Prisoner disenfranchisement and the right to vote in elections to the European Parliament: Universal suffrage key to unlocking political citizenship?

Court of Justice of the European Union

Case C-650/13, request for a preliminary ruling from the tribunal d'instance de Bordeaux, made by decision of 7 November 2013, in the proceedings in *Thierry Delvigne* v. *Commune de Lesparre-Médoc and Préfet de la Gironde*, 6 October 2015, ECLI:EU:C:2015:648

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INTRODUCTION

The issue of prisoner disenfranchisement has become the new angle from which to view the relationship between electoral rights and Union citizenship. A decade ago, the Court of Justice of the European Union (the Court) first developed the relationship between EU citizenship and electoral rights in two cases dealing with the electoral rights of persons at the periphery of the European Union – Gibraltar and the Caribbean Netherlands.[1] In 2013, the mettle of these decisions, *Spain* v *United Kingdom* and *Eman and Sevinger*, was tested before the United Kingdom's Supreme Court, in a case concerning the British blanket ban on prisoner voting.[2]

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[1] ECJ 12 September 2006, Case C-145/04, *Spain* v *United Kingdom*; ECJ 12 September 2006, Case C-300/04, *Eman and Sevinger* v *College van burgemeester en wethouders van Den Haag*. But also *see* the earlier ECJ case of 9 July 1998, Case C-323/97, *Commission* v *Belgium* with regard to municipal elections.

[2] *R (on the application of Chester)* v *Secretary of State for Justice* and *McGeoch* v *The Lord President of the Council and another (Scotland)* [2013] UKSC 63.

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In the same year, the Court had the opportunity to expound on the issue of prisoner disenfranchisement too, when it received a request for a preliminary ruling from a French lower court. On 6 October 2015, the Court issued a ruling in this case, *Delvigne*.[3]

The judgment in *Delvigne* was delivered on the same day as the judgment in the *Schrems*[4] case (or the 'Facebook case'). As a result, it might have gone somewhat unnoticed. If it has, this is not entirely justified. Electoral rights do not often come before the Court. What is more, the Court in *Delvigne* adds a new dimension to political citizenship. *Spain* v *United Kingdom* and *Eman and Sevinger* were handed down in different legal contexts: they were decided pre-Lisbon, and the Charter of Fundamental Rights of the European Union was not yet binding at the time. Therefore it remained to be seen, whether the Court's relatively deferential attitude in those cases towards the member states regarding the scope of EU law over electoral rights would be left intact in a case falling under the new regime. The Supreme Court of the UK did not believe the advent of the Lisbon regime brought any changes in this regard and did not bother to check with the EU Court whether this was true. In *Delvigne*, however, the Court appears to disagree with the Supreme Court. In a remarkably routine way, it explains how Union citizens, on the basis of a combined reading of the EU Treaty, the Charter and the Direct Elections Act concerning European Parliament elections[5], have a *substantive right* to vote in elections to the European Parliament.

This case note will trace how the Court has arrived at this conclusion. In the process, it will describe the nature of the French legislation that was contested, consider how the Court managed to draw this national legislation into the scope of the Charter and finally, find out how the limitation on the right to vote at issue was allowed to remain in place in *Delvigne*. In the conclusions attention is paid to the consequences of *Delvigne*, also in a more political context.

Factual background to the proceedings

On 30 March 1988, Thierry Delvigne, a French citizen from the Bordeaux area, was convicted by final judgment to a sentence of 12 years' imprisonment for murder. Ancillary to his sentence to imprisonment of 12 years, Delvigne was

[3] ECJ 6 October 2015, Case 650/13, *Thierry Delvigne* v *Commune de Lesparre-Médoc and Préfet de la Gironde*.

[4] ECJ 6 October 2015, Case C-362/14, *Maximillian Schrems* v *Data Protection Commissioner*.

[5] Act concerning the election of the representatives of the Assembly by direct universal suffrage annexed to the Council decision of 20 September 1976, as amended and renumbered by Council decision No. 76/787/ECSC/EEC/Euratom of 20 September 1976 and Council decision No. 2002/772/EC/Euratom.

permanently stripped of his right to vote. This ancillary penalty was the result of the old French Criminal Code, which provided that persons sentenced for a serious criminal offence would lose their right to vote.[6] Delvigne's deprivation of the right to vote extended to elections to the European Parliament.[7] In 1992 a new Criminal Code was adopted.[8] Article 131-26 of this law imposes a less stringent regime with respect to prisoner disenfranchisement than the old regime.[9] This amendment, however, was of no avail to Delvigne. Article 370 of the new Criminal Code declares that deprivations of the right to vote resulting from a criminal conviction by a final judgment before the entry into force of the Code, are to be maintained.

In 2012, Delvigne was removed from the electoral roll from the municipality in which he resided, Lesparre-Médoc.[10] Delvigne, now out of prison for quite some years, decided to challenge this removal in court. The competent court, the Tribunal d'instance de Bordeaux, first raised the constitutionality of this decision under French constitutional law.[11] When this had no results, the Tribunal proceeded to ascertain whether the contested legislation might perhaps constitute a breach of constitutional norms laid down in the Charter.[12] To this end, it asked the Court whether Article 39 of the Charter would preclude such general and indefinite and automatic ban on the exercise of civil and political rights. The Tribunal d'instance, moreover, asked the Court whether Article 49 of the Charter would preclude the difference in treatment with regard to the different regimes of criminal law. This last question will not be addressed in this case note.

Legal framework

The reason why the *Delvigne* case deserves our attention is the preliminary question on the interpretation of Article 39 of the Charter. Article 39 is the first out of eight provisions in Title V of the Charter, which lays down the specific citizenship rights of EU citizens. From a traditional perspective, Article 39 constitutes the citizen provision *par excellence*, as it endows citizens of the Union

[6] *See* Arts. 28 and 34 of the Criminal Code of 12 February 1810.

