Editorial note

Koen Lenaerts*

LINKING EU CITIZENSHIP TO DEMOCRACY

1 Introduction

Introduced by the Treaty of Maastricht, 'citizenship of the Union is intended to be the fundamental status of nationals of the Member States'.[1] A close reading of Articles 20 to 25 TFEU suggests that this fundamental status may be examined from three different, albeit closely related, perspectives.

At international level, EU citizens benefit from the protection of EU law. EU citizenship is intended to promote the feeling of belonging to a community of values that stands up for all its citizens when they cross the external borders of the EU. That is why Article 23 TFEU states that, when travelling or residing abroad, any EU citizen enjoys, albeit only in the absence of national representation in the third country, the right to diplomatic and consular protection from all EU Member States.

At Member State level, EU citizens who have exercised free movement must feel part of the society of the host Member State. EU citizenship aims to promote a Europe without internal frontiers where all citizens can move freely and without suffering from any discrimination based on nationality.[2] Bearing in mind that objective, the authors of the Treaty of Maastricht introduced into the Treaties Article 21 TFEU, by virtue of which the right to move and reside freely within the territory of the Member States is no longer conditional on the exercise of an economic activity in the host Member State.[3] Furthermore, full integration could not take

---

* President of the Court of Justice of the European Union, and Professor of European Union Law, University of Leuven. All opinions expressed herein are strictly personal to the author.

1 See, eg, Case C-184/99 *Grzelczyk* ECLI:EU:C:2001:458, para 31; Case C-413/99 *Baumbast and R* ECLI:EU:C:2002:493, para 82; Case C-148/02 *Garcia Avello* ECLI:EU:C:2003:539, para 22; Case C–200/02 *Zhu and Chen* ECLI:EU:C:2004:639, para 25; Case C-135/08 *Rottmann* ECLI:EU:C:2010:104, para 43; Case C-34/09 *Ruiz Zambrano* ECLI:EU:C:2011:124, para 41; Case C-434/09 *McCarthy* ECLI:EU:C:2011:277, para 47; Case C–256/11 *Dereci and Others* ECLI:EU:C:2011:734, para 62; and Joined Cases C-356/11 and C-357/11 *O and Others* ECLI:EU:C:2012:776, para 44.

2 Article 18 TFEU.

3 *Baumbast* (n 1) para 81 ('[a]lthough, before the Treaty on European Union entered into force, the [ECJ] had held that that right of residence, conferred directly by the EC Treaty, was subject to the condition that the person concerned was carrying on an economic activity within the meaning of [the fundamental freedoms], it is none the less the case that, since then, Union citizenship has been introduced into the EC Treaty and Article [21(1) TFEU] has conferred a right, for every citizen, to move and reside freely within the territory of the Member States').

place without at least some degree of political participation and representation. Accordingly, those same authors also introduced into the Treaties Article 22(1) TFEU, which confers on every citizen of the Union residing in a Member State of which he is not a national the right to vote and to stand as candidates in municipal elections in that Member State.

Last but not least, at *EU level, EU citizens are seen as political actors*. EU citizenship reflects the idea that the process of European integration must be not only in the hands of the Member States but also in those of the peoples of Europe.[4] In that sense, it contributes to the democratisation of the EU. That is why any EU citizen is entitled to have his say in the governance of the European Union. In that regard, Article 22(2) TFEU provides that every EU citizen residing in a Member State of which he is not a national is to 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. Moreover, any EU citizen has, in accordance with Article 24 TFEU, the right to hold the EU institutions to account, notably by addressing questions to them in any of the official Treaty languages and by obtaining a reply in the same language. Likewise, that Treaty provision also states that EU citizens enjoy the right to petition the European Parliament in accordance with Article 227 TFEU and the right to apply to the Ombudsman in accordance with Article 228 TFEU.[5] In addition, whilst EU governance is based on representative democracy,[6] the authors of the Treaty of Lisbon decided to incorporate into the EU legal order a form of participative democracy. In that regard, the first paragraph of Article 24 TFEU provides that the European Parliament and the Council shall adopt a regulation laying down the procedures and conditions required for a citizens' initiative within the meaning of Article 11 [TEU].[7]

However, a close look at the new Treaty provisions on democratic principles and at the Treaty provisions on the European Parliament reveals that the political dimension of EU citizenship is not limited to the political rights attaching to the status of EU citizen.[8] This is because

---

4 See Article 10 TEU.

5 See Case C–261/13 P *Schönberger v Parliament* ECLI:EU:C:2014:2423.

6 Article 10(1) TEU states that '[t]he functioning of the Union shall be founded on representative democracy'.

7 Article 11(4) TEU states that '[n]ot less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties'. As to the regulation to which the first paragraph of Article 24 TFEU refers, see Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative [2011] OJ L65/1.

