requirements. “

<sup>57</sup> See Article 1(3) of the *Act concerning the election of the representatives of the European Parliament by direct universal suffrage*.

<sup>58</sup> On different types of preferential list systems see Michael Gallagher and Paul Mitchell (eds), *The Politics of Electoral Systems*. Oxford: Oxford University Press (ms. with eds).2004; Farrell, David M. (2001) *Electoral*

however, are not to affect the proportional nature of the voting system. The states are also authorized to set an electoral threshold but this threshold may not exceed five percent. The Act also regulates incompatibility of membership in the European Parliament with other positions and immunity of European Parliament members.<sup>59</sup> It also authorizes member states to set a ceiling for candidates' campaign expenses but does not contain any more detailed provision on campaign financing.

States could not agree on the same election day. Dutch, British and Danish voters were used to vote on Thursday and were not prepared to give this up. Similarly, most of the rest of Europe fought to keep Sunday as their day of voting. The Act thus holds that election should be held "on the date and the times fixed by each Member State, the date falling within a uniform period of time for all Member States between a Thursday morning and the following Sunday."<sup>60</sup>

Among the provisions that have raised controversy is the prohibition against states "officially mak[ing] public the results of their count before the election in the Member State whose voters are the last ones to vote" is concluded.<sup>61</sup> This provision was included in order to prevent results from states voting earlier influencing voters in states voting at the end of the election weekend. However, in 2004 Holland published provisional results early despite threats by European Commission that legal action would be taken against it.<sup>62</sup>

Certain rules on the European Parliament elections are also included in the Directive 93/109/EC. I will deal with this directive in some more detail later in a chapter on the prevention of double voting and voting by the people deprived of the right to vote.<sup>63</sup>

## Who should get to vote in the European parliamentary elections?

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*Systems: A comparative introduction.* Basingstoke: Palgrave; Karvonen, Lauri. Preferential Voting: Incidence and Effects. 25 *International Political Science Review* 203-226, 2004, no.2.

<sup>59</sup> See Articles 6 and 7 of the Act concerning the election of the representatives of the European Parliament by direct universal suffrage.

<sup>60</sup> See Article 10(1) of the Act concerning the election of the representatives of the European Parliament by direct universal suffrage.

<sup>61</sup> Article 10(2) of the Act concerning the election of the representatives of the European Parliament by direct universal suffrage as amended by Council Decision 202/772/EC of 25 June 2002 and 23 September 2002 amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage. Note that before the Act was amended in 2002 it contained the provision stating that "[t]he counting of votes may not begin" before the voting in all the member states was over.

<sup>62</sup> See for instance "EU results spark Brussels row" *CNN*, June 11, 2004. Available online at <<http://www.cnn.com/2004/WORLD/europe/06/11/eu.elections/index.html>> (last visited March 10, 2007); Ian Black "Dutch release early results" *The Guardian*, June 11, 2004. Available online at <<http://politics.guardian.co.uk/elections2004/story/0,14549,1236460,00.html>> (last visited March 10, 2007).

<sup>63</sup> Two more directives should be taken notice of although they deal mainly with the European Union citizens' right to vote and stand for election at the municipal elections. These are Council Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals and Directive 96/30/EC amending Directive 94/80/EC.

Elections occur once every five years on the basis of universal adult suffrage. First of all, each of the states is free to decide to whom it grants the citizenship. Unlike the United States, where the acquisition of the citizenship is regulated by federal law, in the European Union, it is in the states' domain. The Union thus has no control over who becomes a citizen. With the acquisition of citizenship of a member state, the new citizen automatically becomes at the same time a citizen of the European Union and therefore a voter in the European Parliament elections.<sup>64</sup>

Moreover, the definition of the “universal adult suffrage” is not identical in all the member states. The states are free to decide when a person becomes an adult and when he or she should get the right to vote in European Parliament elections. The decision was easy in states such as Slovenia, where each person, when he or she turns 18, becomes an adult and also acquires the right to vote for presidential, parliamentary and local elections. At the age of 18, each person also has the right to run for any elected office in the country including the office of the president. The decision was somewhat harder in those states where the voting age differs with different types of elections. In Italy, citizens get the right to vote for the lower house of parliament when they turn 18 and for the Senate when they turn 25. It was decided that Italians should become EP voters at the age of 18.

Until recently, one of the open questions was whether a member state was free to allow citizens of third countries to attend European Parliamentary elections. In case the answer to this question was positive, should this right be reserved only for the people somehow related to the member state or to the European Union or should the state be absolutely free to grant the franchise to any foreigner? Some states have granted the right to vote in EP elections to people who were not citizens of any of EU member state. One of those states is Britain, which has granted franchise to citizens of India, Pakistan and other Commonwealth countries who reside in Britain. In 2004 Britain also granted voting rights to citizens of India and Pakistan who resided in Gibraltar; Spain asked European Court of Justice to examine the issue. The Court ruled that the member states are allowed to grant the franchise to citizens of third countries when these individuals have close links to them:

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<sup>64</sup> Article 17 EC provides that “[e]very 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.” “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.” *Declaration (No 2) on nationality of a Member State*, annexed to the Maastricht Treaty (OJ 1992 C 191, p. 45).