[7] *See* Art. 2 of Law No. 77-729 of 7 July 1977 on European Parliament elections and Art. L 2 of the Electoral Code.

[8] Law No. 92-1336 of 16 December 1992, as amended by Law No. 94-89 of 1 February 1994.

[9] French law now provides that it is up to a court to rule on this matter. Also the permanency of the penalty has been dropped: it may now not exceed ten years in the case of a conviction for a serious crime and five years in the case of a conviction for a less serious crime.

[10] The competent administrative commission made this decision pursuant to Art. L 6 of the French Electoral Code.

[11] *See* Art. 61-I Const.

[12] Judgment of 7 November 2013, RG No. 15-13-000003.

with rights regarding elections to the parliament in which they are all represented.[13] However, one might question whether such a traditional perspective fits the European context. The EU is not an average political community and the bonds between the citizens of the Union and their Parliament, the European Parliament, are neither factually nor legally as strong as in most nation states. As a matter of law, this becomes apparent when one reads the two sections of which Article 39 Charter consists. These sections do not explicitly convey that citizens of the Union *qualitate qua* possess the right to vote or to stand as candidate in elections to the European Parliament. Instead, the first section lays down a prohibition of unequal treatment of Union citizens residing in another member state. The second paragraph codifies the essential principles of democratic elections: direct universal suffrage in a free and secret ballot.

Articles 39(1) and (2) of the Charter do not come out of thin air. On the contrary, they very much relate to provisions in other constitutional documents of the EU. By and large, these provisions already existed when the Charter was drafted in 2000. This is true for Article 20(2)(b) and Article 22(2) of the Treaty on the Functioning of the European Union (TFEU), which correspond to Article 39(1) Charter and date back to the Maastricht Treaty.[14] The pedigree of Article 39(2) goes back even further. A similar provision was introduced in 1976, in the Council Act on direct elections to the European Parliament.[15] This provision, today Article 1(3), was later almost literally reproduced in the Treaty establishing the European Community (TEC).[16] Its current location is Article 14(3) of the Treaty on European Union (TEU).

Together, all these constitutional provisions constituted the legal framework in *Delvigne*. Indeed, they were all required to do so, as Article 52(2) of the Charter provides that rights recognised by the Charter which can also be found in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.[17] But exactly what these conditions and limits are has become a point of debate since the entry into force of the Lisbon Treaty in 2009. This is

[13] Art. 10(2) TEU.

[14] Art. 8B of the Treaty of Maastricht established the right for EU citizens to vote and stand as a candidate for municipal and European elections in a host member state on equal conditions as the nationals of that member state.

[15] Art. 1 of the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Decision 76/787/ECSC, EEC, Euratom of 20 September 1976 (OJ L 278 8 Oct. 1976). In 2002, the Direct Elections Act underwent an important amendment. *See* Council Decision 2002/772/EC (OJ L 283, 21 Oct. 2002). In turn, Art. 1 of the Direct Elections Act can be traced to provisions in the founding treaties, such as Art. 21(1) of the 1951 Treaty of Paris, establishing the European Coal and Steel Community. *See* generally Steve Peers et al. (eds.), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014).

[16] Art. 190 TEC.

[17] *See Delvigne*, *supra* n. 3, para. 40.

because the Lisbon Treaty has brought a small, yet possibly meaningful, semantic change to the framework under consideration. This change can be found in two provisions which seem to inform Article 1(3) of the Direct Elections Act and Article 14(3) TEU: Article 10(2) and Article 14(2) TEU. The predecessor of these provisions, Article 189 TEC, declared that the European Parliament consisted of 'representatives of the peoples of the States brought together in the Community'.[18] By contrast, the current provisions state that members of the European Parliament represent the *citizens of the Union*. Additionally, Article 10(3) TEU proclaims that every *Union citizen* shall have the right to participate in the democratic life of the Union.

Until *Delvigne*, those who wanted to find out what the Court made of the legal framework regarding electoral rights, had to look to *Spain* v *United Kingdom* and *Eman and Sevinger*.[19] In the former case, the Court was confronted with the question whether a member state could enfranchise someone, as regards European Parliament elections, who was not a Union citizen. In the latter case, it was the other way round. Here a member state had disenfranchised a group of Union citizens. The applicant parties in the two cases, Spain on the one hand and two Dutch nationals from the Caribbean island of Aruba on the other hand, maintained that Community law conferred a substantive right to vote in elections to the European Parliament. The Court disagreed. According to the Court, none of the relevant electoral provisions expressly and precisely defined who are to be entitled to the right to vote in elections to the European Parliament. Therefore, the definition of persons entitled to the right to vote fell within the competence of each member state, albeit in compliance with European law.[20]

In *Spain* v *United Kingdom* and *Eman and Sevinger*, the Court did not address Article 39 of the Charter, which was not yet binding at the time.[21] The UK Supreme Court, however, did so in its case law on disenfranchisement. In the cases of *Chester* and *McGeoch*, two prisoners contested their disenfranchisement under the notorious British legislation that has been condemned more than once by the European Court of Human Rights.[22] One of the arguments was that Article 39 of the Charter played a role in incorporating the case law of the Human Rights Court in Strasbourg on the right to free elections in Article 3, Protocol 1 of the European Convention on

[18] The reference to 'the peoples of the States brought together in the Community' could also be found in Art. 190 TEC, the predecessor of Art. 14(3) TEU.

[19] *Supra* n. 1.

[20] *Spain* v *United Kingdom*, *supra* n. 1, paras. 70-76; *Eman and Sevinger*, *supra* n. 1, paras. 43-45; 52.

[21] Spain, however, did try to address the provision. *See Spain* v *United Kingdom*, *supra* n. 1, para. 42.

[22] *Supra*, n. 3.