8 As to the Treaty provisions on democratic principles, see Articles 9 to 12 TEU. As to the

those rights do not fully capture the link between EU citizenship and the democratic governance of the EU. Respect for the principle of representative democracy on which the functioning of the EU is founded requires both the EU institutions and the Member States to fulfil democratic obligations that are to be found not only in Articles 20(2), 22(2) and 24 TFEU, but also in other provisions of the Treaties and secondary EU law that relate to the democratic governance of the EU. In fulfilling those obligations, the EU institutions and the Member States must comply with the Charter of Fundamental Rights of the European Union (the 'Charter'), including the provisions thereof that relate to EU citizenship[9] but do not correspond to the rights listed in Articles 20(2), 22(2) and 24 TFEU.

Looking at the seminal ruling of the European Court of Justice (ECJ) in *Delvigne*,[10] this editorial is to shed some light on the link between EU citizenship and the democratic governance of the EU.[11] To that end, it is divided into three parts. Part 2 is devoted to examining that case. For the present purposes, *Delvigne* contains two main findings. First, the ECJ made explicit, for the first time, the link between EU citizenship and EU representative democracy. Second, it rejected a broad interpretation of Article 20(2)(b) TFEU. In so doing, the ECJ refused to support the view that fundamental rights may be incorporated into the political rights attaching to the status of EU citizen by means of judicial interpretation. Exploring further this second finding, Part 3 is to provide additional constitutional arguments militating against such incorporation. Last but not least, a brief conclusion supports the contention that, as interpreted in *Delvigne*, the political dimension of EU citizenship is respectful of the constitutional allocation of powers sought by the authors of the Treaties.

2 Linking EU citizenship to EU representative democracy

As political actors, EU citizens are called upon to play an important role in the democratic functioning of the EU. This follows from the Treaty provisions on 'democratic principles' newly introduced by the Treaty of Lisbon. Notably, Article 10(3) TEU states that '[e]very citizen shall have the right to participate in the democratic life of the Union'. That participation is primarily carried out by means of electing the members of the Eu-

---

Treaty provisions on the European Parliament, see Article 14 TEU and Articles 223 to 234 TFEU. See A Schrauwen, 'European Union Citizenship in the Treaty of Lisbon: Any Change at All?' (2008) 15 Maastricht Journal of European and Comparative Law 55, 56 (noting that 'the political dimension refers to how [EU] citizens participate in the EU decision-making structure, to the way in which the [EU] should treat its citizens and to how the [EU] citizens can legitimize the [EU]').

9 See Title V of the Charter.

10 Case C-650/13 *Delvigne* ECLI:EU:C:2015:648.

11 See L Khadar and J Shaw, 'Article 39 of the Charter' in S Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 1038.

ropean Parliament who are democratically entrusted with the representation of the interests of EU citizens. As Article 10(2) TEU provides, '[EU c]itizens are directly represented at Union level in the European Parliament'. The direct democratic mandate with which EU citizens vest members of the European Parliament was made crystal clear by the authors of the Treaty of Lisbon who decided to abandon the wording of ex Article 189 EC. Whilst the latter Treaty provision referred to the members of the European Parliament as 'representatives of the peoples of the States brought together in the Community', Article 14(2) TEU refers to them as 'representatives of the Union's citizens'.[12] In order to facilitate the democratic participation and representation of EU citizens at EU level, EU law imposes obligations on both the EU institutions and the Member States.

As to the EU institutions, they must, for example, give citizens and representative associations the opportunity to make known and publicly exchange their views in all fields of EU activity. They also have the obligation to take decisions as openly and as close as possible to the citizen. In particular, the principle of transparency enables EU citizens to participate fully in the EU decision-making process. By having access to adequate information on the decisions adopted by the EU legislator and by the EU administration, EU citizens may engage in a discussion as to whether they agree or disagree with those decisions. At the same time, transparency enhances the legitimacy of the EU institutions, given that their actions (or their failures to act) are open to public scrutiny.[13] The right of access to documents gives concrete expression to that principle.[14]

In addition, whilst the functioning of the EU is founded on representative democracy, it also allows EU citizens, acting collectively, to take the initiative to propose EU legislation.[15] Furthermore, it allows room for

---

[12] See the Opinion of AG Cruz Villalón in Case C-650/13 *Delvigne* ECLI:EU:C:2015:363, para 100.

