Article 39

Article 39 EU Charter of Fundamental Rights

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Article 39

Right to vote and to stand as a candidate at elections to the European Parliament

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

2. Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.

Explanation on Article 39 — Right to vote and to stand as a candidate at elections to the European Parliament

Article 39 applies under the conditions laid down in the Treaties, in accordance with Article 52(2) of the Charter. Article 39(1) corresponds to the right guaranteed in Article 20(2) of the Treaty on the Functioning of the European Union (cf. also the legal base in Article 22 of the Treaty on the Functioning of the European Union for the adoption of detailed arrangements for the exercise of that right) and Article 39(2) corresponds to Article 14(3) of the Treaty on European Union. Article 39(2) takes over the basic principles of the electoral system in a democratic State.

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A. Field of Application of Article 39

Article 39 applies to the institutions, bodies, offices and agencies of the Union and, more significantly in this context, to the Member States, in fulfilling their pre-existing obligations under Union law with respect to the guaranteeing of European parliamentary electoral rights.[1]

Specifically, Article 39 applies to Member States in their implementation of the Direct Elections Act 1976.[2] Once agreed to by the Member States, the Direct Elections Act could only take effect once implemented at the national level. The Act provides for free, secret, direct and universal elections to the European Parliament. In absence of a uniform electoral procedure, which has not thus far been agreed upon,[3] Member States may apply their own electoral procedure to enfranchise citizens of the Union in European Parliament elections within the fairly loose confines set out in the Direct Elections Act.[4]

Article 39 also applies to Member States with respect to their transposition of Council Directive 93/109/EC,[5] which lays down detailed arrangements for, *inter alia*, 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.

B. Interrelationship of Article 39 with other provisions of the Charter

Article 39 of the Charter does not refer explicitly to any other provisions of the Charter. However, it is closely related to Article 40 (on the right to vote and to stand as a candidate at municipal elections)

[1] Charter of Fundamental Rights of the European Union, Articles 51 and 52 generally, (2012/C 326/02).

[2] The Council Decision and Act concerning the election of the representatives of the European Parliament by direct universal suffrage, OJ 1976 C27/5.

[3] Although there has been no agreement on a uniform electoral procedure, there has been a steady convergence of electoral systems in the period since the first direct elections of the European parliament in 1979: for example, the universal adoption of proportional representation and abolition of the dual mandate of Members of the European Parliament to the European Parliament and their respective national Parliaments in 2002 and the formal establishment of political parties at EU level in 2003/4..

[4] The Direct Elections Act stipulates, *inter alia*, that: elections are to be by direct universal suffrage and should be free and secret; members of the European Parliament are to be elected on the basis of proportional representation, using the list system or the single transferable vote; in accordance with its specific national situation, each Member State may establish constituencies for elections to the European Parliament or subdivide its electoral area in a different manner, without generally affecting the proportional nature of the voting system; Member States may set a minimum threshold for the allocation of seats; and each Member State may set a ceiling for candidates' campaign expenses.

[5] Directive 93/109/EC, OJ [1993] L 329/34. See also Directive 2013/1/EU, OJ [2013] L 26/27discussed at n.55 below.

within the broad scheme of Union citizenship, and is also connected with Article 12(2), which governs the role of political parties in the European Union. Furthermore, Article 39 is also indirectly interrelated with some of the more general provisions of the Charter to the extent that it comes within their field of application.

The right to vote and to stand as a candidate at municipal elections

As will be discussed in more detail below, although the first direct European Parliament elections were held in 1979, Union citizens did not have any explicitly articulated and justiciable electoral rights, in the Treaties or elsewhere in EU law, until the 1992 Maastricht Treaty. When a limited range of EU electoral rights were finally instituted in 1993 along with the status of 'Union citizenship', this represented for the EU institutions, especially the Commission and the European Parliament, the culmination of a longstanding debate.[6] What is interesting is that the right to equal treatment for non-national Union citizens voting and standing as candidates in European Parliament elections (now Articles 20(2)(b) and 22(2) TFEU) was introduced together with, and under the same provision as, a right to equal treatment for non-national Union citizens voting in *municipal* elections (now Articles 20(2)(b) and 22(1) TFEU). The explanation for this arrangement can be discerned by reference to what can be described as the 'twin roots' of the Maastricht Treaty electoral rights framework.[7] These have been described by D'Oliveira as "*the emergence of a Community or Union collectivity*" in tandem with the extension of the "*principles of democracy*" within the institutions of the Union.[8] On this view, the Maastricht Treaty electoral rights framework emerged out of the twining, by the Parliament, of two issues i.e. on the one hand, the development of free movement rights under the Treaty and the desire promote the political integration of EU citizens who had taken advantage of their free movement rights and, on the other hand, the struggle towards greater formal democratization of the institutions of European integration through increased popular participation.

From this perspective, Article 39 and Article 40 of the Charter are historically connected within the schemes of European integration and institutional democratization as articulated through the concept of Union citizenship and its associated rights in the Treaties.

Political parties of the Union

The idea of political parties at Union level has been invested with the most meaning in the context of the European Parliament, and, consequently, Article 12(2) CFR and Article 39 CFR are intimately related.

General Charter provisions with which Article 39 is indirectly related

Article 39 CFR is also interrelated with the general provisions of the Charter, at Articles 51 to 53, to the extent that its application must be in accordance with such provisions.[9]

C. Sources of Article 39 Rights

[6] J Shaw, 'Sovereignty at the Boundaries of the Polity', in *Sovereignty in Transition*, N Walker, Hart Publishing, Oxford, 2003, at pp461-500.
[7] *Ibid*.
[8] HUJ d'Oliveira, 'European Citizenship: Its Meaning, Its Potential', in R Dehousse (ed.), *Europe after Maastricht: An Ever Closer Union?*, Law Books in Europe, Munich, 1994, at pp142-143. See also J Shaw and S Day, 'European Union electoral rights and the political participation of migrants in host polities', (2002) 8, *International Journal of Population Geography*, 183–199.
[9] By way of example, in Case C-145/04 *Spain v UK*, [2006] ECR I-07917, both the UK and the European Commission relied on Article 53 CFR to justify the UK extension of European parliamentary voting rights beyond EU citizens to include also so-called 'Qualifying Commonwealth Citizens'.

I. ECHR

Article 3, Protocol 1[10] of the European Convention on Human Rights ("ECHR") (1950), provides that:

> 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.

Article 3 was initially understood as merely recognising the principle of universal suffrage and creating an obligation on States to hold free elections (rather than conferring any substantive rights).[11] However, in later years, the position changed and the European Commission of Human Rights ("EComHR") began to interpret Article 3 as implying, within the framework of universal suffrage, "*certain individual rights, such as the right to vote and the right to stand for election*".[12] However, there was never any illusion that such rights were absolute. Some of the early jurisprudence on this point is instructive: in the 1974 case, *X v the Netherlands*,[13] the EComHR noted that:

> [although] the Commission […] has ruled that the undertaking of the Contracting Parties to hold free elections implies the recognition of universal suffrage […] it does not follow that Article 3 accords the right unreservedly to every single individual to take part in elections. It is indeed generally recognised that ***certain limited groups of individuals may be disqualified from voting, provided that this disqualification is not arbitrary***.
>
> [Emphasis added]

This caveat to the right to universal suffrage was echoed by the European Court of Human Rights (the "ECrtHR") in *Mathieu-Mohin and Clerfayt v Belgium*,[14] where the ECrtHR made plain that:

> [t]he rights in question are not absolute. Since Article 3 recognises them without setting them forth in express terms, let alone defining them, there is room for implied limitations […] In their internal legal orders the Contracting States make the rights to vote and to stand for election subject to conditions which are not in principle precluded under Article 3 […] ***They have a wide margin of appreciation in this sphere***.
>
> [Emphasis added]

The debate over just how wide this 'margin of appreciation' actually is, in practice, has continued to the current day and will be discussed in more detail below.

II. UN Treaties

While the UN treaties will, in practice, have little bearing on the interpretation of Article 39 CFR, a lot can be learned about the genesis and historical scope of the principle of universal suffrage, as articulated at Article 39(2), by looking at these treaties. Moreover, the International Covenant on Civil and Political Rights ("ICCPR") and the International Convention on the Elimination of All

[10] Protocol 1 was signed in Paris on 20 March 1952.
[11] DJ Harris, E Bates, M O'Boyle, C Warbrick and C Buckley, *Law of the European Convention on Human Rights*, OUP, Oxford, 2009, p712, n.10.
[12] *Alliance des Belges v Belgium*, N° 8612/7 9 (1979), reference to Applications N° 6745/76 and 6746/76 v Belgium (1976).
[13] *X v the Netherlands* N° 6573/74 (1974).
[14] *Mathieu-Mohin and Clerfayt v Belgium*, N° 9267/81 (1981), at paragraph 52.

Forms of Racial Discrimination ("ICERD") are *occasionally* referred to in ECrtHR judgments as relevant law for interpretive purposes.[15]

Article 21 Universal Declaration of Human Rights ("UDHR") (1948) provides that:

> 1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
> 2) Everyone has the right of equal access to public service in his country.
> 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 ICCPR (1966), provides that:

> Every citizen shall have the right and the opportunity […] 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;
> c) To have access, on general terms of equality, to public service in his country.