Human Rights. The Supreme Court did not take over this argument.[23] It held that there was nothing new under the sun, as far as Article 39 Charter and the other treaty innovations were concerned. Thus, according to the Supreme Court, *Spain* v *United Kingdom* and *Eman and Sevinger* continued to rule the day, and the matter of voting eligibility essentially remained up to the member states.[24]

Unlike in *Chester* and *McGeoch*, the claimant in *Delvigne*, on the issue of voting rights, directed all his attention to Article 39 Charter. This raised the question whether the contested French legislation fell within the scope of the Charter. Another piece of the legal puzzle in *Delvigne*, consequently, was the question how to apply Article 51(1) Charter.

Judgment of the European Court of Justice[25]

In the final case over which President Skouris presided, the Court first of all considered the issue of its jurisdiction and the scope of application of the Charter. Hence, the Court referred to Article 51(1) of the Charter and to its judgment in the case of *Åkerberg Fransson*, in which it considered that provisions of the Charter as such do not bring a matter within EU law.[26] Subsequently, the Court elaborated on the question whether the situation in which an EU citizen is refused to have voting rights for the European Parliament in his own member state, due to criminal law of that member state, as such falls within the scope of EU law. According to the reasoning of the Court, the link with EU law is created by Article 1(3) of the Direct Elections Act and Article 14(3) TEU. These provisions lay down that member states may have the competence to organise European elections, but are nonetheless bound by the obligation to ensure that these elections are direct, universal, free and secret. As a result of this obligation, the Court continued, when a member state in its national legislation makes provision for the disenfranchisement of Union citizens with regard to elections to the European Parliament, it must be considered to be implementing EU law within the meaning of Article 51(1).[27]

The Court subsequently discussed the admissibility of the referred questions. Several parties to the proceedings were critical of the manner in which the Tribunal d'instance referred these questions. The French government in particular

[23] *Chester* and *McGeoch*, *supra* n. 2, paras. 46, 59. *See* on *Chester* and *McGeoch*: A. Lansbergen, 'Prisoner Disenfranchisement in the United Kingdom and the Scope of EU Law: United Kingdom Supreme Court', 10 *EuConst* (2014) p. 126.

[24] *Ibid.*, para. 58.

[25] In consideration of the length of this contribution, we have decided to leave out an account of the (very informative and well-argued) Opinion of A-G Cruz Villalón. In our comments we will refer to the most interesting points of the Opinion.

[26] *Delvigne*, *supra* n. 3, paras. 25-27.

[27] *Ibid.*, para. 33.

lamented the absence in this respect of sufficient factual and legislative context and claimed that this absence put the admissibility of the request in doubt. The Court was not impressed by this argument. According to the Court, it could clearly infer from the factual and legal material available what the referring court was seeking assistance with: the interpretation of two fundamental rights in the Charter, in order to assess the compatibility with the Charter of national legislation leading to the removal of Delvigne from the electoral roll.[28]

On the substance of the matter, the Court considered the questions both in the light of Article 39(1) and Article 39(2) of the Charter.[29] Article 39(1) is similar to Article 20(2)(b) TFEU, which guarantees EU citizens equal treatment with regard to the right to vote and stand as a candidate for the European Parliament. Since the situation of Delvigne did not concern a free movement situation, the right to vote without discrimination on grounds of nationality was not relevant according to the Court. Delvigne wanted to have voting rights in his member state of nationality and there were no cross-border elements present. The Court continued its judgment with Article 39(2). Article 39(2) reads: 'Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot'. The Court held that this provision constitutes the expression of the right of EU citizens to vote in European Parliament elections in accordance with the principles stated in Article 14(3) TEU and Article 1(3) of the Direct Elections Act.[30] According to these provisions, similar to Article 39(2), members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.

The Court then held that the French legislation constitutes a clear limitation of Delvigne's right to vote as a EU citizen in European elections. In this regard, the Court referred to Article 52(1) of the Charter and considered that such a limitation may be allowed when the limitations are provided for by law, respect the essence of those rights and freedoms, and comply with the principle of proportionality, are necessary and meet the objectives of a general interest.[31] The first condition was obviously met: the French exclusion of prisoners to voting rights was provided for by law. The Court was of the opinion that the essence of the right to vote was unharmed by the French legislation, since it only excluded certain persons, under specific conditions on account of their conduct as long as they fulfilled these conditions.[32] Moreover, it is important in that light that there

[28] *Ibid.*, para. 38.
[29] *Ibid.*, para. 40 and further on.
[30] *Ibid.*, para. 44.
[31] *Ibid.*, para. 46.
[32] Apparently, the information of the Court of Justice was not comprehensive, since it seems that the French legislation also excludes prisoners convicted before 1994 with a short-term imprisonment from electoral rights. *See* on this the blog of Julien Fouchet, the lawyer of Delvigne: <www.fouchet-avocat-bordeaux.com/cjue-6-octobre-2015-c-65013-delvigne-lesparre/>, visited 17 February 2016.

is a possibility to apply for the lifting of the deprivation of voting rights as an additional penalty. Therefore the Court ruled that, even though Article 39(2) constituted a right to vote for EU citizens under the common European principles, in the relevant case the limitation of that right was successfully justified.[33]

Comments

The scope of application of the Charter

According to the Court, the situation of Delvigne fell within the scope of EU law and therefore passes the test of Article 51(1) of the Charter. Pursuant to this Article, the Charter is only applicable to the member states when they 'implement' EU law. What the ambit of the Charter is and what the outer limits of Article 51(1) are, have been subject to extensive academic debate, especially since the Explanations to the Charter suggested a broader definition than Article 51(1).[34] According to the Explanations, the Charter applies whenever member states 'act in the scope of Union law'.[35] Nowadays, in light of case law of the Court, the scope of application of the Charter is triggered by national legislation, basically, in at least two situations: (1) when member states implement EU law;[36] and (2) when member states derogate from the free movement provisions.[37] The current trend is that the scope of the Charter is defined rather broadly by the Court and that 'implementation' is interpreted not in the strict sense of the word, but found to include situations in which member states act within the discretion settled by EU law[38] and, moreover, to cover national measures that enforce certain EU obligations, as revealed by the case of *Åkerberg Fransson*.[39]

That the Court in *Delvigne* ruled that electoral laws (can) fall within the ambit of the EU law and may trigger the application of the Charter, might not be too surprising, considering the above-mentioned case law. It may, indeed, be argued that elections for the European Parliament are governed by EU law and that the

[33] *Delvigne*, *supra* n. 3, paras. 46-52.

