

## CHAPTER 7 The EU dimension based on democratic participation rights in Title II TEU

### 216 *Broadening the list of EU citizens' rights*

The concept of 'citizenship rights' is unclear. Are they limited to those enumerated in Article 20(2) TFEU and listed in Articles 20–24 TFEU (the classic citizenship provisions), or do they extend beyond the list? Article 25 TFEU sets out a cumbersome procedure for strengthening or adding to the rights listed, requiring unanimous action by the Council, the consent of the European Parliament, and approval by the Member States in accordance with their constitutional requirements. This suggests that the list of EU citizenship rights is limited. However, the enumeration in Article 20(2) is preceded by the words 'inter alia', which could support the opposite interpretation.<sup>1641</sup>

The Treaties should be read in an evolving context. The words 'inter alia' were added by the Lisbon Treaty.<sup>1642</sup> EU citizens enjoy other rights than those listed in Articles 20–24 TFEU.<sup>1643</sup> An obvious example is the right to participate in the democratic life of the Union granted to every cit-

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1641 O'Leary, *The Evolving Concept of Community Citizenship: From the Free Movement of Persons to Union Citizenship*, 105 ('inter alia'); A Tryfonidou, *The impact of Union citizenship on the EU's market freedoms* (Hart 2016), 26; W Kluth, 'AEUV Art 20' in C Calliess and M Ruffert (eds), *EUV/AEUV: das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta: Kommentar* (5th edn, Beck 2016), Rn 11; Kochenov, 'On Tiles and Pillars: EU Citizenship as a Federal Denominator' 27. Cp Lenaerts and Gutiérrez-Fons, 'Epilogue on EU Citizenship: Hopes and Fears', 752: a limited list ('Otherwise, the constitutional allocation of powers sought by the authors of the Treaties would be disturbed').

1642 2007 Lisbon Treaty, Art 2(34)(b), amending Art 17 of the Treaty establishing the European Community.

1643 Art 25 TFEU reflects an expectation that rights will evolve. See also Closa, 'The concept of citizenship in the Treaty on European Union', 1167: 'Therefore, the character of the union citizenship is determined by the progressive acquisition of rights stemming from the dynamic development of the Union. That is, the gradual acquisition by the European citizen of specific rights in new policy-areas transferred to the Union. This evolutive character, which is in itself the most characteristic feature of the citizenship of the Union, was developed by the contributions to the conference as a channel for incorporating controversial socioeconomic rights.'

ized by Article 10(3) TEU in Title II ‘Provisions on Democratic Principles’ (explained hereafter). In addition to democratic participation rights, citizens’ rights include the right to good administration and the right of access to documents (Articles 41–42 CFR in Title V ‘Citizens’ rights’).<sup>1644</sup> Moreover, the CFR recognises for every citizen of the Union the freedom to seek employment, to work, to exercise the right of establishment, and to provide services in any Member State (in Title II ‘Freedoms’).<sup>1645</sup> Some apparent inconsistencies (or seemingly sloppy drafting) in citizenship rights can be explained by the historical context. The rights in Articles 20–24 TFEU originate in the 1992 Maastricht Treaty and were influenced by the Adonnino Committee which sought to bring Europe closer to the citizen. They are—in the context of the time—more closely linked with mobility. The participation rights in Title II TEU originate in the work done in the Convention on the Future of Europe and the Treaty establishing a Constitution for Europe, which was partially incorporated into the Lisbon Treaty.<sup>1646</sup> These rights aim to strengthen democracy in the EU and increase the participation of EU citizens in EU governance.

It is safe to state that EU citizens have more rights than those listed in Articles 20–24 TFEU, independently of the question whether they are labelled ‘citizenship rights’ from the perspective of EU law. For the purposes of EDC, this label is not essential. All EU citizens’ rights provide relevant content for EDC component (c-1) ‘to exercise and defend their democratic rights in society’.

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1644 Settled case law had developed general principles of good administration. The CFR codified them (partly). Further BC Mihaescu Evans, *The right to good administration at the crossroads of the various sources of fundamental rights in the EU integrated administrative system* (Luxembourg Legal Studies 7, Nomos 2015). Also Hofmann, Rowe and Türk, *Administrative law and policy of the European Union*, 190–204.

1645 Art 15(2) CFR; Art 56 TFEU. Thym, ‘Ambiguities of Personhood, Citizenship, Migration and Fundamental Rights’, 124: ‘it seems that supranational rules on citizenship, migration and human rights are excellent examples to illustrate the inherent ambiguity of conceptions of personhood in EU law’; ‘EU law deconstructs old conception of nation-state membership or lineage and, yet, it is unclear how to explain the new setting positively’.

1646 Convention on the Future of Europe (2003) <european-convention.europa.eu/>; Treaty establishing a Constitution for Europe [2004] OJ C310 (signed in Rome on 29 October 2004, ratified by 15 of 25 Member States, no entry into force).

217 *Linking EU citizenship and democracy (Title II TEU)*

That the Treaties see EU citizens as political actors has become clear from the democratic participation rights in Articles 20–24 TFEU (Chapter six). Yet, the core political rights of EU citizens are not established in these citizenship provisions. EU primary law recognises the role of EU citizens as political actors in many other ways. Title II TEU, which connects the provisions on democratic principles with EU citizenship, is the hard core for the EU dimension of EDC.<sup>1647</sup> Firstly, Title II obliges the Union to observe the principle of equality of EU citizens (Article 9 TEU). Next, Title II sets the scene with a mixture of systemic principles, institutional obligations, individual rights as well as opportunities for EU citizens, individually or collectively. It is a matter of debate among scholars as to the extent to which justiciable individual rights are established by democratic principles, institutional provisions, or obligations on institutions and Member States when implementing EU law. For the purposes of EDC, this is not a decisive factor. To the extent that EU primary law grants democratic participation *rights*, it adds content to EDC component (c-1) ‘to exercise rights’. To the extent that EU primary law grants democratic participation *opportunities*, it adds content to EDC component (c-3) ‘to play an active part in democratic life’. Both share the objective of ‘the promotion and protection of democracy and the rule of law’ (component d).<sup>1648</sup>

Title II TEU must be interpreted in the context of many other provisions of the Treaties. EU secondary law, too, gives concrete expression to democratic principles. The principle of democracy pervades EU law, giving citizens a context of participation, yet with specific EU features.<sup>1649</sup> In legal terms, nationals of a Member State are ‘citizens *of* the Union’ (Treaty expression, e.g. in Article 9 TEU). In reality, they are human beings, living

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1647 Commission Recommendation of 12 March 2013 on enhancing the democratic and efficient conduct of the elections to the European Parliament [2013] OJ L79/29, recital 3 (‘The Treaty of Lisbon enhances the role of citizens of the Union as political actors, establishing a solid link between citizens, the exercise of their political rights and the democratic life of the Union’). See analysis by Shaw, ‘Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism’, 4.2–3; Lenaerts and Gutiérrez-Fons, ‘Epilogue on EU Citizenship: Hopes and Fears’ 752, 756.