[13] See Case C-615/13 P *ClientEarth and PAN Europe v EFSA* ECLI:EU:C:2015:489, para 56 ('[t]he transparency of the process followed by [an EU] public authority for the adoption of [an EU] measure contributes to that authority acquiring greater legitimacy in the eyes of the persons to whom that measure is addressed and increasing their confidence in that authority […] and to ensuring that the authority is more accountable to citizens in a democratic system'). See, to that effect, Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco* v *Council* ECLI:EU:C:2008:374, paras 45 and 59; Case C-506/08 P *Sweden* v *MyTravel and Commission* ECLI:EU:C:2011:496, para 113; Case C-280/11 P *Council* v *Access Info Europe* ECLI:EU:C:2013:671, para 32; and Case C-350/12 P *Council* v *in't Veld* ECLI:EU:C:2014:2039, paras 53, 106 and 107).

[14] See, eg, *Sweden and Turco* (n 13) para 34; Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden and Others* v *API and Commission* ECLI:EU:C:2010:541, para 68; and *Sweden* v *MyTravel and Commission* (n 13) para 72. See also K Lenaerts, 'The Principle of Democracy in the Case Law of the European Court of Justice' (2013) 62 International and Comparative Law Quarterly 271, 300.

[15] See, in this regard, Case T-450/12 *Anagnostakis v Commission* ECLI:EU:T:2015:739 and Case C-589/15 P *Anagnostakis v Commission* (pending).

alternative forms of governance in certain fields, such as the adoption of norms that are the product of a social dialogue at EU level.[16]

As to the Member States, Article 22(2) TFEU, which contains the legal basis for the adoption of detailed arrangements for the exercise of the right set out in Article 20(2)(b) TFEU, states that EU citizens are to be free from any discrimination on grounds of nationality when they exercise their right to vote and to stand as candidates in elections to the European Parliament. In *Eman and Sevinger,* the ECJ explicitly held that 'Article [22(2) TFEU] is confined to applying the principle of non-discrimination on grounds of nationality to [the] right to vote and [to] stand [as a candidate in elections to the European Parliament], by stipulating that every citizen of the Union residing in a Member State of which he is *not* a national is to have [that right] in the Member State in which he resides, under the same conditions as nationals of that State'. [17]

In that regard, the question that arises is whether EU law imposes on the Member States other obligations with regard to the participation and representation of EU citizens in the governance of the EU, notably by guaranteeing the right to vote and to stand as a candidate in elections to the European Parliament in the Member State of which the EU citizen is a *national*. The ECJ was confronted with that very question in *Delvigne*.[18]

The facts of that case are as follows. In 1988, Mr Delvigne – a French national residing in France – was sentenced to 12 years' imprisonment for the crime of murder. As an ancillary consequence of that sentence, French criminal law provided that persons in Mr Delvigne's situation were deprived of their right to vote. In 2012, French authorities decided, in application of the French Electoral Code and French criminal law, to exclude Mr Delvigne from the electoral roll. He challenged that decision before the referring court which asked, in essence, whether Article 39 of the Charter had to be interpreted as precluding such exclusion.

At the outset, the ECJ examined whether the relevant provisions of French law on the basis of which Mr Delvigne was excluded from the electoral roll 'implemented EU law' within the meaning of Article 51(1) of the Charter. In that regard, the ECJ noted that Article 8 of the 1976 Act concerning the elections of members to the European Parliament (the '1976 Act') states that '[s]ubject to the provisions of this Act, the electoral procedure shall be governed in each Member State by its national provisions'.[19]

---

[16] Lenaerts (n 14) 298. See Case T–135/96 *UEAPME v Council* ECLI:EU:T:1998:128.

[17] Case C-300/04 *Eman and Sevinger* ECLI:EU:C:2006:545, para 53 (emphasis added).

[18] *Delvigne* (n 10).