[34] *See* A. Ward, 'Article 51 – Field of Application', in Peers et al., *supra* n. 15, p. 1431-1447; H. van Eijken et al., 'The European citizen as bearer of fundamental rights in a multi-layered legal order', in T. van den Brink et al. (eds.), *Sovereignty in the shared legal order of the EU* (Intersentia 2015) p. 249-298.

[35] Explanations relating to the Charter of Fundamental Rights, OJ, 14.12.2007, 2007/C 303/02.

[36] For an overview of case law in this respect *see* Ward, *supra* n. 34, p. 1431-1447.

[37] ECJ 30 April 2014, Case C-390/12, *Pfleger*, para. 36.

[38] However, the case *Dano* suggests that the Court in other cases is much more hesitant to apply the Charter. In the light of *Åkerberg Fransson* and earlier case law of the Court, it is unclear why the Court in *Dano* held that the situation at stake did not fall within the ambit of the Charter. ECJ 14 November 2014, Case C-333/13, *Dano*. *See* on *Dano* D. Düsterhaus, 'Timeo Danones et dona petentes', 11 *EuConst* (2015) p. 121.

[39] ECJ 21 December 2011, Joined Cases C-411/10 and C-493/11, *N.S.*

member states act in the discretion given by EU law, when restricting the access to these elections by disenfranchising prisoners. The Court already considered as much in 2006, when it found in *Eman and Sevinger* and *Spain* v *United Kingdom* that elections to the European Parliament had to be organised within the outer parameters of EU law.

Although the Court's argument may not come as a surprise, the manner in which this conclusion is reached is nonetheless remarkable. In the Court's reasoning, the essential element that links national electoral laws with EU law is that elections to the European Parliament should be based on direct universal suffrage in a free and secret ballot. Thus, the presence of a set of general principles is deemed sufficient to activate the scope of EU law. This amounts to a broad interpretation of 'implementing EU law'.[40] This reasoning of the Court differs from that of the Advocate-General, who argued that the link between national electoral legislation and EU law was first and foremost given by the existence of an EU competence, Article 223(1) TFEU, even if this competence has not been exercised.[41] The case law of the Court shows that the existence of a competence may be supportive of drawing a situation within the scope of EU law, but is clearly not decisive in this respect.[42]

What may explain the remarkably broad interpretation of Article 51(1) in *Delvigne*, is that the Court recognised Article 39(2) Charter as a substantive right for EU citizens to vote in elections to the European Parliament.[43] One may argue that the very existence of such a substantive right will generally suffice in triggering the scope of application of the Charter. If Article 39(2) is indeed to be read in this way, it is no regular fundamental right we are dealing with. Unlike e.g. the right to family life or the freedom of religion,[44] the right to vote which the Court envisages, is tied to a specific object – the European Parliament – which will fairly easily draw situations within the ambit of the Charter. Whereas certain fundamental rights may have both a national and a European dimension, the right to vote for the European Parliament can be considered a European fundamental right *par excellence*.

If the jurisdiction of the Court in *Delvigne* is triggered by the substance of the case, there is a circular argument in the reasoning of the Court. After all, if the scope of the Charter had not been triggered in the first place, the Court could not have declared Article 39(2) to be an EU citizenship right. In this sense the reasoning of the Court is quite foggy. But, if one wants to follow the Court's

[40] *See also* S. Coutts, 'Case C-650/13 Delvigne – A Political Citizenship?', on www.europeanlawblog.eu/?p=2946, visited 17 February 2016.

[41] Opinion of A-G Cruz Villalón, 4 June 2015, Case 650/13, *Thierry Delvigne* v *Commune de Lesparre-Médoc and Préfet de la Gironde*, para. 92-95.

[42] *See* in this respect also ECJ 10 July 2014, Case C-198/13, *Hernandez*, para. 36.

[43] This point will be discussed in more detail below.

[44] Respectively Art. 7 and Art. 10 Charter.

conclusion that Article 39(2) contains a subjective right to vote in elections to the European Parliament, it is a fogginess that is difficult to circumvent. Article 51(1) Charter seems to be premised on fundamental rights that are open-ended in the sense that has just been explained. In the case of Article 39(2), the fact that the right to vote is connected to the specific context of European elections constitutes the link with EU law without further ado.

It may be argued that this extension of the scope is facilitated by the Charter itself. Article 52(2) Charter provides that rights in the Charter that are similar to rights laid down in the Treaties shall be exercised under the conditions and within the limits defined by the Treaties. In *Delvigne*, the Court emphasises that Article 39(2) Charter should be read in conjunction with Article 14(3) TEU and Article 1(3) of the Direct Elections Act, two provisions that are textually similar. If these provisions turn out to possess an autonomous core, which can be invoked in an internal situation, it may be maintained that Article 39(2) is allowed to follow suit, making the question of jurisdiction in Article 51(1) Charter an easier hurdle to overcome. Admittedly, Article 52(2) will normally have the effect of limiting the applicability of the Charter. Yet the provision does not explicitly rule out situations in which fundamental rights in the Charter actually stand to benefit from it.

Universal suffrage and the right to vote in European elections as a subjective right for Union citizens

The most spectacular finding of the Court in *Delvigne* is that Union citizens have the right, *qualitate qua*, to vote in elections to the European Parliament. This conclusion seems to follow from the Court holding that Article 39(2) of the Charter 'constitutes the expression in the Charter of the right of Union citizens to vote in elections to the European Parliament in accordance with Article 14(3) TEU and Article 1(3) of the [Direct Elections Act]'.[45] If this conclusion is correct, the Court departs from its earlier case law on electoral rights, in which it stressed that Union citizens, under the relevant electoral provisions at the time, could not claim such an unequivocal right to vote. However, as we shall see, the reasons which the Court in *Delvigne* gives for holding that Union citizens have a freestanding right to vote are of such a nature, that one starts to wonder whether the earlier case law was built on proper grounds.