1648 Definition of EDC in Charter on EDC/HRE, para 2.

1649 Transparency rights, rights of freedom of expression, freedom of assembly and association i.a. in political matters, provisions on political parties, etc. See Lenaerts and Gutiérrez-Fons, ‘Epilogue on EU Citizenship: Hopes and Fears’ 752.

in a country which is an EU Member State: they are simply citizens *in* the Union.<sup>1650</sup> Do they understand the system in which they live? This system claims to be democratic. What are the implications when applying EDC standards?

### *A The right to participate in the democratic life of the Union*

#### *218 A citizenship right fundamental to the EU dimension of EDC*

Article 10(3) TEU states that '[e]very citizen shall have the right to participate in the democratic life of the Union' and that '[d]ecisions shall be taken as openly and as closely as possible to the citizen'. Based on a textual and contextual interpretation, the right granted by Article 10(3) TEU is an authentic citizenship right, defined as a right conferred by virtue of the status of citizen of the Union (a right attaching to the status of EU citizen): purely by being a Member State national, the EU citizen has the right to participate in the democratic life of the Union.<sup>1651</sup> It is noteworthy that the right of Article 10(3) is drafted in the same style as the citizenship rights listed in Article 20–24 TFEU ('Every citizen ... shall have the right to ...'). The link between Title II TEU and the citizenship rights in Articles 20–24 TFEU is guaranteed, moreover, by the ECI, inserted into Article 11(4) TEU by the Lisbon Treaty, but with a legal basis in Article 24 TFEU.<sup>1652</sup>

Article 10(3) TEU satisfies the four criteria of relevance for mainstream EDC. The right to participate in the democratic life of the Union provides additional content for national EDC (i) in both components (c-1) and (c-3), and indirectly in (c-2). Since it is not included in the list of Articles

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1650 Distinction between citizens *of* and *in* the Union in Shaw, 'Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism', i.a. text to fn 152 ('the challenge of constructing an effective political citizenship both *of and in* the Union). Shaw emphasises for citizens *in* the Union the political dimension and their role in the Union as a polity evolving beyond the State. In my approach, which is slightly different, citizenship *of* the Union includes the 'citizenship right' of Art 10(3) TEU, including the role in the polity evolving beyond the State. See also the distinction between EU citizenship and European citizenship in Besson and Utzinger, 'Towards European Citizenship' ('the benefit of EU citizenship ensues from its dynamic interplay with existing national citizenships. Hence, the idea of *European citizenship*, that best reflects the transformative Europeanization of national citizenship in Europe').

1651 See also text to n 1691.

1652 Text to n 1541.

20–24 TFEU, the right is often neglected as a citizenship right by scholars and in reports.<sup>1653</sup> It deserves much more attention. It is unnecessary to mention that the right relates to foundational values, objectives and principles, i.e. democracy (ii). True, the content of this citizenship right is quite abstract. Arguably, the right as such does not create rights which are justiciable (the provision on the right ‘to participate in the democratic life of the Union’ can hardly be deemed clear, precise and unconditional). Yet, given its place in the TEU (the Treaty which contains the essential provisions and principles of the EU, further developed in the TFEU), it is at least as important as the classic citizenship rights listed in the TFEU and mostly exercised by mobile citizens. EU institutions repeatedly confirm its importance, e.g. ‘the most fundamental area of citizenship, namely the right to participate in the democratic process’.<sup>1654</sup> The right invites critical thinking (iii) about the EU and input in democratic processes, as well as about the right itself. *How exactly can citizens participate in ‘the democratic life of the Union’? Does participating in a Union of 500 million citizens matter?*<sup>1655</sup> Finally, this right is granted to all citizens. Not dependent on mobility, it is a crucial right for static EU citizens (iv), therefore relevant for mainstream education.

The relevance of the right to participate in the democratic life of the Union for EDC is supported in EU primary law when Article 10(3) TEU is read in conjunction with Article 165(2), first and fifth indent, TFEU.<sup>1656</sup> Under the general objective of quality education, the EU can adopt incentive measures aimed at ‘developing the European dimension in education’ and ‘encouraging the participation of young people in democratic life in Europe’ (Article 165 TFEU).<sup>1657</sup>

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1653 Not mentioned as such: i.a. Nic Shuibhne and Shaw, ‘General report’, 161 ff; Craig and de Búrca, *EU Law: Text, Cases, and Materials* 854, 888; K Lenaerts and P Van Nuffel, *Europees Recht* (6 edn, Intersentia 2017) 115–127.

1654 European Parliament Resolution of 11 November 2015 on the reform of the electoral law of the European Union [2017] OJ C366/7, recital AC (‘whereas harmonisation of the voting age, and of the minimum age for candidates, would be highly desirable as a means of providing Union citizens with real voting equality, and would enable discrimination to be avoided in the most fundamental area of citizenship, namely the right to participate in the democratic process’).

1655 See text to nn 1866 ff.

1656 See Part two, §§ 116–132.

1657 Further Part four, § 305 ff.

219 *A general right relating to representative and participatory democracy*

The abstract wording of Article 10(3) TEU can be given concrete substance in various ways. Does it imply representative or participatory democracy?

On a narrow view, it only covers forms of participatory democracy. The verb 'to participate in' in Article 10(3) TEU connects with the adjective 'participatory'. On a broader view, it is also associated with representative democracy, as voting in elections is the means *par excellence* of participating in the democratic life of the Union; the other means of participation are complementary. Interpretation based on the *travaux préparatoires* does not produce any definitive answers.<sup>1658</sup> What pleads in favour of representative democracy, on the one hand, is that in the Treaty establishing a Constitution for Europe, this right was set out in Article I-46, entitled 'The principle of representative democracy' (just after the provisions which now form Article 10(1) and (2) TEU). Participation in democratic life is traditionally associated with voting to determine the composition of the parliamentary bodies representing citizens. What pleads in favour of participatory democracy, on the other hand, is that in the proposal of the Praesidium on the democratic life of the Union (Title VI), the right was included in Article 34 'The principle of participatory democracy'.<sup>1659</sup>

Given the arguments on both sides, the right in Article 10(3) TEU can be interpreted as an overarching right, relating to both representative and participatory democracy. Institutions and scholars use it in both con-

1658 See also B Kohler-Koch, 'Does participatory governance hold its promises?' in B Kohler-Koch and F Larat (eds), *Efficient and democratic governance in the European Union* (CONNEX Report Series No 9, Mannheim 2008) 266: not much deliberation on the provision; 'the Constitutional Convention was not a body that engages in theoretical reasoning'.