[I]n the current state of Community law, the definition of the persons entitled to vote and to stand as a candidate in elections to the European Parliament falls within the competence of each Member State in compliance with Community law, and that Articles 189 EC, 190 EC, 17 EC and 19 EC do not preclude the Member States from granting that right to vote and to stand as a candidate to certain persons who have close links to them, other than their own nationals or citizens of the Union resident in their territory.<sup>65</sup>

The Court ruled that UK residents who are citizens of Commonwealth countries such as India and Pakistan “satisfy conditions expressing a specific link with the territory in respect of which the elections are held”<sup>66</sup> and concluded that United Kingdom was allowed to grant franchise to these individuals.

Another important question is whether those European Citizens residing out of the European Union have the right to participate in the European Parliament elections. The decision is left to the member states to which these citizens are nationals. Some states have chosen to allow citizens residing out of the European Union to cast votes via post or at the embassies; others do not. The question was examined by the European Court of Justice in the case of *Eman and Sevinger*.<sup>67</sup>

The Kingdom of the Netherlands has allowed voting in European Parliament elections to some of its citizens who live out of the European Union but not to others. The Kingdom of the Netherlands is a federacy that consists of three parts: the Netherlands in Northwestern Europe, the Netherlands Antilles and Aruba, both in the Caribbean. The Queen of the Netherlands is head of state of the federation as a whole. Each of the three parts has its own parliament but all three parts have a vote in government when it comes to matters pertaining to the kingdom as a whole. Only the European part of the federation is in the European Union. People living in all three parts of the federation, however, have a common citizenship and thus they all hold European Union citizenship. Since the two Caribbean parts of the Kingdom of Netherlands are not in the European

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<sup>65</sup> *Spain v. UK*, (C-145/04), Judgment of the Court (Grand Chamber) of 12 September 2006. <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004J0145:EN:HTML>> (last visited March 10, 2007). Consider also Opinion of Advocate General Tizzano of 6 April 2006 in *Spain v. UK* (C-145/04) and *Eman and Sevinger v. College van burgemeester en wethouders van Den Haag* (C-300/04). The Advocate General proposed that the Court should hold that the United Kingdom violated the EU legislation while granting citizenship to non-EU-citizens in Gibraltar.

<sup>66</sup> *Spain v. UK*, (C-145/04), Judgment of the Court (Grand Chamber) of 12 September 2006. Available online at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004J0145:EN:HTML>> (last visited March 10, 2007).

<sup>67</sup> *Eman and Sevinger v. College van burgemeester en wethouders van Den Haag* (C-300/04), Judgment of the Court (Grand Chamber) of 12 September 2006. Available online at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004J0300:EN:HTML>> (last visited March 10, 2007).

Union, the Netherlands' election law did not organize European elections there. The Dutch election law, however, provides for voting of the the citizens of the Kingdom of Netherlands residing abroad. As a result, the citizens of Netherlands living in Aruba and Netherland Antilles could not vote in the European Parliament elections while those living in, let's say, New York, could.

The Court confirmed that the member states were free to define the conditions of a citizen's right to vote and stand as a candidate in elections to the European Parliament, with reference to the criterion of residence pertaining in the territory in which the elections are held. Each member state can therefore decide either to allow or disallow participation in European Parliament Elections by citizens living abroad. But, as the court ruled, member states must have regard to the "principle of equal treatment" and this principle prevents the criteria chosen from resulting in the different treatment of nationals who are in comparable situations, unless that difference in treatment is objectively justified.<sup>68</sup> Each state, consequently, needs to have compelling reasons for allowing some citizens who reside abroad to vote but not others. As for those citizens of the Netherlands and the European Union living in Aruba and Netherlands' Antilles, the Court ruled that persons who possess the nationality of a member state and who reside or live in the overseas countries and territories<sup>69</sup> may rely on the rights conferred on citizens of the Union by the EC Treaty. This consequently means that the Netherlands, Britain, Denmark and other Member States will need to organize elections in territories ranging from Antarctica to Greenland. Also of note are the non-binding resolutions adopted by the European Parliament, which recommend that member states extend the right to vote and to stand in local and European elections to all non-Community nationals who have been legally resident in that state's territory for at least three years.<sup>70</sup>

### **The apportionment of the seats**

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<sup>68</sup> *Eman and Sevinger v. College van burgemeester en wethouders van Den Haag* (C-300/04), Judgment of the Court (Grand Chamber) of 12 September 2006. Available online at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004J0300:EN:HTML>> (last visited March 10, 2007).