[19] Act concerning the election of the members of the European Parliament by direct universal suffrage, annexed to Council Decision 76/787/ECSC, EEC, Euratom of 20 September 1976 [1976] OJ L278/1, as amended by Council Decision 2002/772/EC, Euratom of 25 June 2002 and 23 September 2002 [2002] OJ L283/1.

Referring to its previous case law,[20] it held that Articles 1(3) and 8 of the 1976 Act do not define, expressly and precisely, who is entitled to vote and to stand as a candidate in elections to the European Parliament. That is a competence that remains with the Member States.[21]

However, Member States must, when exercising that competence, fulfil their obligation under Article 1(3) of the 1976 Act, read in conjunction with Article 14(3) TEU, according to which '[t]he members of the European Parliament shall be elected for a term of five years by direct universal suffrage in a free and secret ballot'.[22] The ECJ reasoned that a Member State is fulfilling its obligations under those provisions when it adopts legislation to that effect even where the latter deprives an EU citizen from his right to vote in the elections to the European Parliament. In so doing, such a Member State is implementing EU law within the meaning of Article 51(1) of the Charter.[23]

Next, the ECJ examined which of the two paragraphs of Article 39 of the Charter applied to the case at hand.[24] In the light of the explanations relating to that provision of the Charter,[25] it noted that, whilst Article 39(1) of the Charter corresponds to the right guaranteed in Article 20(2)(b) TFEU,[26] Article 39(2) of the Charter corresponds to Article 14(3) TEU. Those explanations also state that 'Article 39(2) takes over the basic principles of the electoral system in a democratic State'. In accordance with Article 52(2) of the Charter,[27] the ECJ held that, since Article 20(2)(b) TFEU was not applicable to a situation such as that of Mr Delvigne, the same applied to Article 39(1) of the Charter.[28] Thus, the compatibility with EU law of the French legislation at issue had to be examined in the light of Article 39(2) of the Charter.

---

[20] *Eman and Sevinger* (n 17), paras 43 and 45; and Case C-145/04 *Spain v United Kingdom* ECLI:EU:C:2006:543, paras 70 and 78.

[21] *Delvigne* (n 10) para 31.

[22] ibid, para 32.

[23] ibid, para 33.

[24] Article 39 of the Charter, entitled 'Right to vote and to stand as a candidate at elections to the European Parliament', states that: '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.'

[25] See the explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17 ('the explanations relating to the Charter').

[26] It is worth noting that the explanations relating to Article 39(1) of the Charter state that Article 22 TFEU contains the legal basis for the adoption of detailed arrangements for the exercise of the right set out in Article 20(2)(b) TFEU.

[27] Article 52(2) of the Charter states that '[r]ights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties'.

[28] *Delvigne* (n 10) paras 42 and 43.

Once it had been established that the French legislation at issue constituted a limitation on the exercise of the right to vote in elections to the European Parliament as provided for in Article 39(2) of the Charter, the ECJ went on to determine whether such a limitation complied with the requirements laid down in Article 52(1) of the Charter. The ECJ observed that it did, since the exclusion to which Mr Delvigne was subject was provided for by law,[29] respected the essence of that right,[30] pursued a legitimate objective and complied with the principle of proportionality.[31]

Delvigne is an important development in the case law of the ECJ. It has helped to make explicit the link between EU citizenship and the democratic governance of the EU. It shows that the political dimension of EU citizenship is not limited to Articles 20 to 25 TFEU, but also involves other provisions of EU law, notably Article 14(3) TEU and Article 1(3) of the 1976 Act. Those provisions impose on the Member States obligations whose objective is to ensure that the basic principles inherent in a democratic electoral system are applied at EU level. In addition, *Delvigne* supports the view that fundamental rights may not be incorporated into the substantive rights attaching to the status of EU citizen by means of judicial interpretation. The scope *ratione personae* of Article 20(2)(b) TFEU was left untouched. Rather, in fulfilling the obligations imposed by Article 14(3) TEU and the 1976 Act, Member States must comply with the Charter, in particular with the provisions set out under its Title V that do not correspond to the rights listed in Article 20(2) TFEU.