1659 Praesidium European Convention, The democratic life of the Union (2 April 2003) CONV 650/03, Art 34(1) 'Every citizen shall have the right to participate in the democratic life of the Union'; 'Draft Article 34 sets out the main elements of participatory democracy, and is intended to provide a framework and content for the dialogue which is largely already in place between the institutions and civil society' (p 2, also p 8). Further Convention on the Future of Europe (2003) <european-convention.europa.eu/>; Peters, 'European democracy after the 2003 Convention', 44; S Smismans, 'The constitutional labelling of "the democratic life of the EU": "representative" and "participatory" democracy' in A Follesdal and L Dobson (eds), *Political Theory and the European Constitution* (Routledge 2004); L Burgorgue-Larsen, A Levade and F Picod (eds), *Traité établissant une Constitution pour l'Europe, Partie II La Charte des droits fondamentaux de l'Union: Commentaire article par article* (Bruylant 2005); J Mendes, *Participation in EU Rule-Making: A Rights-Based Approach* (Oxford University Press 2011) 27, 140.

texts.<sup>1660</sup> The right to a citizens' initiative, to petition the European Parliament, or to refer to the Ombudsman are expressions of the general right in Article 10(3) TEU.<sup>1661</sup> The general right underpins the specific political rights of EU citizens.<sup>1662</sup> Article 10(3) TEU acquires further substance when read in conjunction with EU law provisions on the institutions.

The relevance of specific political rights to the EU dimension of EDC will now be examined, in respect of representative democracy in sections B and C, in respect of participatory democracy in section D.

## B The right to vote for the European Parliament

### 220 The European Parliament in EU primary law

Voting in elections for the European Parliament is central to the image of active EU citizenship. It constitutes obvious learning content for the EU dimension of EDC in mainstream education. The topic provides additional (i) and significant (ii) content to national EDC, invites critical thinking about the state of play in the EU (iii), and it affects all EU citizens (iv).

The Treaties do not state that every citizen of the Union shall have the right to vote in elections to the European Parliament. While the 1989 'Declaration of fundamental rights and freedoms' of the European Parliament

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1660 See i.a. European Parliament Resolution of 11 November 2015 on the reform of the electoral law of the European Union [2017] OJ C366/7, recital U ('a common European voting day would better reflect common participation by citizens across the Union, reinforce participatory democracy ...'); S Smismans, 'New governance: the solution for active European citizenship, or the end of citizenship?' (2007) 13 *Columbia Journal of European Law* 595, 599, 606; Lenaerts and Van Nuffel, *European Union Law* 737; Khadar and Shaw, 'Article 39: Right to Vote and to Stand as a Candidate at Elections to the European Parliament' 1039; S Smismans, 'Regulating interest group participation in the European Union: changing paradigms between transparency and representation' (2014) 39 *ELRev* 470, 604; M Ruffert, 'EU-Vertrag (Lissabon) Art 10' in C Calliess and M Ruffert (eds), *EUV/AEUV: das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta : Kommentar* (5th edn, Beck 2016), Rn 11–12 ('ein demokratisches Grundrecht', both for representative and participatory democracy); Lenaerts and Gutiérrez-Fons, 'Epilogue on EU Citizenship: Hopes and Fears' 775 (Art 10(3): participation is primarily carried out by means of electing the members of Parliament). See also concept of 'participation' in Mendes (n 1738).

1661 Case C-589/15 P *Anagnostakis* ECLI:EU:C:2017:663, para 24.

1662 For the link between Art 10(3) TEU and access to documents, see Case C-57/16 P *ClientEarth* ECLI:EU:C:2018:660, para 84.



explicitly formulated that right,<sup>1663</sup> the authors of the Treaty were not so explicit. The right of EU citizens to vote in elections for the European Parliament can be deduced from a contextual reading of democratic principles together with the provisions on the institutions (Titles II and III TEU). Article 10 TEU states that '[t]he functioning of the Union shall be founded on representative democracy' and that '[c]itizens are directly represented at Union level in the European Parliament' (paras 1 and 2). It is noteworthy that before the 2009 Treaty of Lisbon, the members of the European Parliament were called 'representatives of the peoples of the States'.<sup>1664</sup> Since 2009, the European Parliament is composed of 'representatives of the Union's citizens' (Article 14 para 1 TEU). The obligation formulated in Article 39(2) CFR corresponds to that of Article 14(3) TEU: 'Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot'.<sup>1665</sup> It was to this obligation that the ECJ linked the right to vote in the landmark decision *Delvigne*.<sup>1666</sup> The second paragraph of Article 39 CFR, corresponding to Article 14(3) TEU, thus constitutes an essential provision for the EU dimension of EDC.

### 221 *Delvigne: the right to vote in elections for the European Parliament*

In settled case law, the ECJ recalls that 'participation reflects a fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly'.<sup>1667</sup> While the right to vote had arguably already been implicitly recognised in *Eman v Sevinger* and in *Spain v UK* (pre-Lisbon),<sup>1668</sup> the explicit recognition by the

1663 European Parliament Resolution of 12 April 1989 adopting the Declaration of fundamental rights and freedoms [1989] OJ C120/51, Art 17 (3).

1664 Art 189(1) TEC.

1665 Correspondance confirmed by the Explanations to the CFR.

1666 Case C-650/13 *Delvigne* ECLI:EU:C:2015:648.

1667 Case 138/79 *Roquette Frères* ECLI:EU:C:1980:249, para 33; Case C 300/89 *Commission v Council (Titanium dioxide)* ECLI:EU:C:1991:244, para 20; Case 139/79 *Maizena v Council* ECLI:EU:C:1980:250, para 34.

1668 Case C-300/04 *Eman and Sevinger* ECLI:EU:C:2006:545; Case C-145/04 *Spain v UK* ECLI:EU:C:2006:543. The ECJ was not as explicit as AG Tizzano, who had argued in his Opinion (para 69) that all EU citizens enjoy the right to vote in European elections, primarily by virtue of the principles of democracy on which the EU is based, and in particular of the basic principle of universal suffrage. Implicit recognition argued in Shaw, 'Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism', text to fn 118 ff; analysis in Khadar and Shaw, 'Article 39: Right to Vote and to Stand as a Candidate at Elections to the European Parliament' 1037–9, 1042–3; in the same sense, Lenaerts and Gutiérrez-Fons, 'Epilogue on EU Citizenship: Hopes and



ECJ in *Delvigne* (post-Lisbon) of the right of EU citizens to vote for the European Parliament was a significant development.<sup>1669</sup> The case concerned the right to vote of an EU citizen in the Member State of which he is a national, thus the situation of a static citizen vis-à-vis his own Member State.