It can be seen from the above that the UN treaties allocate political membership on the basis of nationality i.e. recognising political rights as citizens' rights rather than human rights. The ICCPR goes so far as to explicitly restrict political rights to 'citizens', while the UDHR grants everyone the right to take part in the "*government of his country*" (perhaps implicitly excluding non-citizens).[16] However, it should be pointed out that, in a footnote to a 2006 report on the rights of non-citizens, the UN Office of the Commissioner for Human Rights, responsible for monitoring the implementation of the ICCPR, did go so far as to assert that:

> States should consider granting the right to participate in public life at the local level, including the right to vote in local elections, to long-term non-citizen residents.[17]

Meanwhile, Article 5(c) ICERD (1965) provides that:

> […] States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:
>
> (c) Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service […]

The ICERD is notable as an exception in terms of the language used, firstly in so far as it is structured around State obligations and not rights and secondly, in that, *prima facie*, it appears to leave some normative space for the inclusion of non-citizens within the scope of the proffered undertakings. However, in a 2004 report, the Committee on the Elimination of Racial Discrimination, responsible for monitoring the implementation of the Convention, noted that:

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[15] See e.g. *Sitaropoulos and Others v Greece (No 2)*, N° 42202/07, (2012) and *Sejdić and Finci v Bosnia and Herzegovina*, N° 27996/06 and 34836/06 (2009).
[16] R Rubio-Marin, 'Transnational Politics and the Democratic Nation-State: Normative Challenges of Expatriate Voting and Nationality Retention of Emigrants', (2006) 81 *New York University Law Review* 190 at 199, n.4.
[17] UN Office of the Commissioner for Human Rights, 'The Rights of Non-Citizens', 2006, n.8.

> [S]ome of these rights [in the Convention], such as the right to participate in elections, to vote and to stand for election, may be confined to citizens […][18]

It appears that for the time-being at least, it is entirely legitimate under the UN Treaties for States to exclude non-citizens from the protective umbrella of the principle of universal suffrage.

In addition, Article 29, the Convention on the Rights of Persons with Disabilities provides that:

> States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others […]

The non-discriminatory application of universal suffrage rights in the context of disability is gaining increasing currency as an issue in the EU and will be discussed in more detail below.

III. Council of Europe Treaties

Article 6 of the Convention on the Participation of Foreigners in Public Life at Local Level (1992) provides for the right to vote for resident non-citizens at the local level. However, the provision is only currently in force in 6 Contracting States: the Netherlands, Norway, Iceland, Denmark, Sweden and Finland. It offers, however, some of the backdrop against which votes for non-citizens have become an increasing issue in the EU and its Member States.

IV. Other Sources: the EU Treaties

Without a doubt, the most important background sources of Article 39 CFR are the EU Treaties themselves. This is especially so given that, as mentioned earlier, the CFR only applies within the scope of Union law and does not *prima facie* extend or modify any rights already guaranteed under the Treaties.

The provisions set out below will be dealt with in more detail in the following sections of this chapter and, for present purposes, it will be sufficient to note that, of all the law analysed so far in this Section, the EU Treaties are notable in that they explicitly provide for the safeguarding of electoral rights for specific categories of non-citizen residents in *all* EU Member States.

The relevant provisions are as follows:

Article 20(2)(b) TFEU provides:

> Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:
>
> > (b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;

Article 22(2) TFEU provides:

> [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 in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to

[18] Committee on the Elimination of Racial Discrimination, 'General recommendation on discrimination against non-citizens', 2004, at Article 3.

detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.

Article 10 TEU provides:

1. The functioning of the Union shall be founded on representative democracy.
2. Citizens are directly represented at Union level in the European Parliament.
   […]
3. *Every citizen shall have the right to participate in the democratic life of the Union*. Decisions shall be taken as openly and as closely as possible to the citizen.
4. Political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union.

[Emphasis added]

Article 14(3) TEU provides:

> The members of the European Parliament shall be elected for a term of five years by direct universal suffrage in a free and secret ballot.

A quick comparison between these EU Treaty provisions and Article 39 CFR reveals that Article 39(1) CFR loosely corresponds to Articles 20(2)(b) and 22(2) TFEU, whereas Article 39(2) CFR loosely corresponds to Articles 10(3) and 14(3) TEU. The former set of provisions can be described as 'EU citizen equal treatment rights', whereas as the latter could be broadly described as 'universal suffrage rights'.

D. Analysis

I. General Remarks

It is worth setting out, in some detail, the history and evolution of European parliamentary electoral rights because it is these pre-existing rights that will give substance to Article 39 CFR.

In the long history of European integration, there can be a discerned a laboured yet persistent drive towards the effective political representation of European citizens. The ideal of a European Parliament which would be *directly elected by universal suffrage* can be traced back to the birth of the European Parliament itself (or rather, the "Common Assembly"[19] of the European Coal and Steel Community (the "ECSC"), as it was then known). This fact is recorded in Article 21(1) of the 1951 Treaty Establishing the European Coal and Steel Community (the "Treaty of Paris") which provides that:

> The Assembly shall consist of delegates whom the Parliaments of each of the member states shall be called upon to appoint once a year from their own membership, ***or who shall be elected by direct universal suffrage***, according to the procedure determined by each respective High Contracting Party.
>
> [Emphasis added]

In its initial iteration then, the ideal of direct elections to the Assembly by universal suffrage is framed as an option[20] (which was never exercised by the Member States). Just six years later, by

[19] The title was changed from 'Assembly' to 'Parliament' by Resolution of the Assembly of 30 March 1962, 1045.
[20] This option was introduced on a proposal from the Foreign Affairs Committee of the French National Assembly, see P Reuter, *La Communauté européenne du charbon et de l'acier*, Paris, 1953, p59.

virtue of Article 2(2) of the 1957 Convention on Certain Institutions Common to the European Communities, Article 21 of the Treaty of Paris was amended and the following provision was introduced as Article 21(3):

> The Assembly shall draw up proposals for elections by direct universal suffrage in accordance with a uniform procedure in all Member States.
>
> The Council shall, acting unanimously, lay down the appropriate provisions, which it shall recommend to Member States for adoption in accordance with their respective constitutional requirements.

In its second iteration, the ideal of direct elections to the Assembly by universal suffrage is framed, in less ambitious terms, as a goal to be achieved by the Assembly and the Council working jointly at some unspecified future point in time.[21] Subsequent to this, Article 21(3) of the Treaty of Paris was reiterated in Article 138(3) of the 1958 Treaty establishing the European Economic Community (the "Treaty of Rome") and so, in any event, it is evident that almost from the very beginning, the architects of the European Communities had envisaged the creation of a Parliament that would be directly elected by universal suffrage. It is also interesting to note that a 'uniform procedure' for elections was envisioned – something that would prove very difficult to achieve. Furthermore, as just indicated, neither the Treaty of Paris nor the Treaty of Rome provided any timetable for achieving elections of the Parliament by direct universal suffrage and ultimately, in spite of these clearly articulated early intentions, it would take almost thirty years to actually achieve this goal.

Throughout the 1960s, the Parliament framed the debate around the effective political representation of European citizens in terms of 'building Europe'[22] and establishing democracy to support this aim.[23] This debate was likely energised by the perceived lack of legitimacy of the Parliament and with respect to the decision making process within the Community institutions more generally.[24] Indeed, for the first few decades of its life, the Assembly (and subsequently the Parliament) was populated by parliamentarians appointed by the executives of their respective Member States. This arrangement also reveals one of the major early obstacles to the introduction of direct elections i.e. that there seems to have been a significant fear that 'anti-European' parties (such as the French and Italian Communist parties), if permitted to be elected to the Assembly, would obstruct the development of the Community.[25] Another obstacle seems to have been that the Parliament remained relatively powerless, in legislative terms, until the 1970s and so it was argued that, in view of its limited powers, direct elections were not warranted.[26] The overarching problem can possibly be boiled down to a lack of political will on the part of the executives of the Member States; in the early days of the European Communities, priority was given to economic integration over political integration and so the Parliament, while receiving a limited degree of support,[27] encountered significant opposition. For example, although the Assembly had adopted a proposal for a uniform

[21] This provision results from a proposal made by the Italian delegation to the Intergovernmental Conference that drafted the Rome Treaties, See F Piodo, *Towards direct elections to the European Parliament*, European Communities, 2009, p15.
[22] Ninth General Report on the Activities of the Community, 1 February 1960 to 31 January 1961.
[23] 'The European Parliament demands that the application of the principles of constitutional theory based on democracy and the primacy of law should be reinforced in order to endure the future development of the Community.' 4 *Bulletin de la Communauté Européene du Charbon et de l'Acier*, Chronologie Années 1950-1960, Luxembourg, 1967,p68.
[24] Y Mény (ed.), *Building Parliament:50 years of European Parliament History*, Office for Official Publications of the European Communities, Luxembourg, 2009, p35.
[25] *Ibid*. p9.
[26] J Shaw, *The Transformation of Citizenship in the European Union: Electoral Rights and the Restructuring of Political Space*, Cambridge, 2007, p103.
[27] The Italian Government had introduced measures concerning the direct elections of Italian members of the European Parliament, and in 1968 Christian Democrat MEPs asked the Italian Government to invite other European governments to begin the direct election of their members; see *Cahiers de documentation européenne*, October-Décembre 1969, Parliament Européen, 69.

electoral procedure for direct elections to the European Parliament as early as 1960,[28] it received a lukewarm response from the foreign ministers of the Member States and very little action was actually taken with respect to this proposal throughout the 60s.[29]

The *status quo* changed in the 1970s when – partially as a result of the election in March 1974 of Valéry Giscard d'Estaing, a supporter of direct elections, as French President – the attitude of the Member States' executives became more conducive to the idea of direct elections to the Parliament.[30] The final communiqué of the Summit of Heads of State or Government in Paris of December 1974 maintained that direct elections to the European Parliament should take place "*as soon as possible*".[31] The communiqué even went so far as to direct the Council of Ministers to reach a decision by the end of 1976.[32] To that end, the decision to hold direct elections was taken in Rome in December 1975 by the European Council and, on 20 September 1976, the Council Act on Direct Elections was adopted. Finally, after almost 30 years of effort, the first European parliamentary elections were held in 1979. Although, as already noted, [33] the 1976 Act lays down some limited 'uniform' aspects of elections to the European Parliament,[34] ultimately, the Member States are left with very wide discretion in terms of implementation. Indeed, the 'uniform procedure' for European Parliament elections, promised as early as 1957 in the Treaty of Paris, was still no nearer to being realised.