<sup>69</sup> The *Eman and Sevinger* ruling applies to the overseas countries and territories listed in the Annex II to the EC Treaty. These territories are: Greenland, New Caledonia and Dependencies, French Polynesia, French Southern and Antarctic Territories, Wallis and Futuna Islands, Mayotte, Saint Pierre and Miquelon, Aruba, Netherlands Antilles (Bonaire, Curaçao, Saba, Sint Eustatius, Sint Maarten), Anguilla, Cayman Islands, Falkland Islands, South Georgia and the South Sandwich Islands, Montserrat, Pitcairn, Saint Helena and Dependencies, British Antarctic Territory, British Indian Ocean Territory, Turks and Caicos Islands, British Virgin Islands, Bermuda.

<sup>70</sup> Resolution A5-0223/2001, of 5 July 2001, Report Cornillet (2000) and Resolution A5-0451/2002, of 15 January 2003, Report Swiebel (2001).

In each federally organized entity one of the basic questions to be solved is how the decision-making power will be apportioned among the federal units. Should all the units be treated equally regardless of their populations or should the power be distributed according to their respective populations? As for their legislatures, most of the federations opted for two chamber legislatures where one represents people and the other represents federal units. American Congress, composed of the House of Representatives and Senate, is probably the most widely known example. While each state has two Senators regardless of the differences among the states' populations, the number of seats belonging to each state in the House of Representatives depends on its populations. As early as in 18<sup>th</sup> century George Washington, Thomas Jefferson and the others were aware of the importance of the fair representation. They enacted exact mathematical formula<sup>71</sup> which was to be used for the apportionment of the House seats among the states. Since 1790, once every 10 years the formula is reapplied and the seats are redistributed among the states in order to reflect the changes in the states' populations.

European Union, on the contrary, did not choose to go for the bicameral parliament but rather for the unicameral one. The decision on how many seats should each of the member states receive is very tough. The EU member states' populations varied a lot, ranging from Luxemburg's 400.000 to Germany's 82 million. Large member states would, of course, reject any idea of equal representation of all member states regardless of the population. Similarly, Luxemburg would not agree on the representation based on population since Germany's population was two hundred times larger than the one of Luxemburg and Luxemburg would get only one or zero seats while Germany would get over a hundred seats. In order to get a balanced model of representation a so-called model of degressive proportionality was applied. Under the term of "degressive proportionality" theorists understand all sorts of the distribution models in between the extremes called equal representation and proportional representation.<sup>72</sup> With the degressive proportionality, we let the number of seats increase as a function of population sizes, but smaller states receive more seats and larger countries receive fewer seats than proportionality

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<sup>71</sup> As early as in 1790 Thomas Jefferson proposed the apportionment formula, which is now known as D'Hondt method in most of the world. Several other methods have been used over the past two centuries and currently Hill method is used. For the complete overview of the methods and the history of their use see Michel L. Balinski & H. Peyton Young, *Fair Representation: Meeting the Ideal of One Man, One Vote* (2d. ed. 2001).

<sup>72</sup> Luc Bovens and Stephan Hartmann. *Utilitarianism, Degressive Proportionality and the Constitution of a Federal Assembly*. PolSci Archive <<http://philsci-archive.pitt.edu/archive/00002339/>> (last visited March 10, 2007).

would warrant.<sup>73</sup> There is no single formula of degressive proportionality.<sup>74</sup> Moreover, European leaders never even applied any of these formulas. The seat distribution plan was a result of the negotiations between the member states' leaders. As a result, grave deviations from what could be regarded as fair distribution occur.

Consider the distribution of European Parliamentary seats as agreed in the Treaty of Nice.<sup>75</sup> Hungary and the Czech Republic each got 20 seats in the European Parliament, even though old EU Member States with fewer inhabitants received 22 seats.<sup>76</sup> After the European Parliament reacted, this too obvious deviation has been corrected but some other remained unchanged. It should be clearly emphasized that from the view of the constitutional law it is unacceptable that the seat distribution is a subject of the negotiations. As soon as possible one of the many available degressive proportionality formulas should be adopted into legislation. The seats should then get apportioned according to this formula and formula should periodically be re-applied in order to accommodate the EP seat distribution to the populations of the member states.

**Table 1: The number of seats in the European Parliament belonging to each state (1) before the 2004 elections, (2) as agreed in the Treaty of Nice, (3) before Romania and Bulgaria joined the Union, and (4) after they became EU members.**

	Population	Seats before 2004	Treaty of Nice	Seats as of Dec 2006	Seats as of Jan 2007
<b>Germany</b>	82.1	99	99	99	99
<b>U. Kingdom</b>	59.4	87	72	78	78

<sup>73</sup> Consider also the following definition: “Degressive proportionality means that small countries are advantaged in decision-making process and they are given more votes in so called “weighing of votes.” *Democratic Deficit in the European Union : Project*. Masaryk university Language centre videoconferencing

[http://lingua.muni.cz/videoconferencing/project.php?id\\_vconf=6&item=4](http://lingua.muni.cz/videoconferencing/project.php?id_vconf=6&item=4) (last visited March 10, 2007).