Thierry Delvigne, a French national, is sentenced in France to 12 years imprisonment for murder and, under French law, he is deprived of his right to vote in elections. An administrative commission decides to remove him from the electoral roll of the municipality where he resides (Lesparre-Médoc). Mr Delvigne challenges this decision alleging unequal treatment. A French Court (Bordeaux) asks the ECJ whether the deprivation of the right to vote is compatible with Article 39 CFR on elections to the European Parliament. The French, Spanish and UK Governments claim that the ECJ has no jurisdiction: the provisions of the CFR are addressed 'to the Member States only when they are implementing Union law' (Article 51(1) CFR),<sup>1670</sup> which, they say, is not the case here. The ECJ recalls that, indeed, the fundamental rights guaranteed in the EU legal order are only applicable in situations governed by EU law, but finds that, in this case, the situation is governed by EU law. It is true that the definition of the persons entitled to exercise the right to vote falls within the competence of each Member State, as the Electoral Act of 1976 does not define them and states that the electoral procedure shall be governed in each Member State by its national provisions.<sup>1671</sup> However, when exercising that competence, the Member States must comply with EU law. They are

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Fears', fn 118. The UK Supreme Court (*Chester and McGeoch*) disputed that EU law contained an individual right to vote in European Parliament elections. Comparison with *Delvigne*: H van Eijken and JW van Rossem, 'Prisoner disenfranchisement and the right to vote in elections to the European Parliament: Universal suffrage key to unlocking political citizenship?' (2016) 12 European Constitutional Law Review 114, 118–9; S Coutts, 'Delvigne: A Multi-Levelled Political Citizenship' (2017) 42 ELRev 867, 872–4.

1669 Case C-650/13 *Delvigne* ECLI:EU:C:2015:648.

1670 Para 25. On this condition, see i.a. Case C-617/10 *Åkerberg Fransson* ECLI:EU:C:2013:280, paras 17, 19, 22.

1671 Para 31 (no express and precise definition of who is entitled to the right in Arts 1(3) and 8 Electoral Act). See Act concerning the election of the representatives of the Assembly by direct universal suffrage [1976] OJ L278/5 (Electoral Act), as amended, Art 7; Council Decision of 25 June 2002 and 23 September 2002 amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Decision 76/787/

bound by the EU law obligation to ensure that the election of Members of the European Parliament occurs by direct universal suffrage, free and secret, as set out in Article 14(3) TEU and in Article 1(3) of the Electoral Act. When they exclude an EU citizen from the elections, they are implementing EU law. The action thus falls within the scope of EU law.

As to the substance, the ECJ applies the distinction between the two paragraphs of Article 39 CFR in accordance with the Explanations to the CFR. The first paragraph of Article 39 CFR is not applicable as it only concerns mobile citizens and Mr Delvigne's situation is that of a static citizen. The second paragraph of Article 39, which corresponds to Article 14(3) TEU, is applicable. The ECJ states that Article 39(2) CFR '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 1976 Electoral Act'.<sup>1672</sup> It is this right which has been limited by the decision of the French administrative commission depriving Mr Delvigne of his voting rights. Yet, the limitation is justified under Article 52(1) CFR: it is provided by law, respects the essence of the right as well as the principle of proportionality (excluding a person convicted of a serious crime).

As explained by Lenaerts and Gutiérrez-Fons, what is important in *Delvigne* is that it links EU citizenship and EU representative democracy:

It has helped to make explicit the link between EU citizenship and democratic governance of the EU. It shows that the political dimension of EU citizenship is not limited to Articles 20–25 TFEU, but also involves other provisions of EU law, notably Article 14(3) TEU and Article 1(3) of the 1976 Act.<sup>1673</sup>

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ECSC, EEC, Euratom [2002] OJ L283/1. See also European Parliament Resolution of 11 November 2015 on the reform of the electoral law of the European Union [2017] OJ C366/7.

1672 Para 44.

1673 Lenaerts and Gutiérrez-Fons, 'Epilogue on EU Citizenship: Hopes and Fears', 779; earlier K Lenaerts, 'Linking EU Citizenship to Democracy' (2015) 11 Croatian Yearbook of European Law and Policy VII, ix. Further J Gundel, 'Der Verlust der bürgerlichen Ehrenrechte als Eingriff in die Grundrechtecharta—Neues zur Reichweite des EU-Grundrechtsschutzes gegenüber den Mitgliedstaaten und zur lex-mitior-Garantie' (2016) 51 Europarecht 176; also significance in van Eijken and van Rossem, 'Prisoner disenfranchisement and the right to vote in elections to the European Parliament: Universal suffrage key to

Van Eijken and van Rossem consider that 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’.<sup>1674</sup> This fundamental right, based on a combined reading of the TEU, the CFR and the Electoral Act, strengthens the political dimension of EU citizenship. Coutts finds the recognition of a free-standing right to vote for European Parliament elections more radical than one might suppose: it affirms a political right directly applicable even in the home Member State in wholly internal situations, associated with the status of EU citizenship, unrelated to free movement or non-discrimination. Whereas the Treaties link EU citizenship and direct democracy in the ECI, here the ECJ extends the link to representative democracy.<sup>1675</sup> In *Delvigne*, EU citizenship shifts beyond an economic and transnational citizenship towards a political and supranational citizenship.<sup>1676</sup> At the same time, EU citizenship remains derived multi-level citizenship. Member States can limit the right, and in the case in question, the ECJ even accepted the limit quite easily.<sup>1677</sup>

Importantly, in *Delvigne* the ECJ connected the right to vote for the European Parliament with paragraph 2 of Article 39 CFR, not with paragraph 1 (which corresponds to Article 22 TFEU and is limited to conferring a right of equal treatment on mobile citizens in the host Member State<sup>1678</sup>). This political fundamental right of EU citizens falls within the scope of the Treaties, including with regard to citizens who do not cross borders. Admittedly, the order of the provisions in Article 39 CFR is curious, first setting out the equal treatment right for mobile citizens and

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unlocking political citizenship?’, 130–2; Coutts, ‘*Delvigne*: A Multi-Levelled Political Citizenship’.

1674 van Eijken and van Rossem, ‘Prisoner disenfranchisement and the right to vote in elections to the European Parliament: Universal suffrage key to unlocking political citizenship?’, 123 (emphasis added).