It is important to remember that, at this early stage in its development, the nascent 'right' to vote[35] in European parliamentary elections was only secured at the national level, to the citizens of the Member States resident in those states. The adoption of the 1976 Act had no impact, as such, on the rights of European citizens at the level of EU law. Rather, it merely recommended the Member States should implement provisions at the national level allowing for free, secret, direct and universal elections to the European Parliament.[36] In this light, soon after the first direct elections in 1979, the Parliament settled down to examine the criteria for extending the right to vote as an entitlement under EU law. However, the period of 'Eurosclerosis'[37] (i.e. the period of political stalemate, in terms of European integration, and economic stagnation) throughout the early 1980s largely side-lined the voting rights debate for a number of years.

It was not until the mid-80s, when Jacques Delors took over from Gaston Thorn as President of the Commission, that the debate truly gained some momentum once again. Delors quickly introduced a timetable for the completion of the internal market before 1992.[38] This initiative proved to be a catalyst for Treaty reform and led, via the 1992 Treaty of Maastricht, to the first concrete legal development, at the EU law level, in relation to the European parliamentary voting *and,* candidacy rights, of European citizens. The Treaty of Maastricht and the formal creation of 'citizenship of the Union' (now to be found in Article 20 TFEU) saw the introduction of limited equal treatment rights

[28] The proposal is to be found in a Resolution dated 17 May 1960, Journal Officiel 1960, 834, Article 7.
[29] A communiqué from the six Foreign Ministers announced that five Member States were willing to take it under consideration, but France did not consider it the right time, see above n.21, *Towards direct elections to the European Parliament*, p25.
[30] Above at n. 24, Y Mény (ed.), *Building Parliament:50 years of European Parliament History*, p36. See also S Pinder, 'Steps Towards a Federal European Parliament', (2000) 35 *International Spectator: Italian Journal of International Affairs*, p15.
[31] *Ibid*.
[32] *Ibid*.
[33] See above at n.4
[34] Most of the limited aspects of uniform procedure contained in the 1976 Act were introduced by amendment in 2002.See more on this below in the discussion of Council Decision 2002/772/EC.
[35] N.B. the Direct Elections Act made no reference to a right to stand as a candidate.
[36] The Council Decision and Act concerning the election of the representatives of the European Parliament by direct universal suffrage, OJ 1976 C27/5.
[37] Coined by Herbert Giersch at a Lecture delivered in Sydney on August 20, 1985, at the Regional Meeting of the Mont Pelerin Society.
[38] Commission White Paper on completing the Internal Market (COM(85) 310).

for nationals of the Member States in local and European parliamentary elections (now to be found in Articles 20(2)(b) and 22 TFEU).

It warrants mentioning that the creation of 'citizenship of the Union' did not affect, in any way, the quality of national citizenship or the competence of Member States to determine their citizenry. Union citizenship only had a constitutional impact upon the Member States within the confines of the principle of 'additionality' as now set out in Article 9 TEU[39] and Article 20(1) TFEU[40].

It should also be recalled that while there was now, thanks to the Maastricht Treaty, a right of equal treatment (in the context of voting in European parliamentary elections) for Union citizens exercising their free movement rights, there was still no universal right to vote at the level of EU law. That is to say, there was still no explicit EU law right to vote in European Parliament elections which would embrace *all* Union citizens i.e. including those who remained 'static'. This would not formally come to pass until the Treaty of Lisbon, 14 years later, although jurisprudence from the ECrtHR *implicitly* established the universality of the right to vote in European Parliament elections as early as 1999.[41]

The original EP electoral rights provision (Article 8(b) of the Treaty Establishing the European Community (the "TEC", now the TFEU)) was implemented in 1993 through Directive 93/109/EC,[42] which specifically addresses the issue of the equal treatment rights of 'mobile' EU citizens who have exercised their free movement rights to move from their Member State of nationality to a second Member State. Directive 93/109/EC is structured around the concept of the 'Community voter', i.e. the national of one Member State (and consequently a citizen of the Union) who is resident in another Member State and who therefore has the right to vote in European Parliament elections by virtue of the Directive.[43] In summary, the Directive essentially sets out the requirements to be met by such mobile EU citizens wishing to vote or stand as a candidate in their country of residence.[44] Additionally, the Directive sets out some minimal procedural requirements and permissions, in terms of information exchange between Member States and the exercise of voting rights, and a further provision in relation to derogations.[45] The 1998 Commission report on the implementation of the Directive indicated that the Directive had been applied by all EU Member States to the elections to the European Parliament of June 1994.[46] Indeed, while implementation has been, broadly speaking, without upset,[47] contention has arisen primarily as regards the circumstances in which national electoral law can curtail the Treaty rights which the Directive implements (see further on this at Sections DIII and DIV below).[48]

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[39] I.e., '*Citizenship of the Union shall be additional to and not replace national citizenship.*'

[40] I.e., '*Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.*'

[41] See *Matthews v United Kingdom*, N° 24833/94, (1999) – discussed in more detail below.

[42] Directive 93/109/EC, OJ [1993] L 329/34. Art. 22(1) was implemented through Directive 94/80/EC, OJ [1994] L 368/38.

[43] Above at n. 26, J. Shaw, *The Transformation of Citizenship in the European Union*, p132.

[44] See Directive 93/109/EC, Articles 3 to 6.

[45] *Ibid*. Articles 7 to 13 and Article 14 respectively.

[46] Report from the Commission to the European Parliament and the Council on the application of Directive 93/109/EC - Voting rights of EU citizens living in a Member State of which they are not nationals in European Parliament elections (COM(97)731).

[47] There was some disappointment on the part of the Commission in relation to information exchange between the Member States. See, Communication from the Commission of 18 December 2000 on the application of Directive 93/109/EC to the June 1999 elections to the European Parliament – Right of Union citizens residing in a Member State of which they are not nationals to vote and stand in elections to the European Parliament (COM (2000) 843).

[48] See also, Report from the Commission of 27 October on the election of Members of the European Parliament and on the participation of European Union citizens in the elections for the European Parliament in the Member State of residence (COM (2010) 605) which notes that, 'while in general, EU countries have correctly transposed and implemented Directive 93/109/EC, a few countries impose conditions on non-national EU citizens, thereby creating obstacles to the exercise of their right to vote and to stand as a candidate in their countries of residence; in certain cases contrary to the directive. Furthermore, a number of EU countries must also take further measures to ensure that they comply with the obligation to provide sufficient information to citizens on the exercising of their rights.'

Directive 93/109 does not affect the rights of the nationals of a Member State to vote and stand in European Parliament elections in their *own* country, whatever their circumstances. In other words, it does not regulate the question of whether Member States must allow external voting in European Parliament elections. It should also be noted that the Directive allows considerable scope for national variation in implementation measures and, consequently, left unattained the promise of a 'uniform procedure' for European parliamentary elections which, as already noted, was made as long ago as 1957. However, by virtue of the case-law of the CJEU, which will be discussed in further detail below, while Member States do enjoy substantial discretion in determining the substance of European parliamentary electoral rights for the users of such rights (within the confines of the Directive), they are nonetheless bound to respect the general principles of EU law and are precluded from treating different categories of EU citizens who are in the same circumstances in a way that discriminates between them.

Moreover in 2002, nearly 50 years after the initial promise was made, some significant progress was made in respect of uniform electoral procedure. [49] Council Decision 2002/772/EC, although leaving a great deal at the discretion of the Member States, went some way towards standardizing elements of European Parliament election procedure.[50] The Decision amended the 1976 Direct Elections Act[51] and, amongst other things, introduced proportional representation for European Parliament elections. Member States were, however, left with discretion to implement this amendment by way of either the adoption of a *list* or *single transferable vote* system. Other notable amendments made by the Decision were the elimination of the dual mandate of European Parliament members such that they were no longer responsible to their Member State parliaments and the introduction of a requirement that any minimum threshold for the allocation of seats to a party set by a Member State should not exceed 5%.[52]

The most significant recent development in the evolution of European parliamentary electoral rights has, of course, been ushered in with the 2007 Treaty of Lisbon. The major innovation of the Treaty of Lisbon was to link the citizenship provisions in the TFEU (i.e. in this context, Articles 20(2)(b) and 22(2) TFEU) to the new provisions on democratic representation in Title II of the reworked TEU (i.e. Article 10 TEU).[53] The Treaty developments can perhaps best be understood as a codification of the position taken by the ECrtHR and CJEU in a number of important cases which had broadly confirmed that European citizens have a right, as a matter of democratic principle, to vote for "their"

[49] For more detail on the debate around uniform electoral procedure, see *inter alia*: Resolution on the draft uniform electoral procedure for the election of Members of the European Parliament OJ C 115, 26.4.199; Resolution on the European Parliament' s guidelines for the draft uniform electoral procedure OJ C 280, 28.10.1991; Resolution on a draft uniform electoral procedure for the election of members of the European Parliament OJ C 87, 5.4.1982; and Case C-41/92 *Liberal Democrats v European Parliament*.