<sup>74</sup> For the theoretical analyses of the degressive proportionality models see Luc Bovens and Stephan Hartmann. *Utilitarianism, Degressive Proportionality and the Constitution of a Federal Assembly*. PolSci Archive <http://philsci-archive.pitt.edu/archive/00002339/> (last visited March 10, 2007).; and Claus Beisbart and Luc Bovens. *Why Degressive Proportionality?: An Argument from Cartel Formation*. September 23, 2005. <http://www.uni-konstanz.de/ppm/papers/cartel1.pdf> (last visited March 10, 2007).

<sup>75</sup> The number of seats apportioned to each country is determined by treaty. No change in the number of seats granted to each member state can occur without the unanimous consent of all governments.

<sup>76</sup> Compare the Belgium's and Czech Republic's populations and the numbers of seats assigned by the Treaty of Nice. Belgium, with fewer inhabitants, received two seats more than the Czech Republic. Similarly, Portugal, which has less population than Hungary, was assigned two seats more. Treaty of Nice, Official Journal of the European Communities, C 80/81, 10.3.2001, p. 81. Also available at [http://europa.eu.int/eur-lex/lex/en/treaties/dat/12001C/pdf/12001C\\_EN.pdf](http://europa.eu.int/eur-lex/lex/en/treaties/dat/12001C/pdf/12001C_EN.pdf) (last visited on March 5, 2007).

<b>France</b>	59.1	87	72	78	78
<b>Italy</b>	57.7	87	72	78	78
<b>Spain</b>	39.4	64	50	54	54
<b>Poland</b>	38.6		50	54	54
<b>Romania*</b>	21.6		33	33*	35
<b>Netherlands</b>	15.8	31	25	27	27
<b>Greece</b>	10.6	25	22	24	24
<b>Czech Republic</b>	10.3	25	20	24	24
<b>Belgium</b>	10.2	25	22	24	24
<b>Hungary</b>	10.0		20	24	24
<b>Portugal</b>	9.9		22	24	24
<b>Sweden</b>	8.9	22	18	19	19
<b>Austria</b>	8.1	21	17	18	18
<b>Bulgaria*</b>	7.6		17	17*	18
<b>Slovakia</b>	5.4	16	13	14	14
<b>Denmark</b>	5.3	16	13	14	14
<b>Finland</b>	5.2		13	14	14
<b>Ireland</b>	3.7	15	12	13	13
<b>Lithuania</b>	3.7		12	13	13
<b>Latvia</b>	2.4		8	9	9
<b>Slovenia</b>	2.0		7	7	7
<b>Estonia</b>	1.4		6	6	6
<b>Cyprus</b>	0.8		6	6	6
<b>Luxembourg</b>	0.4	6	6	6	6
<b>Malta</b>	0.4		5	5	5
<b>TOTAL</b>	450.8 479.2	626	732	732 782*	785

\* Before 1 January 2007, Romania and Bulgaria were candidates for the EU membership and their MEPs served as observers.

## The constituencies

In five European Union Member States (Belgium, France, Ireland, Italy and the United Kingdom), the national territory is divided into a number of constituencies for European elections. In the remaining 17 Member States the whole country forms a single electoral area. In Germany political parties are entitled to present lists of candidates either at *Länder* or national level. In Finland they may do so either at electoral district or national level. In Poland they may do so only at a constituency level, but seats are allocated nationally.

The population of constituencies varies widely across the union. Currently, the German speaking community of Belgium are the most represented in the EU Parliament with one seat for

their 71,000 population, while the people of Sardinia and Sicily are the least represented, with only one seat per 943,000 people.<sup>77</sup>

There were several attempts to set the rules on the constituencies in a form of the European law. It has been proposed that all the constituencies should elect between 10 and 15 MEPs. Then, it was proposed that the districts should not have a magnitude smaller than 5. None of these proposals, as said, got supported by the member states and European Parliament.

Recently, an idea to establish a European-level constituency has been introduced. According to the proposals, between three and ten of the members of European Parliament would get elected in a special constituency containing the territory of all the member states. It is said that such a constituency would bring European voters closer together and it would give them a sense that European parliamentary elections truly are a single event as opposed to 27 distinct events taking place in 27 different states on the same weekend. Most of the smaller member states strongly oppose the introduction of such constituencies. They claim that all of these seats would be won by candidates coming from largest states. Candidates coming from small states would have virtually no chances when running against German or British candidates. Firstly, British and German politicians are internationally widely known while those from Estonia or Malta are unknown among the voters. Secondly, it is not hard for a candidate from France or Britain to collect a million votes in his home state. A Maltese candidate, on the other hand, can never collect this support from his home state. And thirdly, the candidates from old member states would probably have better financial background than those from post-communist new member states.

Unfortunately the EP electoral system designers have not yet considered the system where certain number of the members of European Parliament would get elected at large but at the same time no member state would lose a seat on the account of the European-level constituency. Such systems do exist. The method goes something like this: Firstly, the seats elected at large are distributed. Then, the number of seats still available for each of the 27 states is reduced for every MEP resident of that state, who got elected at large. For instance, if three German members of European Parliament would get elected on the EU level at large, only the remaining 96 EP seats would be elected by the German voters.