Before reflecting on *Delvigne* in the light of other decisions, let us first have a look at the reasons the Court advanced. Crucial in this respect is one of the principles that is mentioned in Article 39(2), Article 14(3) TEU and Article 1(3) of the Direct Elections Act: the notion of universal suffrage. In the rather brief judgment of the Court this notion was not singled out. Instead, the Court emphasised that the

[45] *Delvigne*, *supra* n. 3, para. 44.

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provisions take over the basic principles of the electoral system in a democratic state.[46] However, when we zoom in on these principles, it turns out that universal suffrage is the only principle which may serve as a candidate for the transformative leap as described here. This becomes apparent when the arguments submitted by some of the parties to the case and the Opinion of the Advocate-General are taken into consideration. To the European Parliament, for example, it is clear that universal suffrage 'is the central notion for the purpose of defining the substance of' the subjective right to vote which is encompassed by Article 39(2) of the Charter and Article 14(3) TEU.[47] According to the Parliament, the principle 'entails a *ratio personae*, in principle general, which affords unconditional protection not only for a citizen of the Union who votes in a Member State which is not his State of origin, but also for nationals of the Member State of the place where that citizen casts his vote'.[48]

How strong is this argument? Universal suffrage is a principle which features in several international documents and constitutions.[49] What is expressed by these documents is that, within reasonable limits, the entire population of a particular community should be entitled to participate in elections. Accordingly, laws denying the suffrage to persons on the basis of race, sex or income, to name a few resounding historical examples, are not allowed under the principle of universal suffrage. Excluding the entire prisoner population in a community from the franchise will also violate the principle of universal suffrage. This we know from the case law of the Court in Strasbourg. The principle of universal suffrage is not mentioned in Article 3, Protocol 1 of the Convention. All the same, it is clear that the principle is protected by this provision.[50] As a consequence, the Strasburg Court could in 2005 rule in *Hirst* v *United Kingdom* that a blanket ban on prisoner voting constituted a disproportionate infringement of Article 3.[51] *Hirst* illuminates something that is also important for our present purposes. Just like many other fundamental rights, electoral rights are not absolute. Depending on the limitation regime that features in a particular constitutional context, they can be limited.[52] However, the question whether the contested French legislation in *Delvigne* constitutes a lawful limitation of the right to vote in Article 39(2) Charter is not immediately at stake here. Before arriving at the issue of limitation, the

[46] Explanations relating to the Charter of Fundamental Rights, OJ, 14.12.2007, 2007/C 303/02.

[47] *Delvigne*, Opinion of A-G Cruz Villalón, *supra* n. 41, para. 43.

[48] *Ibid*. The European Parliament was supported in this argument by the Commission and, at least so it seems, by Germany.

[49] *See* e.g. Art. 21 of the Universal Declaration of Human Rights (1948); Art. 25 of the International Covenant on Civil and Political Rights; Art. 38(1) of the German *Grundgesetz*.

[50] ECtHR 2 March 1987, Series A, No. 113, *Mathieu-Mohin and Clerfayt* v *Belgium*, para. 51.

[51] ECtHR 6 October 2005, Case No. 74025/01, *Hirst* v *United Kingdom*.

[52] The subject of limitation of fundamental rights will be discussed in more detail below.

question that looms large is whether the notion of universal suffrage encompasses the right to vote *at all* in European elections of Union citizens, mobile or static.

It is certainly possible to defend the affirmative answer that the Court gave to this question in *Delvigne*. Already in 2006, Advocate-General Tizzano argued in *Spain* v *United Kingdom* and *Eman and Sevinger* that 'the right to vote in European elections is enjoyed by citizens of the Union primarily by virtue of the principles of democracy on which the Union is based, and in particular (…) the principle of universal suffrage which "has become the basic principle" in modern democratic States and is also codified within the Community legal order in Article 190(1) EC and Article 1 of the [Direct Elections Act]'.[53] The Advocate-General here cited the European Court of Human Rights, which links the principle of universal suffrage in its case law to 'the concept of subjective rights of participation'.[54] The advent of the Charter, one might maintain, will only have reinforced this argument, as the principle of universal suffrage has now secured a place in an explicit constitutional document under the title *Citizenship rights*.

That being said, it is not necessary to arrive at the same conclusion as the Luxembourg Court. In most situations, the notion 'universal' does not seem to be about conferring a right, but about informing a right that is already conferred. None of the three provisions which are mentioned by the Court contain a reference to the Union citizen. This only occurs in the three electoral provisions which lay down a discriminatory ban on account of nationality – Article 39(1) Charter and Article 20(2)(b) and Article 22(2) TFEU. Furthermore, logic seems to dictate that it is no coincidence that in the Charter the principle of universal suffrage is mentioned after the discriminatory ban. Despite the title *Citizenship rights*, this perhaps indicates that the framers of the Charter, when they adopted the document in 2000, intended to follow the constitutional doctrine that was prevalent at the time. According to this doctrine, EU law did not grant Union citizens a subjective right to vote in elections to the European Parliament, but left the issue to national law.[55]

This brings us back to the question which was raised earlier in this section. Given that the principle of universal suffrage has been part of European law for

[53] Opinion of A-G Tizzano 6 April 2006, Case C-145/04, *Spain* v *United Kingdom* and Case C-300/04, *Eman and Sevinger* v *College van burgemeester en wethouders van Den Haag*, para. 69.

[54] ECtHR 2 March 1987, Series A, No. 113, *Mathieu-Mohin and Clerfayt* v *Belgium*, para. 51.