[50] Council Decision 2002/772/EC, Euratom (OJ L 283, 21.10.2002, p. 1)

[51] The 1976 Act was also amended on another occasion, in 1993. The amendments in 1993, adopted partly to account for the unification of Germany and the planned enlargement, introduced a scheme for the allocation of seats per Member State (Decision 93/81 (OJ L 33, 9.2.1993, p. 15)).

[52] Although Member States are indeed left with wide discretion in terms of implementation under the 1976 Act, this does not mean that the widest possible application of the Act's provisions will always be favoured. A recent and notable example of this can be found in two cases heard before the German Constitutional Court on the interpretation of s(2)7 of the Europawahlgesetz (Cases BVerfG of 9 November 2011, 2 BvC 4/10, 2 BvC 6/10, 2 BvC 8/10). Article 2(a) of the 1976 Act provides that: "*Member States may set a minimum threshold for the allocation of seats. At national level this threshold may not exceed 5 per cent of votes cast*." In spite of this permission under the Act, the German Constitutional Court ruled that just such a 5 per cent hurdle applicable under s2(7) Europawahlgesetz (designed to stop small parties from entering the European Parliament) was unconstitutional and therefore void.

[53] J Shaw, 'Citizenship: contrasting dynamics at the interface of integration and constitutionalism', in P Craig and G de Burca (eds), *The Evolution of EU Law,* (Oxford University Press, 2011) 575-609

parliament.[54] The Treaty of Lisbon, by linking the rights of non-national Union citizens to equal treatment (i.e. the rights of the 'Community voter') to the rights to democratic participation and representation (i.e. the ideal of direct universal suffrage stemming from the Treaty of Paris), for the first time, arguably established the universal right of Union citizens, regardless of whether they are 'mobile' or 'static', to participate in the democratic life of the union by voting or standing for elections to the European Parliament. Thus, as set out above, Article 10(2) TEU provides that "*Citizens are directly represented at Union level in the European Parliament*" and Article 10(3) TEU states that "*Every citizen shall have the right to participate in the democratic life of the Union.*"

Another recent development has come in the form of an amendment to Directive 93/109/EC. The new Directive 2013/1/EU, adopted on 20 December 2012, makes it easier for non-national EU citizens to stand for election in the host State.[55] The amending Directive eliminates the requirement on non-national candidates to secure an attestation from their home State as to their eligibility to stand for election. There was some concern that candidates were having trouble identifying the relevant authorities empowered to issue such attestation. The Directive has simplified this procedure for the candidate by shifting the burden to the Member States. Candidates are now only required to sign a formal declaration that they are eligible to stand, and the State of residence will then be required to request the candidate's home State to confirm. The home State will then have the obligation of verifying that the candidate has no judicial or administrative decisions against his/her name depriving the candidate of the right to stand. If the home State does not respond to the requesting State within five days, the candidate will automatically be admitted.

This amendment was based on an original (and much broader) 2006 proposal from the European Commission, which was re-launched and stripped down (i.e. removing a proposal on the subject of double voting which had proved contentious amongst Member States), in 2011. The new rules will now be implemented in time for the European Parliament elections in 2014.

Although they will not be dealt with in extensive detail in this Chapter, the most recent debates on the subject of European parliamentary electoral rights, revolve around issues of voter participation, participatory democracy and the electoral rights of physically disabled persons and persons with mental health impairments (which *will* be discussed in more detail below).[56]

II. Scope of Application

The substance of the rights guaranteed by Article 39 CFR will be dealt with in more detail in the following Sections; this Section merely sets out, in broad and abstract terms, the scope of Article 39 CFR.

A discussion on the scope of Article 39 CFR can be usefully distributed between 'territorial scope', 'jurisdictional scope', 'vertical scope', 'personal scope' and 'protective scope':

- By territorial scope, we should understand that while Article 39 CFR applies to all Union citizens, it is within the competence of Member States to limit the rights it guarantees by residence requirements;

[54] See *Matthews v United Kingdom*, N° 24833/94, (1999) – discussed in more detail below. See also House of Lords Select Committee on Constitution Written Evidence, Memorandum by Professor J Shaw, Salvesen Chair of European Institutions, University of Edinburgh.
[55] Directive 2013/1/EU, OJ [2013] L 26/27.
[56] See for more information see *Fundamental rights: challenges and achievements in 2011, Chapter 7: Participation of EU citizens in the Union's democratic functioning*, FRA – European Union Agency for Fundamental Rights, 2012, available from http://fra.europa.eu.

- By jurisdictional scope, we should recognise that Article 39 CFR will (generally) not apply in jurisdictions which fall outwith EU Treaty framework or where the European Parliament cannot be characterised as a 'legislature';

- By vertical scope, we should recall that, in the current state of EU law, it is for the Member States to determine who to include in the electorate for the purposes of the rights specified at Article 39 CFR and that they have a wide margin of appreciation in this respect;

- By personal scope, we should understand that, as noted earlier, Article 39 CFR applies to both static and mobile Union citizens and does not require the exercise of free movement rights in order to be activated; [57] and

- By protective scope, we should observe that, on the basis of CJEU and ECrtHR jurisprudence, it is prudent to view Article 39 CFR primarily as an EU law non-discrimination and equal treatment right and secondarily, as a guarantee against the irrational implementation or application by Member States of the electoral rights which Article 39 CFR guarantees.

Having set the broad parameters, in the following Section, we will explore the scope of Article 39 CFR in more detail as we try to understand the substance of the rights which this provision guarantees.

III. Specific Provisions

The aim in this Section is to try to understand more about the likely interpretation of Article 39 CFR and the substance of the rights which are guaranteed. It will therefore be necessary to explore, in a little bit of detail, a range of very important cases that have arisen from the ECrtHR and the CJEU on the subject of electoral rights for European parliamentary elections i.e. *Matthews v United Kingdom*,[58] *Spain v United Kingdom*[59] and *Eman and Sevinger v College van burgemeester en wethouders van Den Haag*.[60]

Important Cases

Matthews v United Kingdom

In 1994, Ms Denise Matthews, a British citizen and a resident of Gibraltar,[61] applied at her local Electoral Registration Office to register as a voter in the 1994 European Parliament elections. The Electoral Registration Officer replied in the following terms:

> The provisions of Annex II of the EC Act on Direct Elections of 1976 limit the franchise for European parliamentary elections to the United Kingdom. This Act was agreed by all member States and has treaty status. This means that Gibraltar will not be included in the franchise for the European parliamentary elections.

[57] See *Matthews v United Kingdom*, above at n. 54, *Spain v the United Kingdom*, above at n. 9, and the Treaty of Lisbon.
[58] *Ibid*. *Matthews v United Kingdom*.
[59] See *Spain v the United Kingdom*, above at n. 9.
[60] Case C-300/04 *Eman and Sevinger v College van burgemeester en wethouders van Den Haag* [2006] ECR I-8055.
[61] Gibraltar is a dependent territory of the United Kingdom. It forms part of Her Majesty the Queen's Dominions, but not part of the United Kingdom. The United Kingdom parliament has the ultimate authority to legislate for Gibraltar, but in practice exercises it rarely.

Sure enough, Annex II of the Direct Elections Act provided that "[t]*he United Kingdom will apply the provisions of this Act only in respect of the United Kingdom*". Ms Matthews took her case to the EComHR claiming that there had been a breach of her right to participate in elections to choose "*the legislature*" contrary to Article 3, Protocol 1 of the ECHR. For convenience, Article 3 provides:

> 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***.
>
> [Emphasis added]

It should be mentioned that the TEC applied to Gibraltar by virtue of what is now Article 355(3) TFEU[62], which provided that the Treaty applied to the European territories for whose external relations a Member State was responsible. While there are some areas of EU law that did not, at the time, have effect in Gibraltar, European Community legislation concerning, *inter alia*, such matters as free movement of persons, services and capital, health, the environment and consumer protection all applied in Gibraltar.

The argument between the parties was framed around the question of whether the European Parliament, at the relevant time, had the characteristics of a 'legislature' in Gibraltar. The UK contended that, at the time, the European Parliament continued to lack both of the most fundamental attributes of a legislature: the power to initiate legislation and the power to adopt it.

Ultimately, the ECrtHR held that even though Gibraltar was excluded from certain areas of Community activity, there remained significant areas where Community activity had a direct impact in Gibraltar.[63] The European Parliament's involvement in specific legislative processes and the general democratic supervision of the EU's activities was enough to render it part of the legislature of Gibraltar for the purposes of Article 3 and, on that basis, there had been a violation of Article 3 as the very essence of Ms Matthews' right to vote to choose the legislature had been denied.[64]

Spain v United Kingdom

As just noted above, in *Matthews v United Kingdom*, the ECrtHR had held that the UK was in breach of Article 3, Protocol 1 of the ECHR in failing to hold European Parliament elections in Gibraltar. To comply with the ECrtHR decision and for the purpose of holding such elections in future, the UK enacted the 'European Parliament (Representation) Act 2003',[65] which made Gibraltar part of the constituency of south-west England and granted the right to vote to persons registered in Gibraltar, including both EU citizens and, in line with the constitutional traditions in the UK, also so-called "Qualifying Commonwealth Citizens".[66] In the context of Gibraltar, this meant that a group of around 200 Commonwealth citizens (i.e. not citizens of the Union) residing in Gibraltar were rendered eligible to vote for the European Parliament elections.