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<sup>77</sup> European Parliament Constituency. *Wikipedia* (visited on July 10, 2006)  
<[http://en.wikipedia.org/wiki/European\\_Parliament\\_constituency](http://en.wikipedia.org/wiki/European_Parliament_constituency)>

## Prevention of double-voting and voting by the people deprived of the right to vote

The *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*<sup>78</sup> gives all citizens of the European Union the opportunity to choose whether to participate in elections to Parliament (by voting or by standing as a candidate) in their state of origin or their state of residence within the EU, if these are not the same. However, no voter is allowed to vote in more than one state.<sup>79</sup>

Due to the extremely decentralized and “hyperfederalized”<sup>80</sup> administration of European Parliament elections, it is difficult to prevent voters from double-voting, that is, voting in both their state of origin as well as their state of residence. Member states that have deprived certain voters of the right to vote or the right to stand for election also strive to prevent these persons from voting or standing for election in another member state.

*Directive 93/109/EC* sought to counter double-voting by:

- requiring the states to exchange information about voters and candidates who are residents but not citizens in the states where they appear on electoral rolls or stand as candidates.
- requiring the EU citizen who wishes to stand as candidate in a state of residence to “produce a formal declaration stating ... that he is not standing as a candidate for election to the European Parliament in any other Member State”

In order to prevent voting and running for office by people who have been deprived of the right to vote or the right to stand for election in their state of origin, *the Directive*:

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<sup>78</sup> *Official Journal* L 329, 30/12/1993 P. 0034 – 0038.

<sup>79</sup> "1. Community voters shall exercise their right to vote either in the Member State of residence or in their home Member State. No person may vote more than once at the same election.

2. No person may stand as a candidate in more than one Member State at the same election." Art. 4 of the *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*.

<sup>80</sup> The term was used by Richard Hasen in relation to the U.S. election registration law and denotes overly decentralized and impractical regulation of elections. Hasen, Richard L., "Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown". *Washington & Lee Law Review*, Vol. 62, p. 937, 2005 ("Hyperfederalization means that there is a great variety among electoral jurisdictions in the rules for registration—from how to fill out the forms, to where the forms are available, to what information must be put on the form, to the deadlines for registration. ... Finally, hyperfederalization means that eligible voters may register, and potentially vote, in more than one jurisdiction.")

- authorizes the state where the voter is a resident to require from the voter to sign a written declaration that he or she has not been deprived of the right to vote in his or her home member state.

- requires the EU citizen who wishes to stand as candidate in a state of residence “to produce an attestation from the competent administrative authorities of his home Member State certifying that he has not been deprived of the right to stand as a candidate in that Member state or that no such disqualification is known to those authorities.”<sup>81</sup>

Until now the Directive has been used in three European Parliament elections (in 1994, 1999 and 2004). However, the requirements it imposes upon non-nationals wishing to stand for elections in the state of residence have turned out to be too much of an administrative burden, resulting in several voters and candidates being deprived of the right to cast a vote or stand for election. Probably as a result of the non-harmonized national legislation in electoral matters, the system of exchange of information on the non-nationals registered to vote in their state of residence has proved to be completely ineffective, costly<sup>82</sup> and administratively burdensome for member states. <sup>83</sup> Two member states, however, *did* discover cases of double-voting in 2004: four voters voting twice have been discovered in Luxemburg and approximately 120 such instances were identified in Germany.<sup>84</sup>

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<sup>81</sup> Article 10-1 (c) of the *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.*

<sup>82</sup> "Fifteen Member States provided estimates of the resources deployed on the information exchange system for the 2004 election. The estimated costs for these Member States alone were 981 000 euros. A large part of the costs for the system are due to the exchange of inadequate information. It is likely that costs would increase if the system remained as it is because of increases in the numbers of EU non-nationals and enlargement of the EU." Commission of the European Communities. *Commission report on the participation of European Union citizens in the Member State of residence (Directive 93/109/EC) and on the electoral arrangements (Decision 76/787/EC as amended by Decision 2002/772/EC) : Impact Assessment Summary for a possible amendment of Council Directive 93/109/EC laying down detailed arrangements for exercising 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.* Brussels, 12.12.2006 SEC(2006) 1647, p. 3.

<<http://register.consilium.europa.eu/pdf/en/07/st05/st05214-ad03.en07.pdf>> (visited on February 10, 2007).

<sup>83</sup> See Commission of the European Communities. *Proposal for a Council Directive amending Directive 93/109/EC of 6 December 1993 as regards certain 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.* Brussels, 12.12.2006, COM(2006) 791 final, 2006/0277 (CNS). <[http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006\\_0791en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0791en01.pdf)> (visited on February 10, 2007).