[55] To sustain its argument in *Delvigne*, the Court called in the support of the Explanations relating to the Charter, OJ, 14.12.2007, 2007/C 303/02. (*See Delvigne*, *supra* n. 3, para. 41.) This support is not really compelling. The Explanations only relate that Art. 39(2) takes over the basic principles of the electoral system in a democratic state. This is no conclusive evidence that the framers of the document – the European Parliament, Commission and Council – intended to change the constitutional arrangement in the (then valid) Treaties. Again, the question may be asked whether this formula confers a right which was previously not conferred.

quite some time, was the former doctrine particularly sound? In other words: how come the Court has only now, in *Delvigne*, accepted Advocate-General Tizzano's argument that the right to vote in European elections is to be enjoyed by Union citizens as a matter of constitutional principle?

Delvigne: Is there something new under the sun?

There are two ways to approach these questions. The first approach is related to something that the Court omits in *Delvigne*, i.e. elaborating on the constitutional context in which the principle of universal suffrage is nowadays embedded. The second approach is related to something that the Court omitted in *Spain* v *United Kingdom* and, in particular, *Eman and Sevinger*: i.e. making it more explicit that Union citizenship can lead to enforceable rights beyond the scope of free movement.

These comments require some clarification. The first comment takes issue with the fact that the Court solely relied on the principle of universal suffrage. There were other candidates to sustain its argument that Union citizens even in an internal situation may rely on the protection of EU law. But unlike the Advocate-General, the Court did not review these other candidates. The Advocate-General, when dealing with the question whether the French legislation fell within the scope of the Charter, emphasised the semantic change the Treaties had undergone since the entry into force of the Lisbon Treaty. The European Parliament, the Advocate-General stressed, is now 'a body representing the will of the citizens "of the Union"'.[56] The Advocate-General was right to underscore this. When one only focuses on the provisions laying down principles on democratic elections, whom these principles apply to remains out of sight. This comes into view when these provisions are combined with the provisions on democracy in which the Union citizen takes centre stage: Article 10(2), Article 10(3) and Article 14(2) TEU.[57] In sum: the principle of universal suffrage, a fundamental element of European democracy for quite some time, may have acquired a deeper

[56] *Delvigne*, Opinion of A-G Cruz Villalón, *supra* n. 41, para. 99.

[57] The German Constitutional Court does not think that these new provisions have changed the face of political representation and democracy. In its *Lisbon* judgment of 30 June 2009, 2 BvE 2/08, the Constitutional Court maintained that '(e)ven in the new wording of Article 14.2 Lisbon TEU, and contrary to the claim that Article 10.1 Lisbon TEU seems to make according to its wording, the European Parliament is not a representative body of a sovereign European people' (para. 280). Instead, the EU would show 'an assessment of values in contradiction to the basic concept of a citizens' Union (…)' (para. 287). In this light, it is interesting that the German government in *Delvigne* sided with the Parliament and the Commission as regards the view that Art. 39(2) Charter contains a subjective right to vote for Union citizens.

meaning as a result of new provisions on political representation and democracy in the EU.

The second comment questions the place of *Spain* v *United Kingdom* and *Eman and Sevinger* in the constitutional doctrine. In both cases, the Court was not convinced that European law conferred an unconditional right to vote on Union citizens.[58] Finding themselves in an internal situation – and consequently unable to invoke the precursor of Article 20(2)(b) TFEU and Article 39(1) Charter – this could have sealed the fate of the applicants in *Eman and Sevinger*.[59] This did not happen, however. The Court ended up offering the protection of EU law in an internal situation.[60] In a way, therefore, it seems that *Eman and Sevinger* belongs to a line of case law which now also includes *Delvigne*. This line of case law is headed by *Ruiz Zambrano*, a judgment in which the Court ruled that irrespective of the exercise of free movement, EU law may preclude national measures that deprive 'citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union'.[61]

Regardless of which approach is taken, it is safe to say that *Delvigne* is an important judgment, which strengthens the political dimension of EU citizenship. Even if one does not accept that the Lisbon Treaty has brought any real change with respect to the nature of voting rights, it is now straightforward that the scope of application of the right to vote in European elections is primarily *personal* instead of *territorial* or *jurisdictional*.[62] In the 2006 rulings on electoral rights, things were rather the other way around. There, the Court held that voting eligibility was essentially a matter for the member states to decide upon, albeit in compliance with European law. As it turned out, the words 'in compliance with' already brought the large majority of Union citizens within the scope of application of the electoral provisions of the Treaties. In *Spain* v *United Kingdom* and *Eman and Sevinger*, the Luxembourg Court relied on the interpretation of Article 3, Protocol 1 Convention given by the Strasbourg Court in the case of

[58] *Eman and Sevinger*, *supra* n. 1, para. 45, 52. The closest the Court comes to assuming a freestanding right to vote for Union citizens is in *Spain* v *UK*, *supra* n. 1, para. 76.

[59] This was repeated by the Court in *Delvigne*, *supra* n. 3, para. 42.

[60] Specifically, the Court ruled that the Netherlands violated the principle of equal treatment by denying the franchise to one class of Union citizens (Arubans and other Dutch nationals from the Caribbean Netherlands) and by granting the franchise to another class of Union citizens (Dutch nationals resident in a non-member state). *See Eman and Sevinger*, *supra* n. 1, para. 60. *See also* J. Shaw, 'Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism', in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law*, 2nd edn. (Oxford University Press 2011) p. 600-603.

[61] ECJ 8 March 2011, Case C-34/09, *Ruiz Zambrano*, para. 42. *Cf.* also ECJ 2 March 2010, Case C-135/08, *Rottmann*, para. 42.

[62] *See* L. Khadar and J. Shaw, 'Article 39 – Right to Vote and to Stand as a Candidate at Elections to the European Parliament', in Peers et al, *supra* n. 15, p. 1040-1046.

Matthews v *United Kingdom*.[63] On the basis of this judgment, the Court reasoned that a disenfranchising criterion linked to residence could in principle only be valid when the European Parliament could not be considered as a Union citizen's legislature; i.e., as long as EU law generally did not apply in the place where someone was resident.