Spain objected to a number of measures that the UK had adopted to implement the *Matthews* case, but chiefly to the inclusion of Commonwealth citizens in the franchise, and requested the Commission to bring an enforcement action against the UK. However, making no headway with the

[62] Formerly Article 299(4) TEC.
[63] See *Matthews v United Kingdom*, above at n. 54, at paragraph 53.
[64] *Ibid*. at paragraph 54.
[65] European Parliament (Representation) Act 2003 c. 7, Part 2.
[66] In the UK all Commonwealth citizens who are resident in the UK and who have leave to enter or remain in the UK or do not require leave to enter or remain in the UK ("Qualifying Commonwealth Citizens") are entitled to vote in all forms of elections in the UK. See Representation of the People Act 1983 ss1 and 2; Scotland Act 1998 s11; Government of Wales Act 2006 s12; The Northern Ireland Assembly (Elections) Order 2001 s4(1); Elected Authorities (Northern Ireland) Act 1989 s1(c); Local Government Act 2000 s43(1)(a); and Local Government Act 2000 s45(4).

Commission, Spain brought an enforcement action itself under Article 226 TEC (now Article 258 TFEU). Spain contended, *inter alia*, that by including Commonwealth citizens, the UK was in breach of Articles 189[67] and 190[68] TEC, under which the right of suffrage was, Spain argued, confined to EU citizens. Spain also sought to rely on Article 19(2) TEC (now 22(2) TFEU), asserting that the language of the provision expressly confined the right to "citizens of the Union". In support of its argument, Spain also referred to Article 39 CFR. Spain noted that the provision "*uses the expression "[e]very citizen of the Union", and not the term "everyone" or an expression referring to national law*".[69] Spain also contended that the right to vote of a national of a non-Member State cannot be described as a "human right" or a "fundamental freedom".[70] Meanwhile, the European Commission, in support of the UKs case, argued that the wording of Article 39 CFR should not be viewed as requiring the right to vote to be limited to Union citizens.[71]

The ECJ, as it then was, held that the Treaty did not expressly state who was entitled to vote in European Parliamentary elections, nor did it state that its provisions were confined to EU citizens alone.[72] The Court maintained that Article 19(2) TEC was a rule of equal treatment between citizens of the Union and could not be interpreted in a way that would prevent a Member State from extending the right to vote to those with whom it had a close link.[73] The final choice of who to include in the electorate was, the Court said, "*in the current state of Community law*", a matter for individual Member States to determine.[74] The Court supported its position by referring to the "*constitutional traditions*" of the UK (i.e. enfranchising resident Commonwealth citizens in all UK elections).[75] The UK had therefore not been in breach of the Treaty by including Commonwealth citizens in the Gibraltar electorate. The Court made no reference to Article 39 CFR – this being before the Treaty of Lisbon.[76]

Eman and Sevinger v College van burgemeester en wethouders van Den Haag

In 2004, Mr Michiel Eman and Mr Oslin Sevinger, two Netherlands citizens, resident on the island of Aruba,[77] applied to be entered on the register which was maintained in the Netherlands, for European Parliament elections. The *College van Burgemeester en Wethouders* (i.e. the municipal executive) of Den Haag, rejected their application on the basis of the *Keiswet* (i.e. the Netherlands Electoral Act). The *Kieswet* granted the right to vote in European Parliament elections to all

[67] I.e. "*The European Parliament, which shall consist of representatives of the peoples of the States brought together in the Community, shall exercise the powers conferred upon it by this Treaty*".
[68] I.e. "*The representatives in the European Parliament of the peoples of the States brought together in the Community shall be elected by direct universal suffrage* […]".
[69] See *Spain v the United Kingdom*, above at n.9, at paragraph 42.
[70] *Ibid*.
[71] *Ibid*. at paragraph 56 – although it should be noted that the Court went on to say that the United Kingdom and the Commission interpreted Article 39 CFR as not permitting the right to vote ***currently conferred*** by a Member State on third-country nationals to be impaired. This begs the question: what would the position be if a Member State, let's say the UK, chose to enfranchise a *new* group of third country nationals in European Parliament elections?
[72] *Ibid*. at paragraphs 65 to 70.
[73] *Ibid*. at paragraph 76.
[74] *Ibid*. at paragraph 78.
[75] *Ibid*. at paragraph 79.
[76] It has been suggested that this omission was on account of the Courts desire not to accord too much weight to a document which was not, at the time, legally binding. See LFM Besselink, 'Case C–145/04, *Spain v. United Kingdom*, judgment of the Grand Chamber of 12 September 2006; Case C–300/04, *Eman and Sevinger*, judgment of the Grand Chamber of 12 September 2006; ECtHR (Third Section), 6 September 2007, Applications Nos. 17173/07 and 17180/07, *Oslin Benito Sevinger and Michiel Godfried Eman v. the Netherlands (Sevinger and Eman)*, (2008) 3 *Common Market Law review* 787–813.
[77] Aruba is one of the four constituent countries that form the Kingdom of the Netherlands, together with the Netherlands, Curaçao, and Sint Maarten whose citizens share a Dutch nationality. The legislature in Aruba is largely autonomous; however, there are a few areas, such as foreign affairs, defence and nationality which are still regulated by acts of the *Staten-Generaal* (legislature for the Kingdom of the Netherlands).

Netherlands nationals with the exception of those resident in Aruba and in the Netherlands Antilles.[78] Mr Eman and Mr Sevinger instituted proceedings against the decision of the municipal executive before the *Raad van State* (i.e. the Council of State),[79] claiming that the Netherlands Electoral Act infringed the provisions in the TEC on Citizenship,[80] and infringed Articles 189[81] and 190[82] TEC read in conjunction with Article 3, Protocol 1 of the ECHR which, they argued, granted the right to vote in European Parliament elections to all citizens of Member States, including those residing in overseas countries. The matter was referred to the ECJ for clarification, *inter alia*, as to the correct interpretation of the relevant Treaty provisions and, essentially, seeking to ascertain whether a Member State must grant the right to vote in European elections to persons who, although possessing its nationality, resided in an overseas territory which was covered by special association arrangements with the Community.

It should be briefly mentioned that Aruba was an overseas country or territory ("OCT") for the purposes of the TEC. This meant that EC law did not, in principle, apply to it expect in relation to the special regime contained in Part Four of the TEC (i.e. Article 299(3) TEC (now Article 355(2) TFEU), which should be distinguished from the separate provisions, mentioned above, for Member States' European territories, such as Gibraltar, under Article 299(4) TEC).

The ECJ held that persons, who possessed the nationality of a Member State, and who resided or lived in a territory which was one of the OCTs referred to in Article 299(3) TEC, could rely on the rights conferred on citizens of the Union in the Treaty.[83] Furthermore, the Treaty did not expressly state who was entitled to vote in European Parliamentary elections[84] and in the current state of Community law, the definition of the persons entitled to vote and to stand for election fell within the competence of each Member State acting in compliance with Community law.[85]

The ECJ further noted that Member States were not required to hold elections to the European Parliament in OCTs under the TEC and that since the provisions of the Treaty did not apply to OCTs, the European Parliament could not be regarded as their "legislature" within the meaning of Article 3, Protocol 1 of the ECHR.[86] The Court further stated that the TEC did not confer an unconditional right to vote and to stand as a candidate in elections to the European Parliament and that, in view of ECrtHR jurisprudence, it was not inappropriate for Member States to use residence as a criterion for determining who could vote and stand in such elections.[87]However, such provisions must not be applied arbitrarily, unreasonably or in contravention of the principle of equal treatment.[88] It should be noted that the reference to considerations of *reasonableness* and *arbitrariness* was made in the context of a discussion on ECHR jurisprudence on Article 3, Protocol 1 ECHR. It is notable that the Court relied on such jurisprudence to come to its conclusion that it was not inappropriate for Member States to use residence as a criterion.

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[78] Besselink, above, n. 76.
[79] In the Netherlands, the Council of State is a constitutionally established advisory body to the government.
[80] See the Treaty Establishing the European Community, Part Two (Articles 17 – 22) instituting citizenship of the Union for all Member State nationals and articulating certain Citizens' rights such as the right to equal treatment for non-national Union citizens wishing to vote in European Parliament elections in the Member State in which they reside (Article 19(2) TEC).
[81] I.e. "*The European Parliament, which shall consist of representatives of the peoples of the States brought together in the Community, shall exercise the powers conferred upon it by this Treaty*".
[82] I.e. "*The representatives in the European Parliament of the peoples of the States brought together in the Community shall be elected by direct universal suffrage* […]".
[83] Above at n. 60at paragraphs 27 to 29.
[84] *Ibid*. at paragraphs 40 to 44.
[85] *Ibid*. at paragraph 45.
[86] *Ibid*. at paragraph 46 to 48.
[87] *Ibid*. at paragraph 51 to 55.
[88] Which as one of the general principles of Community law, requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment was objectively justified – see paragraphs 54 to 60.

Finally, the ECJ noted that it had not been demonstrated, in this case, that the principle of equal treatment had not been infringed given that all those Netherlands expatriate citizens who resided in other parts of the world (i.e. outside of the Netherlands OCTs), were entitled to vote in European Parliament elections, while those residing in OCTs, such as Aruba, were disenfranchised.[89]

The Scope of Article 39 CFR

Having set out the relevant case law, we can now explore, by reference to that case law, the likely scope of Article 39 CFR. The case law illustrates how the CJEU has been very cautious in defining the scope of the rights guaranteed under EU law.