1675 Coutts, ‘*Delvigne*: A Multi-Levelled Political Citizenship’, 875.

1676 Ibid, 881 (political rights in Art 22 TFEU are in fact transnational rights; see Dir 93/100 and 94/80).

1677 Ibid, 881 (remarkable discretion). See also comparison with ECtHR case law in van Eijken and van Rossem, ‘Prisoner disenfranchisement and the right to vote in elections to the European Parliament: Universal suffrage key to unlocking political citizenship?’, and Gundel, ‘Der Verlust der bürgerlichen Ehrenrechte als Eingriff in die Grundrechtecharta—Neues zur Reichweite des EU-Grundrechtsschutzes gegenüber den Mitgliedstaaten und zur *lex-mitior*-Garantie’.

1678 *Delvigne* para 42; text to n 1486.

thereafter the right of universal suffrage. It should probably be seen in the historic drafting context.<sup>1679</sup>

*Delvigne* furthermore shows that fundamental rights may not be incorporated into the substantive rights attaching to the status of EU citizens by means of judicial interpretation.<sup>1680</sup> The rights in the CFR are not self-standing. It is the scope of the Treaty provision corresponding to a CFR right which determines the scope of the CFR right, here Article 14(3) TEU determining the scope of Article 39(2) CFR.<sup>1681</sup> The ECJ recognised the right to vote without linking it to the citizenship rights listed in Articles 20–24 TFEU. As Lenaerts and Gutiérrez-Fons emphasise, the Court left the scope *ratione personae* of Article 20(2)(b) TFEU and Article 22 TFEU untouched. It is in ‘implementing’ the obligations imposed by Article 14(3) TEU and the Electoral Act that the Member States must respect the CFR (in application of Article 51(1) CFR), also in regard to EU citizens who are nationals.<sup>1682</sup>

The recognition of the right of EU citizens to vote and the political dimension of EU citizenship in Title II TEU are a significant development for EU citizenship and for the application of EDC standards.

## 222 *Relevance of the right to vote for the European Parliament for mainstream education*

On a reading of EU primary law provisions on the European Parliament, in particular Articles 10(1)(2), 14(3) TEU, and 39(2) CFR, jointly with

1679 Khadar and Shaw, ‘Article 39: Right to Vote and to Stand as a Candidate at Elections to the European Parliament’, 1053.

1680 Lenaerts and Gutiérrez-Fons, ‘Epilogue on EU Citizenship: Hopes and Fears’ 779; Lenaerts, ‘Linking EU Citizenship to Democracy’, ix (against the incorporation doctrine ‘à l’Européenne’).

1681 Lenaerts, ‘Linking EU Citizenship to Democracy’, xvi.

1682 Lenaerts and Gutiérrez-Fons, ‘Epilogue on EU Citizenship: Hopes and Fears’ 779. For comments on *Delvigne*, see i.a. van Eijken and van Rossem, ‘Prisoner disenfranchisement and the right to vote in elections to the European Parliament: Universal suffrage key to unlocking political citizenship?’, 122 (quite foggy, circular, remarkably broad interpretation, ‘a set of general principles is deemed sufficient to activate the scope of EU law’); Gundel, ‘Der Verlust der bürgerlichen Ehrenrechte als Eingriff in die Grundrechtecharta—Neues zur Reichweite des EU-Grundrechtsschutzes gegenüber den Mitgliedstaaten und zur *lex-mitior*-Garantie’, 187 (on the link with EU law: ‘zwar dünn... aber unbestreitbar vorhanden’—admittedly tenuous... but indisputably there). On the scope of application of the CFR, see i.a. Case C-390/12 *Pfleger* ECLI:EU:C:2014:281: para 36 (derogation from free movement rules must comply with the CFR).

EDC standards, the right to vote in European Parliament elections adds significant content to national EDC (i, ii), in both components (c-1) and (c-3).

Sceptics doubt whether electoral rights in respect of the European Parliament really provide additional content for national EDC (i). Asked about EU citizenship and the EU dimension of citizenship education in schools, the head of one of the main school networks responsible for specifying the curriculum in a Member State, answered that it suffices for pupils to have learned about the national parliament; learning about another parliament (the European Parliament) does not add much to their civic knowledge.<sup>1683</sup> Admittedly, the act of voting is the same in parliamentary elections at regional, national, or EU level. Citizens do not need much additional empowerment to go to a polling station and tick a box on an electoral list for the European Parliament. From the perspective of *formal* or *procedural* democracy, additional educational preparation is superfluous. However, from the perspective of *substantive* democracy<sup>1684</sup>, EU citizens need to be empowered to participate meaningfully in elections at EU level. For a non-negligible group of nationals, paradoxically, the *EU* dimension of voting in European Parliament elections needs to be explained. European Parliament elections should be more than popularity tests of national politicians or parties.<sup>1685</sup>

The increasingly important role of the European Parliament in the institutional framework of the EU provides additional content for national EDC (i). The European Parliament exercises legislative and budgetary functions jointly with the Council, functions of political control and consultation, and elects the President of the Commission (Art 14 (1) TEU).

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1683 Studiedag KU Leuven, ICCS Vlaanderen, ‘Burgerschap op school: hoe ga je ermee aan de slag?’ (Brussels, 8 February 2018).

1684 Rosas and Armati, *EU Constitutional Law: An Introduction* 140: ‘substantive principles and rules with constitutional status may contribute to democratic legitimacy, provided that they are based on values which are generally accepted and are articulated in an open deliberative process in which political institutions, judges and civil society can take part. This is what we mean by substantive democracy’. This conception of democracy presupposes ‘agreeing up-front what the Union is based on and what the integration process is for’. See also D Van Reybrouck, ‘Democratie is meer dan een bolletje kleuren’ *De Standaard* (19 November 2016) <[www.standaard.be/cnt/dmf20161118\\_02579747](http://www.standaard.be/cnt/dmf20161118_02579747)> .

1685 See also European Parliament Resolution of 11 November 2015 on the reform of the electoral law of the European Union [2017] OJ C366/7, para L (electoral campaigning remains national).

The Commission is as a body responsible to the European Parliament (Article 17(8) TEU). In many policy fields, the European Parliament is co-legislator together with the Council. Numerous legislative acts create EU rights or obligations for citizens and have an impact on their daily lives.<sup>1686</sup> It therefore is not sufficient to have learned about the national parliament. If the will of EU citizens is to be represented, these citizens need to be aware of the role of the European Parliament in their lives.<sup>1687</sup>

The electoral rights at EU level invite critical thinking about the EU and its policies, as well as about the European Parliament itself (iii). The European Parliament does not have the typical features of a parliament in the statal context. EU citizens' votes do not have equal weight.<sup>1688</sup> Article 14(2) TEU defines the criteria for the composition of the European Parliament, the minimum and maximum numbers of seats, and a system of degressive proportionality.<sup>1689</sup> Pupils should have some idea about the specific fea-

1686 EU rights, next chapter. See also Commission Recommendation (EU) 2018/234 of 14 February 2018 on enhancing the European nature and efficient conduct of the 2019 elections to the European Parliament [2018] OJ L45/40, recital 7.