At least in a conceptual way, *Delvigne* seems to make this untenable. Now that the scope of application of electoral rights is mainly personal, a member state is no longer allowed to exclude its own citizens from the European franchise altogether on the basis of a residence criterion. Of course, what may still be tested, is whether such a national restriction of the right to vote can be considered as a lawful limitation of this right. Here we see how the introduction of the Charter might have helped to clear things up. As the Charter in Article 52 gives a framework for dealing with limitations on the exercise of fundamental rights, the Court may have found it easier to accept the right to vote in elections to the European Parliament as a subjective right.[64]

The limitation of the right to vote in Delvigne by the Court

Whether the French legislation on prisoner disenfranchisement limited the right to vote at issue was solely assessed in *Delvigne* by the Court within the framework of the Charter. Contrary to the Advocate-General, the Court did not refer to the case law of the Strasbourg Court. Especially in the context of justification and proportionality, this would have seemed appropriate.[65]

Article 52(3) Charter stresses that the rights of the Charter which correspond with the rights guaranteed by the Convention shall have a similar scope and meaning as these Treaty rights. The Explanations to the Charter add that Article 52(3) is 'to ensure the necessary consistency between the Charter and the ECHR' and that rather than following a rigid approach of 'a lowest common denominator', the Charter rights concerned should be interpreted in a way offering a 'high standard of protection'. This aim for consistency between the Convention and the Charter should not endanger the autonomy of EU law but, importantly, the autonomy of EU law may only serve as a

[63] ECtHR 18 February 1999, Case No. 24833/94; *Eman and Sevinger*, *supra* n. 1, paras. 45-49. *See* extensively on the interplay between the ECHR and Community law: L. F. M. 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* (*Eman and Sevinger*)', 45 *Common Market Law Review* (2008) p. 787-813.

[64] *Cf.* J. Shaw, 'Prisoner voting: now a matter of EU law' on <eulawanalysis.blogspot.nl/2015/10/prisoner-voting-now-matter-of-eu-law.html>, visited 17 February 2016, where a different explanation is given as to how the Charter, despite similar language, might have tipped the balance in favour of a subjective conception of the right to vote in European elections.

[65] *Ibid.*

justification for a more extensive protection, not for a lower standard.[66] In this light, it is remarkable that the Court did not refer to the Convention and the case law of the Strasbourg Court in its assessment of the proportionality test. In *Delvigne*, the Court appears to be quite lenient with regard to national legislation restricting the electoral rights of prisoners. It is not self-evident that the leeway granted by the Luxembourg Court for member states to restrict voting rights would be accepted by the Strasbourg Court under the Convention.[67]

One of the reasons why the Court did not refer to the Strasbourg case might be that Article 39(2) grants a specific Charter right to *EU citizens*, and should therefore have the Charter as main frame of reference. However, even if this argument is accepted, it remains artificial that the Court completely ignored the case law on prisoner voting of the Strasbourg Court in *Delvigne*, especially given the amount of detail of this case law and the fact that the Convention is an important source of fundamental rights within EU law. *Delvigne* is therefore an example of what can be called 'Charter-centrism': a preference of the Court to apply Charter rights rather than the Convention or Strasbourg case law as a source of fundamental rights.[68]

Is there a difference in the standards of protection offered by the Court in *Delvigne* and in similar cases by the Strasbourg Court? As observed above, the latter Court held in *Hirst* that a general, automatic, indiscriminate rule of disenfranchisement of prisoners is in violation of Article 3 of Protocol 1. In *Scoppola* v *Italy*,[69] the Strasbourg Court confirmed its ruling in *Hirst*, but also gave more discretion to state parties to comply with the Convention by adding that it is up to the states to 'mould into their own democratic vision'.[70] The European Court of Human Rights added that states should ensure that the issue of proportionality is examined or considered either by a national court or by the legislature that should define the circumstances in which disenfranchisement could be decided upon. In *Delvigne*, the Court of Justice took a similar approach, stating that it is important that French legislation provides for an option for review. Moreover, the Court held that the French measure is proportionate, because it takes

[66] *See* K. Lenaerts, 'The Court of Justice of the European Union and the Protection of Fundamental Rights', *Polish Yearbook of International Law* (2011) p. 79-105, especially on p. 98 and further.

[67] On this point also D. Sarmiento, 'What Schrems, Delvigne and Celaj tell us about the state of fundamental rights in the EU' on Verfassungsblog: <verfassungsblog.de/en/what-schrems-delvigne-and-celaj-tell-us-about-the-state-of-fundamental-rights-in-the-eu/#.Vih9Vuuhdjo>, visited 17 February 2016.

[68] S. Douglass-Scott, 'The relationship between the EU and the ECHR five years on from the Treaty of Lisbon', in S. A. de Vries et al. (eds.), *Five Years Binding EU Charter of Fundamental Rights* (Hart Publishing 2015), p. 21-46, G. de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a human rights adjudicator?', 2 *Maastricht journal of European and comparative law* (2013) p. 168-184.

[69] ECtHR 22 May 2012, Case No. 126/05, *Scoppola* v *Italy*.

[70] *Ibid.*, para. 102.

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into 'account the nature and gravity of the criminal offence committed and the duration of the penalty'.[71] In this sense, *Delvigne* seems to be in line with *Scoppola.* However, since the European Court of Human Rights seems to perform a more in-depth proportionality analysis of national legislation, whether the French legislation would actually pass the test of Strasbourg is not certain.

Consequences and conclusion

In *Delvigne*, the Court of Justice follows a classical strategy for landmark decisions. It shows restraint with regard to the outcome of the case, but scores an important point as a matter of legal principle.[72] France gets what it wants – it may continue to apply its former restrictive prisoner voting regime to old criminal convictions – yet at the same time the constitution of the EU is enriched: voting in elections to the European Parliament is now a subjective fundamental right for *all* Union citizens.