With respect to *jurisdictional* scope, in *Matthews*, the ECrtHR made it plain that the right to vote and stand in European parliamentary elections should be limited to jurisdictions in relation to which the European Parliament can accurately be characterised as a 'legislature'. Meanwhile, in *Eman and Sevinger*, the ECJ confirmed that since the provisions of the Treaty did not apply to OCTs, the European Parliament could not be regarded as a "legislature" in such territories within the meaning of Article 3, Protocol 1 of the ECHR. This jurisprudence limits the scope of Article 39 CFR by reference to the legal reach of the EU Treaty framework i.e. Union citizens who do not reside in jurisdictions that are bound by the Treaties will not have an absolute right vote and stand in European Parliament elections and will only be enfranchised where the relevant Member State has determined to enfranchise them.

With respect to *vertical* scope, it is clear from the jurisprudence that, in absence of any further Treaty developments, it is for the Member States, and not the CJEU, to determine the contours of the electorate for the purposes of European parliamentary elections. In *Spain v UK*, the Court framed its reasoning in terms of the "*competence of Member States*" to extend the right to vote to those with whom they have a "*close link*" and in terms of the "*current state of Community law*" and the "*constitutional traditions*" of the UK. Again, in *Eman and Sevinger*, the Court stipulated that, "*in the current state of Community law, the definition of the persons entitled to vote and to stand for election falls within the competence of each Member State*".[90] The reliance by the Court on this line of reasoning illustrates the deference it feels bound to give, as a consequence of the current EU law framework, to the constitutional arrangements of the Member States. In this sense, Article 39 CFR can be viewed as vertically limited in that any vertical bond that exists between citizens and the Union in this context is necessarily mediated by national law.

The discretion granted to Member States in this respect also permits the circumscription of the *territorial* scope of Article 39 CFR. This was confirmed by the CJEU in *Eman and Sevinger*, where the Court made clear that:

> [T]here is nothing which precludes the Member States from defining, in compliance with Community law, the conditions of the right to vote and to stand as a candidate in elections to the European Parliament by reference to the criterion of residence in the territory in which the elections are held.[91]

However, as discussed above, Article 39 CFR does appear to be pervasive in terms of its *personal* scope (i.e. it applies to both static and mobile Union citizens). Certainly the Treaty of Lisbon seems to elevate what was originally a right of equal treatment to *mobile* EU citizens, into a right, albeit not absolute, of *all* Union citizens, to participate in the democratic life of the Union by voting and

[89] *Ibid*.
[90] *Ibid*. at paragraph 45.
[91] *Ibid*. at paragraph 61.

standing in European Parliament elections. However, *Eman and Sevinger* and *Spain v UK* were decided prior to the changes brought in by the Treaty of Lisbon, and so the exact contours of this right in light of these Treaty amendments are yet to be settled out by the CJEU.

The question that remains, however, is 'what is the *protective* scope of Article 39 CFR?' In other words, once we have taken into account the various ways in which the electoral rights that Article 39 purports to guarantee can be limited by reference to territory, jurisdiction and the current EU law framework (i.e. personal and vertical scope), what remains of the substance of such rights? In this respect, the jurisprudence reveals not only the right to non-discrimination on grounds of nationality – as explicitly provided for in the relevant EU law provisions – but also, an equal treatment principle, which is not limited by reference to nationality, and which perhaps hints at a guarantee against the arbitrary or unreasonable application or implementation by Member States, of European parliamentary electoral rights.

Indeed, the willingness of the ECJ, in *Eman and Sevinger*, to extend general principles of EU law (i.e. equal treatment) to protect citizens of the Union, even though such citizens fell outwith the *jurisdictional* scope (as defined in Section DII, above) of the EU Treaty framework, is the true innovation of this case. Furthermore, the reference made by the Court to considerations of the arbitrariness and rationality of relevant legal provisions adds another dimension to the equal treatment principle in this context.

The question that follows from this is to what extent the protective scope of Article 39 CFR, emerging from *Eman and Sevinger*, can be said to also cover third country nationals to whom European parliamentary electoral rights have been extended by virtue of national law? In other words, what happens when the principles emerging from *Eman and Sevinger* are combined with those emerging from *Spain v UK*? Once third country nationals (who are also, by definition, not Union citizens) residing in Member States or territories covered by European parliamentary rights have been brought within the purview of Article 39 because a Member States has exercised its discretion, is there, under EU law, an obligation on the Member State to apply those provisions in a manner that is rational, consistent and in accordance with the principle of equal treatment? Moreover, if such third country nationals *are* afforded some form of guarantee of equal treatment or protection against irrationality and arbitrariness, does such protection derive from Article 39 CFR, from Article 3, Protocol 1 of the ECHR, or from general principles of EU law? Unfortunately, the answers to these questions remain presently out of reach and can only be clarified CJEU.

IV. Limitations and Derogations

a. Limitations and derogations from Article 39 CFR under the Charter

The Charter provides at Article 52(1) that:

> Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. ***Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others***.

This provision remains to be interpreted by the CJEU, however, given that by virtue of Articles 52(2) and (3) CFR, Charter rights (like Article 39 CFR) which are provided for under the Treaties or which correspond to rights existing under the ECHR, are to be interpreted within the limits of existing law (see more on this directly below), it is not likely that this provision will have any dramatic novel effect in the short term.

b. Limitations and derogations from Article 39 CFR on grounds of EU law

The likely limitations on Article 39 CFR under EU law have already been extensively explored in the context of the above discussion on the likely scope of the provision. Consequently here we will only discuss derogations under EU law.

As has already been noted above, in accordance with Article 52(2) of the Charter, Article 39 applies under the conditions laid down *in* and within the limits defined *by* the Treaties. Moreover, as also noted above, Directive 93/109/EC (which implements the relevant Treaty provisions) provides scope for derogation at Article 14.

The Directive provides for exceptions to the principle of equal treatment between national and non-national voters where this is deemed to be justified by complications which are specific to a Member State. Such expectations are deemed to be justified where the proportion of Union citizens of voting age, resident in a Member State of which they are not a national, is much greater than the average within the Union as a whole. Article 14(1) provides:

> If […] in a given Member State, the proportion of citizens of the Union of voting age who reside in it but are not nationals of it exceeds 20 % of the total number of citizens of the Union residing there who are of voting age, that Member State may, by way of derogation […]:
>
> (a) restrict the right to vote to Community voters who have resided in that Member State for a minimum period, which may not exceed five years;
>
> (b) restrict the right to stand as a candidate to Community nationals entitled to stand as candidates who have resided in that Member State for a minimum period, which may not exceed 10 years.

In effect, this derogation is only granted to and applied by Luxembourg, where in 2007, the proportion of non-national citizens of the Union, of voting age, was 37.87% of the total number of Union citizens of voting age.[92]

[92] For more information, see: Report from the Commission to the European Parliament and to the Council of 20 December 2007 on granting a derogation pursuant to Article 19(2) of the EC Treaty, presented under Article 14(3) of Directive 93/109/EC on the right to vote and to stand as a candidate in elections to the European Parliament (COM(2007) 846) and Report from the Commission to the European Parliament and to the Council of 27 January 2003 on granting a derogation pursuant to Article 19(2) of the EC Treaty, presented under Article 14(3) of Directive 93/109/EC on the right to vote and to stand as a candidate in elections to the European Parliament (COM(2003) 31).

c. Limitation of Article 39 CFR by virtue of the ECHR

Although not explicitly referred to in the explanation of Article 39 CFR, Article 52(3) provides that:

> In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

It would not be difficult to argue that the rights provided for by Article 39 CFR (certainly the universal suffrage right at Article 39(2)) correspond to the rights articulated at Article 3, Protocol 1 ECHR. Certainly, *Matthews v United Kingdom* would suggest that this is the case. Moreover, in *Eman and Sevinger* the ECJ referred to ECHR jurisprudence concerning the limitation of Article 3, Protocol 1 on grounds of residence and linked this jurisprudence to the right to vote and stand in European Parliament elections. The ECJ asserted that:

> Having regard to [ECHR jurisprudence], the criterion linked to residence does not appear, in principle, to be inappropriate to determine who has the right to vote and to stand as a candidate in elections to the European Parliament.[93]

This cross-reference quite clearly suggests a correspondence between the right to vote and to stand as a candidate in elections to the European Parliament as contained at Article 39 CFR and the rights guaranteed by Article 3, Protocol 1 ECHR.

It would not then be overly presumptuous to suggest that the limitations to Article 3, Protocol 1 ECHR as expressed within the ECrtHR case law (such as limitations on the basis of residence) would likely apply to Article 39 CFR (with the caveat that Union law *may* – although it does not currently – provide more extensive protection). Under the following headings we will explore the main categories of limitation that exist under ECHR case law.

Limitation on grounds of criminal convictions/incarceration

Recent ECrtHR cases such as *Hirst v the United Kingdom (No 2)*[94] and *Scoppola v Italy (No 3)*[95] have confirmed that it is within the competence of States to disenfranchise prisoners so long as there is no general and automatic disenfranchisement of *all* serving prisoners.

Several EU Member States, including Denmark, Finland, Ireland, Spain and Sweden have no form of disenfranchisement for imprisoned offenders. In other States, disenfranchisement depends on the nature of the offence committed or the duration of the sentence; while in yet others prisoners are only allowed to vote at certain elections. However, currently, the UK, Bulgaria, Estonia and Hungary all apply a blanket disenfranchisement in respect of all serving prisoners.[96]

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[93] Above at n.60 at paragraphs 54 to 55.