<sup>84</sup> Commission of the European Communities. *Commission report on the participation of European Union citizens in the Member State of residence (Directive 93/109/EC) and on the electoral arrangements (Decision 76/787/EC as amended by Decision 2002/772/EC) : Impact Assessment Summary for a possible amendment of Council Directive 93/109/EC laying down detailed arrangements for exercising the right to vote and stand as a*

We should note that United States is experiencing similar difficulties detecting and limiting double-voting. It seems that double-voting is an inevitable companion of the elections governed by “hyperfederalized” election law. Despite quite stiff jail penalties imposed for voter fraud,<sup>85</sup> double-voting is not uncommon in United States. A comparison of voter rolls of Florida and New York showed that between 400 and 1000 voters had cast ballots in both states in the last presidential elections and that over 45,000 voters were registered in both states.<sup>86</sup> Another report comparing data of South and North Carolina showed that as many as 60,000 voters were registered in both states.<sup>87</sup> Observers propose radical change of the law and the introduction of a nationwide voter registration system.<sup>88</sup>

Noting that the *Directive 93/109/EC* has proved to be ineffective, costly and too burdensome for the prospective candidates, European legislators have intensively considered its amendment. One of the proposals has included the introduction of a Europe-wide electoral roll. Given the diversity of the 27 member states’ election laws and the expected opposition of some member states, this idea would seem unrealistic. Another proposal has suggested improvement of the exchange of voters’ and candidates’ data among the member states, a system that would use a uniform online application to exchange data on the voters registered in the state of their residence. A third proposal advocates a loosening of the rules whereby member states would abolish the current information exchange system while maintaining a written declaration by non-

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*candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals.* Brussels, 12.12.2006 SEC(2006) 1647, p. 3.

<http://register.consilium.europa.eu/pdf/en/07/st05/st05214-ad03.en07.pdf> (visited on February 10, 2007).

<sup>85</sup> Voting in more than one state is said to be a federal offense punishable by up to five years in prison and a \$10,000 fine. Russ Buettner “Exposed: Scandal of Double Voters,” *New York Daily News*, August 21, 2004.

<http://www.nydailynews.com/front/story/224449p-192807c.html> (visited on February 8, 2007). Cf. Bill Gifford. People Who Vote Twice: A Sudden Crackdown on an Old Trick. *Slate*, Oct. 28, 2004.

<http://www.slate.com/id/2108807/> (visited February 10, 2007) (“Intentionally voting more than once in a federal election is a third-degree felony in most states and probably also violates federal election-fraud laws. The punishment varies from state to state but is usually up to five or 10 years in jail and fine of up to \$5,000 or \$10,000.”)

<sup>86</sup> Russ Buettner “Exposed: Scandal of Double Voters,” *New York Daily News*, August 21, 2004.

<http://www.nydailynews.com/front/story/224449p-192807c.html> (visited on February 8, 2007).

<sup>87</sup> “Report: As many as 60000 people file to vote in both Carolinas,” Associated Press, October 24, 2004. Cited in Report of the Commission on Federal Election Reform, “Building Confidence in U.S. Elections,” organized by the Center for Democracy and Election Management, American University, September 2005 [http://www.american.edu/ia/cfer/report/full\\_report.pdf](http://www.american.edu/ia/cfer/report/full_report.pdf) (visited on February 10, 2007).

<sup>88</sup> See for instance Hasen, Richard L., “Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown”. *Washington & Lee Law Review*, Vol. 62, p. 937, 2005, 964 (advocating universal voting registration and government-issued voter identification cards with biometric information) and the so-called Carter-Baker Commission Report: Report of the Commission on Federal Election Reform, “Building Confidence in U.S. Elections,” organized by the Center for Democracy and Election Management, American University, September 2005, pp. 9-23.

[http://www.american.edu/ia/cfer/report/full\\_report.pdf](http://www.american.edu/ia/cfer/report/full_report.pdf) (visited on February 10, 2007) (recommending that states be required to establish unified, top-down voter registration systems; voter databases should be made interoperable between states, which would serve to eliminate duplicate registrations.)

national citizens of the Union pledge not to double vote or stand as a candidate in two member states in the same EP election. It also proposes the introduction of stricter penalties for double voting and the introduction of *ex post* checks for the occurrence of voting in more than one state. This third proposals appears to have the widest support among the member states and the European Commission has recently proposed the amendment of the *Directive 93/109/EC* according to these principles.

### **Right to join a political party in the voter's state of residence**

Each EU citizen has a right to vote and to stand for election in the member state of his residence. However, in the proportional representation electoral systems used in all the EU member states, political parties play an essential role. In a party-list PR system it is often impossible to run for election let alone to be elected without running on a party list. In order to effectively take advantage of the right to run for office in the state of his or her residence, each EU citizen should also have a right to become a member of a political party in the state of residence. However, not all the member states allow non-nationals to become members of the political parties. A study published in March 2005 closely examines the participation of EU citizens in the political parties of their member state of residence.<sup>89</sup> As of 2005, sixteen of the member states recognized the right of the non-national Union citizens both to join existing political parties and to found a new political party in the member state in which they reside.<sup>90</sup> Only legislation of Hungary, Latvia and Portugal explicitly gave all EU citizens the rights to form and join political parties. In 13 states, however, this recognition was based on the absence of any restriction based on nationality in the applicable legislation. Two countries (Slovenia and Spain) made a distinction between the right to found a political party and the right to become a member of a political party. Finally, in seven member states (the Czech Republic, Estonia, Greece, Lithuania, Malta, Poland, and the Slovak Republic), non-nationals had no right to become members of political parties or found political parties.