Does this particular enrichment indeed make *Delvigne* a landmark decision? Probably not in the sense that the judgment will change the face of European law generally, but there are several reasons why *Delvigne* might end up in the canon of European law.

One reason why this may be the case concerns the immediate constitutional ramifications which the judgment has possibly unleashed. Prisoner voting is a highly sensitive issue in some member states. This is particularly true in the United Kingdom.[73] The British Prime Minister, David Cameron, once remarked that the idea of curtailing the British ban on prisoner voting makes him 'physically ill'.[74] A decade after it was handed down, the *Hirst* judgment still needs to be complied with by the United Kingdom. *Delvigne* has the potential of further tightening the screws on the British government. Although the proportionality test which the Court of Justice on the basis of the Charter applies in *Delvigne* is not severe, the sole fact that there *is* a proportionality test already sounds like bad news for the blanket ban which is in place in the United Kingdom and some other member states.

Asked what he would do when the Court of Justice were critical of the French legislation contested in *Delvigne*, Cameron vowed to ignore any judicial ruling which affects the British ban.[75] In the run-up to the referendum on

[71] *Ibid.*, para. 49.

[72] The *locus classicus* in this respect is the American case of *Marbury v Madison*, 5 U.S. 137 (1803), in which the U.S. Supreme Court developed the power of judicial review. In European constitutional history, the classical case is ECJ 15 June 1964, Case 6/64, *Costa/ENEL*.

[73] Member states with a similar blanket ban are Hungary, Bulgaria and Estonia.

[74] Cameron made this remark during a debate in 2010 in the House of Commons. *See* <www.youtube.com/watch?v=DjzmvvozHuw>, visited 17 February 2016.

[75] *See* <www.telegraph.co.uk/news/uknews/law-and-order/11911057/David-Cameron-I-will-ignore-Europes-top-court-on-prisoner-voting.html>, visited 17 February 2016.

British membership to the EU, such a ruling could have further complicated pleas to keep the United Kingdom on board. Now that the Court has allowed the former French regime on prisoner disenfranchisement to remain in place, some of the pressure is off in this respect.[76] Still, it seems only a matter of time before the question of prisoner voting returns in British courts as a result of *Delvigne*. When this happens, the UK Supreme Court will not find it so easy to shrug off, as it did in *Chester* and *McGeoch*, any suggestion that there is a distinctive imprint of Union law on the issue of voting eligibility regarding the European Parliament.

Another reason why *Delvigne* is important, is that prisoner voting is not the only terrain where the ruling could produce effects. Several member states, for example, also restrict the franchise on grounds of mental health problems.[77] Until this moment, it was chiefly the European Convention on Human Rights which stood in the way of such restrictions. In 2010, the Strasbourg Court issued an important ruling in this respect, criticising mental disability legislation that was on the books in Hungary.[78] *Delvigne* opens a new, possibly more effective venue for contesting such legislation. In the absence of a uniform election procedure under Article 223 TFEU, member states still have a lot of constitutional discretion in regulating elections to the European Parliament. However, because the right to vote in European elections is now first of all a matter of EU law, it seems likely that, when judging the legitimacy of a certain voting arrangement, the burden of proof in future voting cases lies with the member states.[79] *Delvigne* only concerns rights regarding elections to the European Parliament. Yet the judgment might have a spill-over effect to other electoral arrangements. As restrictions on electoral rights in national law are usually not linked to elections of specific representative bodies, denouncing such a restriction with regard to one particular body might lead to a reform of the whole system.[80]

[76] This was the sentiment that dominated British newspapers after the ruling in *Delvigne* had been handed down. *See* e.g. <www.theguardian.com/politics/2015/oct/06/uk-ban-on-prisoner-voting-is-lawful-eus-highest-court-rules>, visited 17 February 2017.

[77] The list of member states that restrict the franchise on grounds of mental disability is rather long. *See* the 2012 report of the Fundamental Rights Agency: *Fundamental rights: challenges and achievements in 2011*, <fra.europa.eu/sites/default/files/annual-report-2012-chapter-7_en.pdf>, visited 17 February 2016.

[78] ECtHR 20 May 2010, Case No. 38832/06, *Alajos Kiss* v *Hungary* (disenfranchisement of mentally disabled people under partial guardianship).

[79] In the context of free movement and social benefits this point is raised by M. Dougan and E. Spaventa, 'New Models of Social Solidarity in the EU', in M. Dougan and E. Spaventa (eds.), *Social Welfare and EU law* (Hart Publishing 2005) p. 211.

[80] This did not happen in the Netherlands after *Eman and Sevinger*. Up until that point, most restrictions to the right to vote in elections to the European Parliament were linked to restrictions to the right to vote in elections to the Dutch parliament. After *Eman and Sevinger*, the Dutch legislator

What may finally secure a place in European constitutional history for *Delvigne*, is that the judgment constitutes a milestone in the field of political representation and of democracy. The development of these concepts has mostly been a gradual one in Europe. Calls for more political representation and democracy at the European level have usually been answered by solutions which elicited further calls for political representation and democracy in turn.[81] The latest of these solutions found its way into primary law in 2009, when the Lisbon Treaty entered into force. The European Parliament could now for the first time claim, as a matter of law, to represent European citizens instead of national ones. However, again as a matter of law, the electorate of the Parliament was still largely composed of national citizens. The confluence in *Delvigne* of the principle of universal suffrage and the Charter has put an end to this discrepancy. Those who are represented in the Parliament, now also elect it. It is a semantic twist of ironic fate that it took a (former) prisoner to find the key to unlock this conceptual problem.

removed the contested residence restriction with respect to elections to the EP, but left the restriction intact with respect to elections to the Dutch Parliament.

[81] *See* J. Shaw, 'Sovereignty at the Boundaries of the Polity', in N. Walker (ed.), *Sovereignty in Transition* (Hart Publishing 2003) p. 461-500.