1687 Commission Recommendation of 12 March 2013 on enhancing the democratic and efficient conduct of the elections to the European Parliament [2013] OJ L79/29, recitals 4 and 9; Case C-650/13 *Delvigne* ECLI:EU:C:2015:648, Opinion of AG Cruz Villalón, para 99. Flash Eurobarometer 431, Electoral Rights (March 2016): 84% of respondents think that turnout at European elections would be higher if more information was provided on the impact of the EU on their daily lives.

1688 See i.a. *BVerfG, 2 BvE 2/08 (Lissabon)* 30 June 2009, Absatz-Nr (1-421), para 279: 'The democratic basic rule of equal opportunities of success ("one man, one vote") only applies within a people, not within a supranational representative body, which remains a representation of the peoples linked to each other by the treaties albeit now with special emphasis on citizenship of the Union'; para 284: 'As a result the weight of the vote of a citizen from a Member State with a small population may be about twelve times the weight of the vote of a citizen from a Member State with a large population'.

1689 European Council Decision (EU) 2018/937 of 28 June 2018 establishing the composition of the European Parliament [2018] OJ L1651/1 (legal basis Art 14(2) TEU) sets the seats for the 2019–2024 parliamentary term after Brexit (i.a. BE 21, DE 96, FR 79, LU 6, RO 33), defining degressive proportionality: 'the ratio between the population and the number of seats of each Member State before rounding to whole numbers is to vary in relation to their respective populations in such a way that each Member of the European Parliament from a more populous Member State represents more citizens than each Member of the European Parliament from a less populous Member State and, conversely, that the larger the population of a Member State, the greater its entitlement to a large number of seats in the European Parliament'.

tures of representative democracy in the EU, which has to balance the principles of equality of its citizens and equality of Member States. If the minimal voting age for the European Parliament is harmonised at 16 years,<sup>1690</sup> EU learning at school becomes even more relevant.

Finally, the right to vote for the European Parliament is granted to every EU citizen. It affects static citizens too (iv), as illustrated by *Delvigne*.

In short, electoral rights for the European Parliament are relevant for mainstream education. They satisfy all criteria. The explicit recognition by the ECJ of the right to vote in the European Parliament underscores its relevance for mainstream education.

While the right to vote for the European Parliament is as such relevant to the EU dimension of EDC, labelling it a ‘political right attaching to the status of EU citizen’ would provide an even stronger argument in favour of an EU dimension to EDC. Yet, caution is needed for a proper understanding of this label.

### 223 *A political right attaching to the status of EU citizen?*

Lenaerts and Gutiérrez-Fons state that ‘the political dimension of EU citizenship is not fully captured by the political rights attaching to the status of EU citizen’ and ‘the rights attaching to that status do not fully capture the link between EU citizenship and the democratic governance of the EU’.<sup>1691</sup>

True, as Lenaerts writes, the political dimension ‘is not only about rights, but also about ensuring that representative democracy at EU level is

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1690 Recommendation to enhance electoral equality and bring the EU closer to young citizens: European Parliament Resolution of 11 November 2015 on the reform of the electoral law of the European Union [2017] OJ C366/7, paras AC and 15.

1691 Lenaerts and Gutiérrez-Fons, ‘Epilogue on EU Citizenship: Hopes and Fears’: ‘the new Treaty provisions on democratic principles reveal that EU citizenship has a political dimension that is not only about the political rights attaching to the status of EU citizen, but also about ensuring that representative democracy at the EU level is effective, and, most importantly, legitimate [fn: see Art 14 TEU, Arts 223–234 TFEU]. This means that the rights attaching to that status do not fully capture the link between EU citizenship and the democratic governance of the EU’ (at 752); see also 780. Respect for the principle of representative democracy may require the EU institutions and the Member States to fulfil obligations not only flowing from Articles 20(2), 22(2) and 24 TFEU. See also Lenaerts, ‘Linking EU Citizenship to Democracy’, viii–ix. Cp critical comments of Kochenov, ‘On Tiles and Pillars: EU Citizenship as a Federal Denominator’ 27.



effective, and most importantly, legitimate'.<sup>1692</sup> Institutions and Member States must indeed fulfil obligations not only based on Articles 20(2), 22(2) and 24 TFEU, but also based on the other provisions of EU law which concretely express democratic principles. Importantly, here EDC standards come into play.

However, doubts may arise where Lenaerts and Gutiérrez-Fons seem to limit the category of 'political rights attaching to the status of EU citizen' to the rights listed in Articles 20(2), 22(2) and 24 TFEU.

In my view, the right to vote for the European Parliament is also a political right attaching to the status of EU citizen. As explained, the category of citizenship rights is not so clear: EU law grants EU citizens more rights than those listed in Articles 20–24 TFEU.<sup>1693</sup> In *Ruiz Zambrano* and *Rottman*, the ECJ used the expression 'rights attaching to the status of EU citizen' or 'rights conferred by virtue of their status as citizens of the Union', and referred in this context to 'the rights and duties laid down by the Treaty'.<sup>1694</sup> If the concept of 'rights attaching to the status of EU citizen' is defined as (tautologically, who will object?) rights which are granted purely because an individual has the EU citizen status, thus granted ipso facto because he or she is a national of a Member State, then the right to vote for the European Parliament is a political right 'attaching to the status of EU citizen'. Individuals have the right to vote in elections for the European Parliament just because they have the status of EU citi-

1692 Lenaerts, 'Linking EU Citizenship to Democracy', xviii.

1693 See text to n 594.

1694 Case C-34/09 *Ruiz Zambrano* ECLI:EU:C:2011:124, para 42 ('Article 20 TFEU precludes national measures which have the effect of depriving 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*'), para 45 ('Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of *the rights attaching to the status of European Union citizen*'). See Case C-135/08 *Rottmann* ECLI:EU:C:2010:104, para 44 ('Article 17(2) EC attaches to that status *the rights and duties laid down by the Treaty, including* the right to rely on Article 12 EC in all situations falling within the scope *ratione materiae* of Union law'), para 46 ('the conditions in which a citizen of the Union may, because he loses his nationality, lose his status of citizen of the Union and thereby be deprived of *the rights attaching to that status*'). Emphasis added. See i.a. text to n 1456.