[94] *Hirst v United Kingdom (No 2)*, N° 74025/01 (2006).

[95] *Scoppola v Italy (No.3)*, N° 126/05 (2012).

[96] The House of Commons Library Standard Note, 'Prisoners' voting rights', SN/PC/01764, 5 November 2012; and the House of Commons Library Standard Note, 'Prisoners' voting rights', SN/PC/1747, 17 May 2011. The UK has refused to lift its current disenfranchisement of all serving prisoners (except those on remand) and during Prime Minister's questions, on 24 October 2012, David Cameron told MPs that, "*No one should be under any doubt - prisoners are not getting the vote under this government*." The UK had been given six months from the date of the Grand Chamber judgment in *Scoppola* above n. 95 (22 May 2012) to put forward proposals with a view to dealing with the established problems with UK law from the perspective the ECHR, and draft legislation – which stands little present prospect of being adopted by Parliament – was duly put forward in November 2012, which offers a number of options which would satisfy the Court of Human Rights, such as allowing prisoners serving sentences of less than four years to vote: see J

Thus far, the issue of the effect of Article 39 CFR in relation to disenfranchisement of prisoners from voting in European Parliament elections has not been tested, as the cases have concentrated on the interface between the ECHR and national elections. But this is set to change in 2013, with a case before the UK Supreme Court bringing together two cases – one argued in Scotland and one argued in England.[97] The issues that this could raise for the interpretation of Article 39 are discussed in more detail in Section E.

Limitation on grounds of residence requirements

As has been discussed extensively above, both the ECrtHR and the CJEU have determined that it is within the competence of States to apply residence requirements to electoral rights.

In *Doyle v the United Kingdom*, the ECrtHR has established that stipulating a residence or length-of-residence requirement for citizens wishing to vote did not fall foul of Article 3, Protocol 1 ECHR.[98] In *Eman and Sevinger*, it was held that it was not inappropriate for Member States to use residence as a criterion for determining who could vote and stand in such elections.[99]

Limitation on grounds of mental health problems

As with persons convicted of offences, persons suffering from mental impairments are legally disenfranchised in the majority of EU states, which still link the loss of legal capacity to disenfranchisement [100] There seem to be three broad approaches to mental impairment: total exclusion, case-by-case consideration and full participation.

In 2010, in *Alajos Kiss v Hungary*, the ECrtHR overturned a blanket provision which denied voting rights to mentally disabled people under partial guardianship in Hungary.[101] The ECrtHR held that:

> The Court cannot accept […] that an absolute bar on voting by any person under partial guardianship, irrespective of his or her actual faculties, falls within an acceptable margin of appreciation. Indeed, while the Court reiterates that this margin of appreciation is wide, it is not all-embracing […] In addition, if a restriction on fundamental rights applies to a particularly vulnerable group in society, who have suffered considerable discrimination in the past, such as the mentally disabled, then the State's margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question.[102]

The Court went on to say that "*the treatment as a single class of those with intellectual or mental disabilities is a questionable classification, and the curtailment of their rights must be subject to strict scrutiny*."[103] The Court thus concluded that "*an indiscriminate removal of voting rights, without an individualised judicial evaluation and solely based on a mental disability necessitating partial guardianship, cannot be considered compatible with the legitimate grounds for restricting the right to vote*."[104] On the basis of this decision, Hungary adopted a new Basic Law which entered into

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Rozenburg, 'Prisoner Votes: Government is playing for more time', *The Guardian*, 22 November 2012, http://www.guardian.co.uk/law/2012/nov/22/prisoner-votes-government-more-time.

[97] See *McGeoch v Lord President of the Council* [2011] CSIH 67 and *Chester v Secretary of State for Justice* [2010] EWCA Civ 1439.

[98] *Doyle v the United Kingdom* , N° 30158/06, (2007).

[99] Above at n. 60 at paragraphs 51 to 55.

[100] Above at n.56 at p189. See also for additional details Fundamental Rights Agency, *The right to political participation of persons with mental health problems and persons with intellectual disabilities*, Report, October 2010.

[101] *Alajos Kiss v Hungary*, N° 38832/06, (2010).

[102] *Ibid*. at paragraph 42.

[103] *Ibid*. at paragraph 44.

[104] *Ibid*.

force on 1 January 2012 by virtue of which a Judge is to decide on a case-by-case basis whether guardianship warrants disenfranchisement.

The *Alajos Kiss* ruling casts doubt on the total exclusions applied by a vast number of EU Member States.[105]

d. Limitation of Article 39 CFR by virtue of disability

The limitations in the context of disability are not legal impediments, but practical impediments.

The EU ratified the UN Convention on the Rights of Persons with Disabilities in 2011 which, as noted above, provides at Article 29:

> States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others […]

Furthermore in November 2011, the Committee of Ministers of the Council of Europe adopted a Recommendation on the participation of persons with disabilities in political and public life which calls on Council of Europe Member States to guarantee persons with disabilities the right to vote and the right to stand for election in a manner equal to that of any other citizen.[106]

However, in 2011, the Organisation for Security and Cooperation in Europe, reported that the right to vote, for persons with disabilities, was a matter of serious concern and went so far as to make dedicated recommendations for five EU Member States (Bulgaria, Cyprus, Estonia, Finland and Latvia).[107] Disability will likely be an impediment to the effective exercise of Article 39 CFR rights throughout the EU, for example, by way of lack access to polling stations[108] or the lack of Braille templates for blind voters.[109]

V. Remedies

While no express remedies for breach of article 39 CFR are stipulated, there are hints in the Charter, in the case law and in Directive 93/109/EC.

The right to an effective remedy as per Article 47 CFR (e.g. where an individual has been refused entry on the electoral register), would logically require the inclusion of that individual on the relevant electoral register. However, that leaves open the question of what would be an appropriate remedy where the relevant election has already taken place and the individual concerned has been irrevocably disenfranchised with respect to that election.

This point was discussed by the ECJ, as it was called at the time, in the *Eman and Sevinger* case. The Court states, at paragraph 68:

> [I]t is for the national law of each Member State to determine the rules allowing legal redress for a person who, because of a national provision that is contrary to Community law, has not been entered on the electoral register for the election of the members of the European Parliament […] and has therefore been excluded from participation in those elections. Those remedies, which may include

[105] Above at n.56 at p189.
[106] Above at n.56 at p186.
[107] *Ibid*.
[108] *Ibid*. In Latvia in 2011 only 46% of polling stations were accessible, in the Netherlands, 83% and in Poland , just 33%.
[109] As is the case in Portugal.

> compensation for the loss caused by the infringement of Community law for which the State may be held responsible, must comply with the principles of equivalence and effectiveness.[110]

It appears then that the likely remedies for a breach of Article 39 CFR, would either be inclusion on the electoral register or, where the election has already taken place, whichever remedies would be applicable in the relevant Member State (which may include, but would not be limited to, compensation for loss). This issue is set to be considered in the UK in *McGeoch and Chester*, in the context of prisoner disenfranchisement.[111] While a number of claims brought before the UK courts already on the basis of the UK's failure to implement the original *Hirst (No. 2)* judgment of the ECtHR have 'succeeded' in the sense that the courts have recognised the incompatibility of UK with the ECHR,[112] no meaningful remedies, such as damages, have yet to be awarded. This could change if claimants are denied their EU 'right to vote' and Article 39 and the normative force of EU law is invoked,[113] and substantial damages may be awarded in the future (or the threat of substantial damages actions under the shadow of EU law may finally bring the UK to comply with an original finding of the incompatibility of UK law with the ECHR on the part of the European Court of Human Rights).

Furthermore, Directive 93/109/EC, Article 11(2) provides:

> Should a person be refused entry on the electoral roll or his application to stand as a candidate be rejected, the person concerned shall be entitled to legal remedies on the same terms as the legislation of the Member State of residence prescribes for voters and persons entitled to stand as candidates who are its nationals.]

The principle of non-discrimination on grounds of nationality therefore also applies to any remedies that are provided under national law.

E. Evaluation

> The same essential rights were at once claimed as the inalienable heritage of all human beings and as the specific heritage of specific nations, the same nation was at once declared to be subject to laws, which would supposedly flow from the Rights of Man, and sovereign, that is, bound by no universal law and acknowledging nothing superior to itself [and] from then on human rights were protected and enforced only as national rights […]
>
> - Hanna Arendt, *The Origins of Totalitarianism*[114]

In this famous passage on the 1789 French Declaration of the Rights of Man and of the Citizen, Hanna Arendt draws our attention not only to the power vacuum that exists beyond the sovereign, but also to the stark difference between 'human rights' and 'citizens' rights'. While citizens' rights are concrete and enforceable by an identifiable political and judicial authority, human rights are, to some extent, aspirational and intangible.[115]

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[110] *Ibid*. at paragraph 68.
[111] See above n. 97, due to be heard in the Supreme Court in June 2013.
[112] E.g. *Smith v Scott* 2007 SC 345; 2007 SLT 137; 2007 SCLR 268.
[113] See the discussion in BBC News, 'Votes for Prisoners – opening the door', 19 November 2012, http://www.bbc.co.uk/news/uk-politics-20397871.
[114] H Arendt, *The Origins of Totalitarianism*, Andre Deutsch, 1986, p291.
[115] A distinction is often made between absolute and relative human rights, where absolute rights are rights that everyone has against everyone else and relative human rights are rights that every member of every legal community has in her respective legal community, see e.g. R Alexy, *Discourse Theory and Human Rights*, (1996) 9 *Ratio Juris*, 209 and 210.

