The Delvigne judgment and the European franchise: going boldly… but perhaps not boldly enough

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In its recent *Delvigne* judgment, issued by the grand chamber on 6 October 2015, the European Court of Justice used Article 39(2) (*Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot*) and the last sentence of Article 49(1) (*If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable*) of the Charter of Fundamental Rights of the European Union in order to assess whether the automatic loss of civic rights, by the operation of French Law, of a French citizen who had been convicted of a serious crime was proportionate. This rather important ruling has already been the subject of much discussion, for example here and here. It has also be put in perspective in the broader context of the recent case-law of the European Court of Justice concerning fundamental rights on this blog. This solution is quite important, especially as regards Article 39(2) of the Charter. One important aspect this judgment raises is the question of the compatibility of the British "blanket ban" (the disenfranchisement of prisoners) with EU Law and of the consistency of *Delvigne* with the *Hirst* judgment of the European Court of Human rights. However, I would like here to focus on a particular aspect of this ruling, the way that the Court took a rather bold stance on the material scope of the right to vote and to stand as a candidate at elections to the European Parliament. I will however also argue that, in some respect, this stance was not bold enough.

A bold solution

The first important point to be noted is the fact that, in *Delvigne*, the European Court of Justice managed to find a real individual right in a rather vague provision. In its wording, Article 39(2) of the Charter does not seem to grant any right but merely to lay down the principle according to which "Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot". Yet, the Court found that this provision "constitutes the expression in the Charter of the right of Union citizens to vote in elections to the European Parliament".

In this conclusion, the Court was probably inspired by the case-law of the European Court of Human Rights on Article 3 of Protocol 1. According to this provision, "*The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature*". This wording seems not to give rise to individual rights and freedoms but solely to obligations between States. The Strasbourg Court, however, judged otherwise in *Mathieu-Mohin and Clerfayt v Belgium* (1987), and consistently considers that this provision enshrines an individual right to free elections, under the conditions laid down in this provision.

The ECJ also used the text called "explanations relating to the Charter". This text was originally prepared under the authority of the Praesidium of the Convention which drafted the Charter of Fundamental Rights of the European Union. According to the third subparagraph of Article 6(1) of the TEU and Article 52(7) of the Charter, this text must be given due regard for interpreting the Charter. The explanations state that Article 39(2) takes over the basic principles of the electoral system in a democratic State.

In that respect, the *Delvigne* ruling paves the way for an extended control of the European Court of Justice on all the limitations of civic rights imposed on Union citizens – as long as these limitations affect their right to participate in the European elections. Furthermore, the European Court of Justice will be probably able, on the basis of this provision, to assess fully whether States meet fundamental democratic standards, as laid down in the case-law of the European Court on Human rights (see here for an overview), when organising the European elections – just as the European Court on Human Rights did itself in *Matthews v United Kingdom* (1999).

The second important feature of *Delvigne* is the fact that the Court found Article 39(2) of the Charter applicable in a purely internal situation. The main case was about a French national complaining that French legislation prevented him from participating in the European elections in France. Despite the fact that it was the European

elections, all the elements of the case were related to one country.

This is as well a rather bold move. Usually, EU citizens' rights (understood *senso strictu* as the rights enjoyed only by the citizens of the European Union) require a "cross-border" situation in order to apply. The freedom of movement and of residence applies only, in principle, to EU citizens who have crossed or want to cross an internal border of the European Union. The diplomatic and consular protection only applies to EU Citizens in their relations with Member States other than those of which they are nationals. The right to vote and to stand as a candidate at municipal elections is, in fact, a specific expression of the principle of non-discrimination on grounds of nationality. Therefore, it only applies to non-national EU citizens. The ECJ reached the same conclusion as regards the right to vote and to stand as a candidate at the European elections in *Spain v United Kingdom* (2006). It is true that, in *Eman and Sevinger* (2006), the European Court of justice managed to consider that a difference of treatment between *nationals* as regards the European elections fell within the scope of EU Law. However, in this case, the applicable principle was *not* the right to vote and to stand as a candidate at European elections itself. The applicable principle was the general principle of equality, as a general principle of Community Law. The Court only used the right to vote and to stand as a candidate at European elections in order to "link" the situation with Community Law, making the general principle of equality applicable to the case. In *Delvigne*, the Court applies the right to vote and to stand as a candidate at elections *itself* to a purely internal situation.

The application of EU citizens' rights in a purely internal situation is not unprecedented. In the *Rottmann* judgment (2010), the Court held that a Member State shall observe the principle of proportionality when deciding whether to withdraw its nationality from one of its nationals, especially when such a decision would deprive this citizen of his/her EU citizenship. In the *Zambrano* judgment (2011), the Court held that a Member State could not deprive an EU citizen – even one of its own nationals – of "the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen". In this case, Belgium could therefore not refuse a third country national upon whom his minor children, who were Belgians, are dependent, a right of residence in Belgium, nor refuse to grant a work permit to that third country national. In doing so, Belgium would have forced this third country national to leave the EU territory with his children, depriving them of "the genuine enjoyment of the substance" of the right to stay on the territory of any Member State. However, in *Delvigne*, the European Court of Justice went further than those precedents in applying fully Article 39(2) in a purely internal situation, and not only in extreme cases like in *Rottmann* and *Zambrano*.