3 The incorporation of rights other than those listed in Article 20(2) TFEU

It follows from the ruling of the ECJ in *Delvigne* that fundamental rights may not be 'incorporated' into the political rights attaching to the status of EU citizen. Otherwise, the system of fundamental rights protection under EU law would serve as a 'federalising device', since those rights would apply on a 'free-standing' basis, ie regardless of whether the national measure at issue adversely affects the rights attaching to that status. [32] In order for a national measure to fall within the scope of those rights, it would then suffice for that measure to infringe any fundamental right recognised in the Charter.

One can draw important lessons from the US constitutional experience.[33] In the US, the Bill of Rights set out in the Federal Constitution has

---

[29] ibid, para 47.

[30] ibid, para 48.

[31] ibid, paras 49-51.

[32] See K Lenaerts, 'The Concept of EU Citizenship in the Case Law of the European Court of Justice' (2012) 13 ERA Forum 569, 577-579.

[33] See also K Lenaerts, 'Fundamental Rights in the European Union' (2000) 25 EL Rev 575.

operated as a centripetal force which protects individuals from the illegitimate interference of public power, whether of federal or state origin.[34] Thus, the Privileges or Immunities Clause and, notably, the Due Process Clause of the XIVth Amendment have served as the gateway for the application of the Bill of Rights to the American States.[35] According to some scholars, Article 20 TFEU could likewise provide the legal basis for an EU variant of the incorporation doctrine,[36] as this Treaty provision, having stated that '[c]itizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties', goes on to enumerate those rights on a non-exhaustive basis. The argument then runs that the status of EU citizen contains more rights than those set out in Articles 21 to 24 TFEU so that, emulating the US Supreme Court, the ECJ should rely on Article 20 TFEU with a view to attaching fundamental rights to that status.

In that regard, some scholars have advocated a 'reverse *Solange* doctrine' according to which national measures that do not implement EU law fall outside the scope of that law *as long as* they do not constitute systemic violations of fundamental rights. Where, however, national measures do give rise to such systemic violations, those scholars argue that, by virtue of the Treaty provisions on EU citizenship, EU citizens enjoy a judicially enforceable EU law right to protection from those violations, regardless of whether they move or remain in their Member State of origin.[37] That would create 'a common minimum level of fundamental rights protection throughout the EU'. The idea would thus be to protect not only the individual but also the 'constitutional core' of the EU which comprises, at the very least, the values set out in Article 2 TEU.

However, such an incorporation doctrine '*à l'européenne*', even if limited to 'systemic violations', would mean that fundamental rights pro-

---

[34] The Bill of Rights (Ist to Xth Amendments of the US Constitution) was originally conceived as a limit on the powers of the federal government but not those of the American States. The reason was that the majority of the founding fathers believed that the application of the Bill of Rights to the American States would give leverage to the federal government to encroach upon State powers not transferred to the Union. See, generally, E Chemerinsky, *Constitutional Law* (4th edn, Kluwer 2011). For an excellent study on US-EU comparative law regarding fundamental rights, see A Knook, 'The Court, the Charter, and the Vertical Division of Powers in the European Union' (2005) 42 CML Rev 367.

[35] The Privileges or Immunities Clause and the Due Process Clause read as follows: 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law'.

[36] In favour of applying the US incorporation doctrine to an EU context, see M van den Brink, 'EU Citizenship and EU Fundamental Rights: Taking EU Citizenship Rights Seriously?' (2012) 39 Legal Issues of Economic Integration 273, 287-288 (who advocates following the example of the US Supreme Court, whilst allowing Member States to opt for a higher level of protection).

[37] A von Bogdandy et al, 'Reverse Solange: Protecting the Essence of Fundamental Rights Against EU Member States' (2012) 49 CML Rev 489. See also D Kochenov et al (eds), *EU Citizenship and Federalism: The Role of Rights* (CUP, forthcoming).

tection under EU law would apply to national measures falling outside the scope of application of EU law, thus having the same scope as that of national constitutions or of the ECHR. That outcome would be incompatible with the principle of conferral, as it adversely affects the allocation of powers between the EU and its Member States sought by the authors of the Treaties.[38]

It is worth recalling that the principle of conferral affects the exercise of powers within the EU in two different but related ways. On the one hand, it limits the fields in which EU action can be undertaken.[39] On the other hand, it ensures that the EU will refrain from acting in a way that renders the powers retained by the Member States devoid of substance.[40] If, however, all national measures, regardless of their substantive link to EU law, had to pass muster under the Charter, that would seriously undermine the powers retained by the Member States, notwithstanding the principle of conferral.[41]

As I have explained elsewhere, the Charter is the 'shadow' of EU law. Just as an object defines the contours of its shadow, the scope of EU law determines that of the Charter.[42] Article 51(1) of the Charter must be interpreted as meaning that it is the scope of EU law that defines that of the Charter, and not the other way around.[43] An incorporation doctrine '*à l'européenne*' is simply incompatible with the rationale underpinning Article 51(1) of the Charter, by virtue of which recourse to fundamental rights cannot be invoked to broaden the substantive scope of EU law.