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<sup>89</sup> E.U. network of independent experts on fundamental rights (CFR-CDF). *Opinion of the E.U. network of independent experts on fundamental rights regarding the participation of E.U. citizens in the political parties of the member state of residence*. March 2005.

<[http://ec.europa.eu/justice\\_home/cfr\\_cdf/doc/avis/2005\\_1\\_en.pdf](http://ec.europa.eu/justice_home/cfr_cdf/doc/avis/2005_1_en.pdf)> (visited on February 10, 2007).

<sup>90</sup> These are Austria, Belgium, Cyprus, Denmark, Finland, France, Germany, Hungary, Ireland, Italy, Latvia, Luxemburg, the Netherlands, Portugal, Sweden and the United Kingdom. E.U. network of independent experts on fundamental rights (CFR-CDF). *Opinion of the E.U. network of independent experts on fundamental rights regarding the participation of E.U. citizens in the political parties of the member state of residence*. March 2005, p.8. <[http://ec.europa.eu/justice\\_home/cfr\\_cdf/doc/avis/2005\\_1\\_en.pdf](http://ec.europa.eu/justice_home/cfr_cdf/doc/avis/2005_1_en.pdf)> (visited on February 10, 2007).

But again, one cannot imagine full exercise of the right to political participation and the right to stand for election without being allowed to form or join a political party. Although EU legislation does not explicitly grant EU citizens the right to join or form a political party in the state of their residence, most experts agree that the EC Treaty, the Charter of Fundamental Rights and the European Convention can only be interpreted as extending the right to form and join political parties to non-nationals of the member state.<sup>91</sup>

## Conclusions

It is usually impossible to reach a consensus among all political parties concerned when it comes to changes in the election law. In the first place, each change in the regulation of elections directly affects the parties at the following elections. It may benefit some parties and be detrimental to others. When new election-law amendments are proposed, parties are quick to examine which amendments would be advantageous for themselves and which not. Second, while parties are often prepared to make compromises during the legislative process, this is not the case when it comes to amending election law. There is no law more important for politicians' careers than electoral law. Since their jobs and political existences depend on it, politicians are hardly ever prepared for compromises and sacrifices in this area. Moreover — and this is the case especially in the larger, federally organized countries — not only is agreement among the political parties often needed, but agreement among various regions or federal entities.

It is usually quite difficult for national legislatures to change election law since these laws usually require broader support among the legislators than 'ordinary' laws. However, that is nothing compared to the support that is needed to amend the election law at the level of the European Union. The enactment of some sort of European Election Act would require an agreement involving numerous partners. All of the 27 member states would first need to agree on the law. Needless to say, it would have been much easier to reach such an agreement when there were only 12 or 15 member states. As the number of member states gets larger, the possibility of reaching an agreement among them seems ever more illusory. And in addition to reaching an agreement among all 27 of the member states' governments, the act would need to pass a vote in the European Parliament's committees and the plenary. We should bear in mind that any change

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<sup>91</sup> E.U. network of independent experts on fundamental rights (CFR-CDF). *Opinion of the E.U. network of independent experts on fundamental rights regarding the participation of E.U. citizens in the political parties of the member state of residence*. March 2005, pp. 6-8. Available online at <[http://ec.europa.eu/justice\\_home/cfr\\_cdf/doc/avis/2005\\_1\\_en.pdf](http://ec.europa.eu/justice_home/cfr_cdf/doc/avis/2005_1_en.pdf)> (visited on February 10, 2007).

in the European Parliament electoral procedure can easily affect the electoral system used for that state's parliamentary or local elections. Experience shows that politicians pay much attention to the effects any change of the election law at the European level might have on the national level, if the law was enforced at that level.

To understand better what it would take to change EP election legislation and to harmonize election law at the European level, we can examine how in the past harmonizations of election procedures had been achieved. As we have seen, all of the ambitious proposals outlining new election law or radical changes in any of the states' procedure have been defeated quickly, either in the European Parliament or in the Council. When we examine the rules governing election procedure that *have* been harmonized, we note that these rules were not enforced from the top down, that is, they were not enforced from the European parliament upon the member states. Rather, over the decades, the states themselves harmonized their election procedures and when all of them — or at least most of them — agreed on a certain election principle then the rule was enacted at the EU level. We can reasonably anticipate such a process for the future harmonization of any new election rules. Individual states will decide to adopt a specific election principle in their national legislations when they feel it's the right time to do so. When a considerable number of them have adopted the rule, these states can pressure the rest of the states to adopt it. At the end of this process, when agreement among the states is reached about the rule, we can then — and only then — expect it to be implemented in European legislation.<sup>92</sup>