zen, 'qualitate qua'.<sup>1695</sup> Article 39(2) is, moreover, a provision in the Title 'Citizens' rights' of the CFR. The right to vote is an expression of the right in Article 10(3) TEU, which is a citizenship right as well, i.e. attaching to citizen status.<sup>1696</sup> Recognising the right to vote for the European Parliament as a citizenship right is not inconsistent with Article 25 TFEU, which lays down a cumbersome procedure for adding new citizenship rights. Article 25 TFEU starts with '*on this basis*, and without prejudice to the *other provisions of the Treaties*'. The '*this basis*' relates to the previous provision on Commission reports '*which shall take account of the development of the Union*'. The right to vote for the European Parliament must be seen in the light of the development of the Union as reflected in the Lisbon Treaty and its new provisions on the European Parliament ('representatives of the Union's citizens', no longer of 'the peoples') and inclusion of democratic principles in the TEU. The '*other provisions of the Treaties*' include Title II and Article 14 (3) TEU. Recognising the right to vote for the European Parliament as 'a political right attaching to the status of EU citizenship' is not pushing at the boundaries of the vertical delimitation of powers between the EU and the Member States but is respectful of the constitutional framework of the Treaties. It is the corollary of EU primary law obligations on Member States to organise free elections to the European Parliament and is confirmed by a contextual interpretation. It does not open the door to jurisprudential recognition of any further right of interest for EU citizens. The right concerns the very foundations of the Union, democracy.

In any case, irrespective of its label 'political right attaching to the status of EU citizen', the right to vote for the European Parliament is relevant for the EU dimension in mainstream education.

#### 224 *A right limiting the margin of appreciation of Member States*

The fact that the right of EU citizens to vote in elections to the European Parliament is expressed in a provision of the CFR (Article 39(2)) has legal consequences for the relationship of static citizens with their own Member State.<sup>1697</sup> As appears from *Delvigne*, it affects the determination by the Member State of the members of the electorate, even though this determination is a matter of national competence. Limitations of CFR rights must

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1695 See also Van Eijken and van Rossem in text to n 1695 ('qualitate qua').

1696 See § 218.

1697 *Delvigne*, para 44: Article 39(2) CFR '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 1976 Electoral Act'.

respect the conditions in Article 52(1) CFR. Other general rules of the CFR must also be respected (interpretation and level of protection of the CFR right, as determined in Articles 52–53 CFR). The margin of appreciation of Member States, even when they are exercising national competences, is thus limited by EU law.

What conclusions can be drawn from this finding with regard to the relationship between static citizens and their own Member State in the field of education? Can the CFR right to vote in European Parliament elections also affect the norm-setting by Member States with regard to EDC and limit their margin of appreciation, even if education falls within national competence? This will be analysed in Part four.<sup>1698</sup>

### *C The right to vote for the national parliament and its EU dimension*

#### *225 Specific features of democracy in the EU: dual democratic legitimacy*

The right to vote for the national parliament is based on national law and voting primarily means taking part in the democratic life of the *Member State*. However, voting in national elections is at the same time indirect participation in the democratic life of the *Union*, because Member State parliaments and governments are important actors at EU level and Member States' democracies are interdependent.<sup>1699</sup> The Commission puts it succinctly: 'Full participation of EU citizens in *the democratic life of the EU at all levels* is the very essence of Union citizenship'.<sup>1700</sup> Representative democracy in the EU follows two tracks: citizens choose their representatives in the national parliament as well as in the European Parliament. Article 10(2) TEU is the basis for what is commonly referred to as the dual structure of democratic legitimacy of the Union: citizens are directly represented at Union level in the European Parliament (to which the Commission is accountable) and Member States are represented in the European Council by their Heads of State or Government and in the Council by

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1698 The exercise of competences has to comply with fundamental rights. See in particular §§ 323 and 325 .

1699 See also I Pernice, 'Editorial: Nationale Wahlen sind Europäische Wahlen' [2017] *Europäische Zeitschrift für Wirtschaftsrecht* 441.

1700 Commission EU Citizenship Report 2013: EU citizens: your rights, your future COM(2013) 269 p. 5; note also the commas at p 20: 'Bolstering EU citizens' full participation in the democratic life of the EU, *at all levels*, is the very essence of EU citizenship'; they indicate that democratic life *includes* all levels. Levels are local, national or EU.

their governments, who in turn are themselves democratically accountable to their national parliaments or to their citizens.<sup>1701</sup> In this sense, the EU can be seen as a Union of citizens and States.<sup>1702</sup> Undeniably, these specific features of democracy in the EU system need to be explained and discussed with pupils. They provide additional (i) and significant (ii) content for EDC. In order to participate meaningfully in both tracks of representative democracy, some insight is needed into the delicate vertical and horizontal balance of powers in the system: the delimitation of powers between the EU and the Member States, with the pivotal principle of conferral,<sup>1703</sup> and the separation of powers between the institutions.<sup>1704</sup> Here EU primary law texts provide solid content for EDC. Even so they leave ample room for exercising critical agency (iii), as evidenced by a huge body of scholarly

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- 1701 Lenaerts and Van Nuffel, *European Union Law*, 743; A von Bogdandy, 'The European lesson for international democracy: the significance of Articles 9 to 12 EU Treaty for International Organizations' (2012) 23 *European Journal of International Law* 315, 325; Calliess and Hartmann, *Zur Demokratie in Europa: Unionsbürgerschaft und europäische Öffentlichkeit*, 80, 152; Lenaerts and Gutiérrez-Fons, 'Epilogue on EU Citizenship: Hopes and Fears' 755–6; Commission Recommendation (EU) 2018/234 of 14 February 2018 on enhancing the European nature and efficient conduct of the 2019 elections to the European Parliament [2018] OJ L45/40 ('the Union's ... democratic legitimacy, which rests on the dual pillars of direct representation of citizens in the European Parliament and their indirect representation by governments of the Member States in the European Council and the Council'); Case C-411/06 *Commission v Parliament and Council* ECLI:EU:C:2009:518, Opinion of AG Poiares Maduro, para 6 fn 5. See also *BVerfG*, 2 *BvE* 2/08 (*Lissabon*) 30 June 2009, Absatz-Nr (1-421), para 36.
- 1702 See analysis by Timmermans, 'How to Define the European Union?' (other qualifications of the EU at 82). See also n 1036; further R Schütze, *European constitutional law* (2 edn, Cambridge University Press 2016) 75 (the EU is a Federation of States); Hoeksma, *From Common Market to Common Democracy: A Theory of Democratic Integration*. Before the Lisbon Treaty: W van Gerven, *The European Union: A Polity of States and Peoples* (Hart 2005).
- 1703 *BVerfG*, 2 *BvE* 2/08 (*Lissabon*) 30 June 2009, Absatz-Nr (1-421), para 265 ('To safeguard democratic principles, it may be necessary to clearly emphasise the principle of conferral in the treaties and in their application and interpretation, in order to maintain the balance of political forces of Europe between the Member States and the level of the Union as the precondition for the allocation of sovereign powers in the association').
- 1704 See, i.a., Case C-411/06 *Commission v Parliament and Council* ECLI:EU:C:2009:518, Opinion of AG Poiares Maduro, para 6; on vertical and horizontal division of powers: Lenaerts and Van Nuffel, *European Union Law* 298; also Schütze, *European constitutional law*.