Not bold enough?

There is, however, something slightly disappointing in this ruling, especially in the way the Court used Article 51(1) of the Charter.

One of the first tasks of the Court was to establish whether it had jurisdiction to reply to the request for a preliminary ruling. According to Article 51(1), the provisions of the Charter are addressed to the Member States *only when they are implementing European Union law*. It is true that the Court has broadly interpreted this provision in the past, especially in the *Fransson* judgement of 2013 in which the Court said that "since the fundamental rights guaranteed by the Charter must (…) be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter". However, in the same decision, the Court added that even such a broad interpretation has its limits: "where, on the other hand, a legal situation does not come within the scope of European Union law, the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction they are applicable every time EU Law is applicable". Later judgments of the European Court of Justice, for example *Torralbo Marcos* and *Siragusa*, demonstrate that the Court can be quite strict when defining the limits of the material scope of the Charter as regards the Member States.

In *Delvigne*, the Court demonstrated the link between the situation in question and EU Law by saying that the French legislation must be considered as an implementation of Article 14(3) of the TEU ("The members of the European Parliament shall be elected for a term of five years by direct universal suffrage in a free and secret

ballot") and Article 1(3) of the 1976 Act concerning the election of the members of the European Parliament by direct universal suffrage ("Elections shall be by direct universal suffrage and shall be free and secret").

There is something artificial in this reasoning. According to the "explanations relating to the Charter", Article 39(2) of the Charter corresponds to Article 14(3) of the TEU. Is it not artificial to say, on the one hand, that the provisions of the Charter cannot, by themselves, form the basis for the Court's jurisdiction and, on the other hand, that the "clone" of this provision in the Treaty can be used for establishing such jurisdiction? As for Article 1(3) of the 1976 Act, this provision has nearly the same substance as Article 14(3) of the TEU. Furthermore, we could say that Article 39(2) is the "fundamentalisation" (i.e. the transformation into a fundamental right) of Article 14(3) of the TEU, which itself (just like Article 190(1) of the TEC before the Lisbon Treaty used to be) is a "constitutionalisation" (i.e. the transformation into a primary Law provision) of Article 1(3) of the 1976 Act. On this basis, does it make sense to use Article 14(3) of the TEU and Article 1(3) of the 1976 Act to justify that the situation falls within the scope of Article 39(2) of the Charter?

The problem in fact goes deeper than that. Is it even necessary to apply the "Fransson" test when one of the provisions of the Charter invoked is an EU citizen's right? Is it consistent with the very purpose of Article 51(1)?

One must not forget that the doctrine of fundamental rights in Community Law was developed by the Court in the 70's, under the pressure of several national constitutional courts (especially German and Italian), in order to protect individuals' rights against the *institutions* of the (then) European Communities. These rights therefore address mainly the institutions. Therefore, in EU legal system, fundamental rights only apply to the States when they are acting as "agents" of the European Union. The Charter does not primarily address the Member States; it only binds them in an incidental manner – even though the Court adopted a broad view of the applicability of the Charter to the States in the *Fransson* judgment. As regards the Member States, the EU standards of human rights are functional, not federal.

This is not, and this has never been, the way EU citizens' rights operate. Since their inception in the Maastricht Treaty, they have been intentionally designed to be enjoyed by EU citizens in their relations with the Member States. Member States are therefore the *primary* addressees of the EU citizens' rights, whether they are laid down in the Treaties or in the Charter. This is true for all of them, even the right to vote and to stand as a candidate at elections to the European Parliament, since these elections are organised by the Member States. This right, and all the other rights of the EU citizens, have been designed *primarily* to impose specific obligations on the Member States as regards these EU citizens.

The Court should therefore clarify its position on the material scope of the Charter as regards the Member States by distinguishing EU citizens' rights, on the one hand, from the other fundamental rights, on the other hand. As regards the latter, Article 51(1) is relevant and the *Fransson* solution applies. As for the former, the Court should admit that EU citizen's rights apply in any situation, even in the absence of *another* link with EU Law.

Such a position would not dramatically extend the scope of the Charter – it may not even extend it at all. After all, the Charter provisions on EU citizens' rights mirror provisions contained in the Treaties and, sometimes, in secondary legislation. Therefore, each time a national situation falls within the scope of these provisions, they will also fall within the scope of the Charter – which is precisely what happened in *Delvigne* with Article 14(3) TEU and Article 1(3) of the 1976 Act. However, a clear and solemn proclamation that EU citizens' rights in the Charter are, in fact, freestanding, would make things both less artificial and simpler for the Court, as well as for national judges and for litigants. There are, however, two arguments against this solution. The first is textual. Article 51(1) does not distinguish EU citizens' rights from the other fundamental rights. This argument is not very strong however. EU citizens' rights could be considered a *lex specialis* within the Charter, due to their specific nature. The second argument is political. Admitting that some provisions of the Charter are freestanding would mean that these provisions are federal in essence. This may be too big a statement for the Court to endorse. It does not change the fact that there may be, indeed, some truth to it.

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but perhaps not boldly enough, VerfBlog, 2015/10/24, http://verfassungsblog.de/the-delvigne-judgment-of-the-cjeu-going-boldly-but-perhaps-not-boldly-enough/.

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