---

[38] Referring to the Opinion of AG Sharpston in *Ruiz Zambrano*, see P Van Elsuwege, 'Shifting the Boundaries? European Union Citizenship and the Scope of Application of EU Law — Case No C-34/09, Gerardo Ruiz Zambrano v Office national de l'emploi' (2011) 38 Legal Issues of Economic Integration 263, 267 (who argues that 'this proposal suggests a Copernican revolution within the EU's legal and political system, comparable to the impact of *Gitlow v New York* on American constitutional law').

[39] See Article 5(2) TEU: 'Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States'.

[40] See Article 4(1) TEU: '[i]n accordance with Article 5 [TEU], competences not conferred upon the Union in the Treaties remain with the Member States'.

[41] However, see van den Brink (n 36) 283, who posits that 'it is […] not the Charter but EU citizenship that has changed the field of application of Union law. Since EU fundamental rights could always be applied in situations falling within the scope of Union law, they would still be applicable if EU citizenship extends the scope of EU law'. However, in my view, this argument is circular given that it is by having recourse to the Charter that new rights attaching to the status of citizen of the Union would be created, hence expanding the scope of application of EU law.

[42] K Lenaerts and JA Gutiérrez–Fons, 'The Place of the Charter in the EU Constitutional Edifice' in S Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 1567-1568.

[43] Case C–617/10 *Åkerberg Fransson* ECLI:EU:C:2013:105, para 19.

That said, that incompatibility does not, however, rule out the possibility that other provisions of EU law may give rise to obligations on the Member States that relate to the political dimension of EU citizenship but are not set out in Articles 20(2), 22(2) and 24 TFEU. In fulfilling those EU law obligations, the Member States must, of course, comply with the Charter.[44]

Article 52(2) of the Charter, which states that '[r]ights recognised by [the] Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties', also opposes an incorporation doctrine '*à l'européenne*'. In that regard, the explanations relating to that Article of the Charter, which expressly mention 'the rights derived from Union citizenship', state that '[t]he Charter does not alter the system of rights conferred by the EC Treaty and taken over by the Treaties'. This means that the Charter may not be relied upon as a device which expands or grants new rights to EU citizens. This was actually what the ECJ did in *Delvigne*: compliance with Article 52(2) of the Charter means that the scope of Article 20(2)(b) TFEU determines that of Article 39(1) of the Charter. Since the former provision did not apply to a situation such as that at issue in the main proceedings, the latter did not apply either.[45] Conversely, given that Article 14(3) TEU applied to the case at hand, the same held true for Article 39(2) of the Charter. As mentioned above, it is thus the Treaty provision that corresponds to a fundamental right recognised in the Charter that determines the scope of application of that fundamental right, and not the other way around.

Furthermore, the incorporation of fundamental rights into the status of EU citizen may not be judicially driven, since Article 25(2) TFEU clearly states that:

> without prejudice to the other provisions of the Treaties, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may adopt provisions to strengthen or to add to the rights listed in Article 20(2) [TFEU]. These provisions shall enter into force after their approval by the Member States in accordance with their respective constitutional requirements.

It follows that Article 25(2) TFEU incorporates a double 'political safeguard of federalism'.[46] First, it safeguards Member States as a whole,

---

[44] *Delvigne* (n 10) para 33.

[45] *ibid,* paras 40 to 43.

[46] Term borrowed from H Wechsler, 'The Political Safeguards of Federalism: The Ro1e of the States in the Composition and Selection of the National Government' (1954) 54 Columbia Law Review 543.

since unanimity voting is required within the Council. Second, Article 25(2) TFEU also protects national parliaments and even the peoples of Europe themselves where their consent to such measures is required by their national constitution. Additionally, Article 25(2) TFEU applies 'without prejudice to the other provisions of the Treaties', notably Article 6(1) TEU which states that '[t]he provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties'. Accordingly, the political incorporation of new rights (or the strengthening of the rights already listed in Article 20(2) TFEU) to the status of EU citizen would have to comply with the prohibition laid down in Article 6(1) TEU.