The European Union, on the other hand, has various means at its disposal to influence its member states in respect to its policies. This has been widely observed, for instance, in the introduction of gender quotas in the European election legislation. Most member states use some sort of gender quotas in order to achieve a balance among women and men members sitting in the European Parliament. While EU officially enacted no legislation requiring the introduction of such quotas, the EU has strongly influenced the states through its own gender-equality policy, as Mona Lena Krook has pointed out in her paper.<sup>93</sup> “Although grounded in domestic politics, changes in party selection practices over the last ten years have been fundamentally shaped by

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<sup>92</sup> The proponents of internet-based voting have come to the same conclusion. In their view, the only way to achieve uniform remote electronic voting to the European Parliament is through the states, one by one. Alexander H. Trechsel and Fernando Mendez (Eds.) *The European Union and e-Voting : Addressing the European Parliament's internet voting challenge*. Routledge: London and New York, 2005, p. 13.

<sup>93</sup> Krook, Mona Lena. *Is There a 'Europe Effect'? Women and Elections to European and National Parliaments, 1979-2004*. Paper presented at the International Political Science Association World Congress, Fukuoka, Japan, July 10-13, 2006, p. 16.

developments in European integration and in EU gender equality policy.”<sup>94</sup> When gender-quota legislation was proposed in the Slovenian parliament, for example, one of the government’s primary arguments in favor of the introduction of the quotas was accommodation to European legislation and standards, although such legislation does not exist. Fair representation of males and females are indeed understood to be one of EU’s basic election standards and the number of states adopting gender-quotas and other equality-enhancing measures is growing.<sup>95</sup>

On the other hand, constant pressure applied by the majority of the member states to a single non-complying state *does* produce results. It took decades to persuade the UK to move from the plurality principle to proportional representation elections of their MEPs. Finally, the UK gave up on the plurality principle that has been traditional in British elections for centuries.<sup>96</sup>

While the politicians are not particularly successful in harmonizing electoral rules, the courts may be able to do some of the job. We must not overlook the role of the European Court of Human Rights, which is playing an ever more active role in setting the electoral standards at the European level. It should be emphasized that the Court is not an EU body nor did the EU ever accede to the European Convention. This fact lends great interest to our observations of this Court’s influence on elections to the European Parliament. Over the past few years it has set standards as to who should get the right to vote in the EP elections and who should have a right to stand for election. The European Court of Justice, on the other hand, has not hitherto played an important role in election law. But with the two important franchise-related cases currently pending before it, we can expect the European Court of Justice too to begin setting common European election law standards.

In the light of developments over the past decades, it’s unlikely that the European Parliament will be elected by the ‘uniform electoral procedure’ any time soon. In the meantime the elections will probably take place on three different days and they will be governed by 27 quite different laws.

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<sup>94</sup> Krook, Mona Lena. *Is There a 'Europe Effect'? Women and Elections to European and National Parliaments, 1979-2004*. Paper presented at the International Political Science Association World Congress, Fukuoka, Japan, July 10-13, 2006, p. 16.

<sup>95</sup> The introduction of gender-quotas and other means to enhance balanced representation of both genders has never been required by the European Union but often recommended. See, for instance, Resolution A5-0451/2002, of 15 January 2003, Report Swiebel (2001), and Resolution A5-0281/2003, of 4 September 2003, Report Sylla (2002) (calling on the Member States to promote a balanced representation of women and men in local and European elections, as the lack of balanced participation of women and men in the decision-making process diminishes the democratic values of the society and political system; calling on governments, especially those of countries where women’s participation in decision-making bodies is still lower than 30%, to review the differential impact of the electoral systems on the political representation of men and women in elected bodies and consider the adjustment or reform of these systems, in order to achieve a gender balance.)

<sup>96</sup> For the purpose of the House of Commons elections, of course, plurality system is still used. There are, however, regular attempts to influence the politicians and the public with the idea of proportional representation.

Such parliamentary elections may not deserve to be regarded as a single parliamentary election, but we might reconsider whether a fully uniform electoral procedure is really something we need. While basic EP election standards surely need to be harmonized among all the member states as soon as possible, not every detail of the procedure needs to be unified. Many federations, the United States being just one of them, conduct elections according to a much decentralized election law and no serious problems arise for this reason. We might better decide on where to draw the line between basic election principles and details. While the former need to be common to the EP elections across the whole EU territory, the regulation of the latter can easily be left to the member states. It would exceed the scope of this paper to try to define where the boundary between the two sets of rules should lie. The European Parliament, the member states and the courts will do that.

On a final note, we can forget for now any dream that the EP will pass laws enacting a whole set of common election principles. Except for the principles set by the courts, we can expect instead that the common electoral rules will be enacted one by one, following long and tormenting negotiations and deliberations between all concerned.