Nowhere is this contrast, between human rights and citizens' rights, more apparent than in the context of the 'right' to universal suffrage as formulated in international human rights law. The ideal of universal human suffrage, as articulated in many international treaties, has historically been subject to the (virtually unquestioned) caveat that this principle does not extend to non-citizens. It has, in international practice, been perfectly legitimate for States to exclude non-citizens from the scope of their franchise without any suggestion arising that the principle of universal suffrage was being encroached upon.[116] Although the position has moved on somewhat, the lacuna identified by Arendt is still very relevant today in the context of universal suffrage rights.

The rights accorded under the EU Treaties to citizens of the Union to vote and stand in European parliamentary elections are entirely *sui generis* in that, on the one hand, they allocate political membership on the basis of Member State nationality (i.e. recognising political rights as citizens' rights rather than human rights in line with the historical *status quo*) and on the other hand, they are accorded to *all* 'citizens' of the supranational union (regardless of nationality) such that they also, in some way, transcend nationality. These rights have evolved out of the unprecedented experiment that is the European integration project and they are very much the creature of *that* project. From this perspective, Article 39 CFR is merely the latest stage in this evolutionary trajectory and is every bit as unique and unprecedented as what it follows.

Indeed, Article 39 CFR is a curious combination of a classic universal suffrage right, of the variety found in many international human rights treaties, (i.e. Article 39(2)) and a distinctly 'Union-esque' EU citizenship right guaranteeing special protections for mobile EU citizens (i.e. Article 39(1)).

Even more curious, perhaps, is the order in which the two limbs of the provision have been articulated. One would expect the more general principle of universal suffrage to have been set out first and the more specific non-discrimination right to have been set out second. It could perhaps be postulated that the drafters of Article 39 adopted this rather peculiar arrangement so as to prevent the broader universal suffrage right (of somewhat unknown legal application in the EU context) from 'infecting' the rather more specific and historically contingent EU Citizenship right.

It seems likely that the most obvious place to look, if trying to assess the potential future substance of the universal suffrage right at Article 39(2), is to the jurisprudence of the ECrtHR (especially if we note the wording of Article 52(3) CFR as discussed above). Perhaps the development of Article 39(2) will shadow the cautious jurisprudence of that Court, which has struck a delicate balance between recognising the historical right of the sovereign to demarcate the *demos* on the one hand, and extending the ostensibly *universal* right to human suffrage to ever more groups of individuals on the other.

The question that pervades ECHR jurisprudence, as noted above, is: how wide a 'margin of appreciation' do States have when determining the electorate? Recent cases such as *Hirst v United Kingdom (No 2)*[117] and *Scoppola v Italy (No 3)*[118] have confirmed that it is within the competence of States to disenfranchise prisoners so long as there is no general and automatic disenfranchisement of *all* serving prisoners. The ECrtHR has also established that stipulating a residence or length-of-residence requirement for citizens wishing to vote is within the competence of States[119] and, in *Sitaropoulos v Greece (No 1)*,[120] that Article 3, Protocol 1, does not obligate States to enfranchise

[116] New Zealand, where non-nationals have been entitled to vote since 1975, is perhaps the most complete exception to this.
[117] Above at n. 94.
[118] Above at n. 95.
[119] Above at n.98
[120] *Sitaropoulos and Others v Greece (No 1)*, N° 42202/07, (2010) (confirmed in *Sitaropoulos and Others v Greece (No 2)*, N° 42202/07, (2012)).

their expatriate citizens. Moreover, in *Hirst v United Kingdom (No 2),* the ECrtHR also confirmed that the setting of a minimum age threshold equally does not fall foul of Article 3.[121]

The Court has, however, constrained the margin somewhat, noting for example, as noted above, in *Alajo Kiss v Hungary*[122] and in *Hirst (No 2)* that the margin of appreciation should also be narrower where legislation disenfranchised a particularly vulnerable group in society.[123] In the 2012 case of *Sitaropoulos v Greece (No 2),* the Court repeated its oft-recited caution that:

> it is for the [ECrtHR] to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with; it has to satisfy itself that the conditions to which the right to vote and the right to stand for election are made subject do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they meet the requirements of lawfulness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate.[124]

The ECrtHR has had fewer occasions to deal with an alleged violation of an individual's right to stand as a candidate for election under Article 3. In *Ždanoka v Latvia*, the court noted that the 'margin of appreciation' was historically narrower with respect to the right to vote than the right to stand as a candidate and involved different considerations:

> As regards the right to stand as a candidate for election, i.e. the so-called "passive" aspect of the rights guaranteed by Art.3 of Protocol No.1, the Court has been even more cautious in its assessment of restrictions in that context than when it has been called upon to examine restrictions on the right to vote, i.e. the so-called "active" element of the rights under Art.3 of Protocol No.1. In the Melnychenko judgment […] the Court observed that stricter requirements may be imposed on eligibility to stand for election to Parliament than is the case for eligibility to vote. In fact, while the test relating to the "active" aspect of Art.3 of Protocol No.1 has usually included a wider assessment of the proportionality of the statutory provisions disqualifying a person or a certain group of persons from the right to vote, the Court's test in relation to the "passive" aspect of the above provision has been limited largely to a check on the absence of arbitrariness in the domestic procedures leading to disqualification of an individual from standing as a candidate.[125]

This position was echoed in the more recent case of *Sitaropoulos (No 1).*[126] Meanwhile, in *Melnychenko v Ukraine*, the Court also recognised that legislation establishing domestic residence requirements for a parliamentary candidate was, in principle, compatible with Article 3.[127] Furthermore, in *Glimmerveen and Hagenbeek v Netherlands*, the EComHR declared inadmissible two applications concerning the refusal to allow the applicants, who were the leaders of a banned organisation with racist and xenophobic tendencies, to stand for election.[128]

Although the Court has been more forthright in cases like *Alajo Kiss* and *Hirst (No 2),* on the whole, the basic premise that States are to have a considerable amount of discretion with respect to determining the scope of the franchise (and electoral procedure more generally) remains relatively unchanged.

Taking the jurisprudence emanating from the ECrtHR together with the CJEU case law analysed earlier in this Chapter, the current *status quo* can be summed up in the following way: while States are to have considerable discretion to determine the contours of their political communities, such

[121] Above at n. 94.
[122] Above at n. 101.
[123] *Ibid*. at paragraph 41.
[124] See *Sitaropoulos and Others v Greece (No 2),* at paragraph 64. Above at n. 120.
[125] *Ždanoka v Latvia*, N° 58278/00, (2006) at paragraph 115
[126] See *Sitaropoulos and Others v Greece (No 1)* at paragraphs 41 to 45. Above at n. 120.
[127] *Melnychenko v Ukraine*, N° 17707/02, (2006), at paragraphs 53 to 67.
[128] *Glimmerveen and Hagenbeek v the Netherlands*, N°s 8348/78 and 8406/78, (1979).

discretion is not, as it once was, absolute: it is subject to international and regional oversight and regulation and it is fettered by considerations of reasonableness, equality, proportionality and the legitimacy of the ostensible aims being pursued.

The key question, with respect to Article 39 CFR, and especially Article 39(2), is whether these provisions will, through their future interpretation by the CJEU, have any transformative effect on the 'margin of appreciation' currently accorded to EU Member States to determine the electorate. Will these provisions, over time, further erode the State sovereignty to determine the electorate?

In *McGeoch v Lord President of the Council Court of Session*,[129] an attempt was made by lawyers for the claimant to extend the municipal franchise to prisoners in Scotland by arguing that the convicted prisoner disenfranchisement provisions under UK law were incompatible with rights granted under Article 20(2)(b) TFEU and Article 40 CFR. However, the Scottish courts held that the EU law did not confer upon the nationals of a Member State the right to vote in municipal elections *in that state* (i.e. only mobile EU citizens were covered by the provisions). The court was very careful to distinguish the right to vote in municipal elections from the right to vote in European parliamentary elections, noting that while the franchise for municipal elections did not fall within the scope of EU law, the franchise for European elections *did*, under Article 14 TFEU (upon which Article 39(2) CFR is based). This begged the question of what would happen if European parliament elections were brought into play, and this is precisely what has happened in relation to the conjoined appeals to the UK Supreme Court in *McGeoch* and the English case of *Chester*.[130] It is possible that the next stage in this saga might then be a reference to the CJEU by the UK Supreme Court giving the CJEU the opportunity to articulate its understanding of both the character of the universal suffrage right (in relation to EP elections) found in Article 39(2) CFR and also the scope of the Member States' margin of appreciation in that context. If the EU really does 'own' the franchise to European Parliament elections, as would seem to follow from an argument based on understanding the EU as an emergent constitutional polity, it is arguable that, although at the present time it remains within the competence of Member States to *extend* the franchise to certain non EU citizens (as *Spain v UK* shows), Member States are not permitted to *exclude* certain groups of EU citizens from the franchise altogether as *Eman and Sevinger* hints at (especially if this is not done proportionately or rationally). This is an interesting question given the number of EU Member States that still disenfranchise both prisoners and persons with mental impairments. Moreover, if EU Member States are indeed prohibited from excluding certain groups of EU citizens from the European Parliament franchise altogether, is that now on the basis of EU law general principles, CJEU case law, or ECHR case law? All of which, as already noted, are likely relevant for the interpretation of Article 39 CFR by virtue of Article 52 CFR. These may be the most important questions to come before the courts of both the Member States and of the EU in the coming years on the question of the scope of the right of universal suffrage.

[129] See above n. 97.
[130] See above n. 97.