An incorporation doctrine would also be inconsistent with the objectives sought by the authors of the Treaties. In particular, it would run counter to the fact that, in accordance with Article 4(2) TEU, the EU is committed to respecting the national identity of the Member States, of which national constitutional arrangements are part and parcel.[47] An incorporation doctrine '*à l'européenne*' would inevitably face opposition from national constitutional courts which would undermine the legitimacy of the ECJ. Even if limited to systemic failures, it would send the message that national constitutional courts are unable to fulfil the very mission for which they were created, ie to protect a sphere of self-determination at national level free from public interference. Since the relationship between the ECJ and national courts is based not on hierarchy but on cooperation and mutual respect, any breakdown in trust will lead not to submissive obedience on the part of national constitutional courts, but rather to resistance and conflict.[48] Outside the scope of application of EU law, the authors of the Treaties have entrusted the EU's political institutions, not the ECJ, with the task of monitoring whether 'there is a clear risk of a serious breach by a Member State of the values referred to in Article 2 [TEU]'. In accordance with Article 269 TFEU, the role of the ECJ is, by contrast, limited to verifying that the procedural stipulations laid down in Article 7 TEU have been met.

4 Concluding remarks

The ruling of the ECJ in *Delvigne* demonstrates that the political dimension of EU citizenship is not fully captured by the political rights attaching to the status of EU citizen. Respect for the principle of representative democracy may require both the EU institutions and the Member States to fulfil obligations that are not to be found in Articles 20(2), 22(2) and 24 TFEU, but in other provisions of the Treaties and secondary

[47] See Case C–208/09 *Sayn-Wittgenstein* ECLI:EU:C:2010:806, para 92.

[48] See also K Lenaerts, 'Kooperation und Spannung im Verhältnis von EuGH und nationalen Verfassungsgerichten' (2015) 50 Europarecht 3.

EU law that give concrete expression to democratic principles. Those obligations may seek to incorporate into the EU legal order basic electoral principles that are part and parcel of European democracies.[49]

Notably, by virtue of those electoral principles, the Member States are bound to ensure that members of the European Parliament are elected by direct universal suffrage in a free and secret ballot. That is so even in respect of EU citizens who are nationals. This shows that EU citizenship is linked to the democratic governance of the EU. As political actors, EU citizens who effectively participate in elections to the European Parliament contribute to strengthening the democratic credentials of the EU. Thus, the political dimension of EU citizenship is not only about rights, but also about ensuring that representative democracy at EU level is effective and, most importantly, legitimate.

Moreover, *Delvigne* illustrates the fact that the scope of the political rights attaching to the status of EU citizen may not be expanded via judicial interpretation, notably by incorporating fundamental rights into that status. In particular, the scope of Article 20(2)(b) TFEU is limited to giving concrete expression to the principle of non-discrimination on grounds of nationality as applied to the right to vote and to stand as a candidate in elections to the European Parliament. Consequently, that provision may not, as the ECJ ruled in *Eman and Sevinger*, be relied upon by an EU citizen against the Member State of which he is a national.

As interpreted in *Delvigne*, the political dimension of EU citizenship is respectful of the constitutional framework set out in the Treaties. This is because the ECJ grounded the obligation to ensure that members of the European Parliament are elected by direct universal suffrage in a free and secret ballot in the EU principle of representative democracy – as given concrete expression in Article 1(3) of the 1976 Act and Article 14(3) TEU. It did so, whilst leaving the scope of Article 20(2)(b) TFEU untouched. Since the national measure at issue 'implemented' that obligation within the meaning of Article 51(1) of the Charter, the ECJ was right to examine whether that measure complied with Article 52(1) of the Charter. This shows that, contrary to what an incorporation doctrine '*à l'européenne*' would have entailed, the ECJ gave impetus to the political dimension of EU citizenship without extending in any way the competences of the EU as defined in the Treaties.

[49] See the Opinion of AG Cruz Villalón in *Delvigne* (n 12), para 98 (holding that 'elections to the European Parliament by direct universal suffrage meant at all events that the composition of that chamber would be the image and reflection of that of the parliaments of the Member States').