writing (e.g. on EU ‘demoi-cracy’).<sup>1705</sup> At EU level, neither the European Parliament nor the national parliaments play the traditional role of a parliament in a State.<sup>1706</sup> Pupils can discuss many questions. *Is EU membership eroding national democracy? Why have Member States opted for membership? How can national parliaments play a more prominent role in EU matters?* Finally, the last criterion for relevance for mainstream education is also satisfied, since the specific features of EU democracy affect all EU citizens (iv).

### 226 *National parliaments as actors in the EU*

The EU dimension of EDC enables citizens to make informed choices when voting for the European Parliament as well as for national parliaments. The role of national parliaments in the EU provides additional and significant content to national EDC (i, ii). This role (again) underscores the EU dimension of the relationship of static citizens with their own Member State. National parliaments ‘contribute actively to the good functioning of the EU’ in the six ways described in Article 12 TEU and in

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1705 K Nicolaïdis, ‘The New Constitution as European “Demoi-cracy”?’ (2004) 7 *Critical Review of International Social and Political Philosophy* 76; R Bellamy, ‘“An Ever Closer Union Among the Peoples of Europe”: Republican Intergovernmentalism and Demoicratic Representation within the EU’ (2013) 35 *Journal of European Integration* 499; R Bellamy and D Castiglione, ‘Three models of democracy, political community and representation in the EU’ (2013) 20 *Journal of European Public Policy* 206; F Cheneval and F Schimmelfennig, ‘The Case for Demoicracy in the European Union’ (2013) 51 *JCMS* 334; Nicolaïdis, ‘European Demoicracy and Its Crisis’; F Cheneval, S Lavenex and F Schimmelfennig, ‘Demoi-cracy in the European Union: principles, institutions, policies’ (2015) 22 *Journal of European Public Policy* 1; Lenaerts, ‘Demoicracy, Constitutional Pluralism and the Court of Justice of the European Union’; T Hüller, ‘Out of time? The democratic limits of EU demoicracy’ (2015) 22 *Journal of European Public Policy* 1; A Schlenker, ‘Supranational, Intergovernmental or Demoicratic Legitimacy? Citizens’ Evaluations of the EU’ (2015) 16 *European Politics and Society* 581; Lenaerts and Gutiérrez-Fons, ‘Epilogue on EU Citizenship: Hopes and Fears’ 779 (‘the idea of demoicracy suggests that both types of citizenship should coexist in a mutually reinforcing system of multilevel governance’).

1706 C Sprungk, ‘A New Type of Representative Democracy? Reconsidering the Role of National Parliaments in the European Union’ (2013) 35 *Journal of European Integration* 547, 548: national parliaments play the role of gatekeepers (preventing rather than shaping legislation), of networkers (cooperating with other parliaments and supranational institutions), and of unitary scrutineers (a uniform mode of control of government across all party groups); analysis of how France, Germany and Poland perform these roles.

accordance with Protocols No 1 and 2.<sup>1707</sup> Article 12 TEU illustrates how EU democracy depends on Member State democracy. National parliaments are actors in the EU at ‘constitutional’ moments, such as Treaty ratification or revision.<sup>1708</sup> They have responsibilities in the genesis of EU secondary law. Protocol 1 encourages greater involvement of national parliaments in the EU. Seeking to take decisions ‘as closely as possible to the citizens of the Union’, Protocol 2 establishes a system for monitoring the principles of subsidiarity and proportionality (Article 5 TEU, Article 69 TFEU). Commission consultation documents and draft legislative acts are forwarded to national parliaments, who can send reasoned opinions on non-compliance with the principle of subsidiarity (Early Warning System). Draft legislative acts may have to be reviewed, subject to conditions.<sup>1709</sup> Furthermore, national parliaments act in legislative implementation at national level, e.g. transposing directives. Last but not least, national parliaments play an essential role in guaranteeing ministerial accountability.<sup>1710</sup> National governments are accountable to the national parlia-

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- 1707 Protocol (No 1) On the role of the National Parliaments in the European Union [2012] OJ C326/1; Protocol (No 2) On the application of the principles of subsidiarity and proportionality [2012] OJ C326/1.
- 1708 Arts 12(d) and 48 TEU. Withdrawal takes place in accordance with national constitutional requirements (Art 50 TEU).
- 1709 Protocol (No 1) On the role of the National Parliaments in the European Union [2012] OJ C326/1, Arts 1–3; Art 9 (interparliamentary cooperation); Protocol (No 2) On the application of the principles of subsidiarity and proportionality [2012] OJ C326/1, Arts 4–6, Art 7 (obligation to review the draft legislative act for non-compliance with the principle of subsidiarity). See P Kiiver, ‘Analysis and reflections: The early-warning system for the principle of subsidiarity: The national parliament as a Conseil d’Etat for Europe’ (2011) 36 *ELRev* 98; E Miklin, ‘Beyond subsidiarity: the indirect effect of the Early Warning System on national parliamentary scrutiny in European Union affairs’ (2016) 23 *Journal of European Public Policy* 1 (national parliaments are under normative pressure to engage in the Early Warning System). Example of the effect of a yellow card from national parliaments: Commission Decision to withdraw the Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services COM(2012) 130.
- 1710 Protocol (No 1) On the role of the National Parliaments in the European Union [2012] OJ C326/1: ‘the way in which national Parliaments scrutinise their governments is a matter for constitutional organisation and practice of each Member State’ (preamble). See P Kiiver, ‘European Treaty reform and the national parliaments: towards a new assessment of Parliament-friendly Treaty provisions’ in J Wouters, L Verhey and P Kiiver (eds), *European Constitutionalism beyond Lisbon* (Intersentia 2009) 133; Lenaerts and Van Nuffel, *European*

ments for their actions at EU level, e.g. negotiations in the European Council or Council, the nomination of Commissioners, actions in committees, etc.<sup>1711</sup> The interface between national parliaments and the EU thus has multiple facets.

The effective exercise by national parliaments of this multifaceted role in the EU depends on the awareness of their members of EU policies and of the importance they attach to them. Members of national parliaments are sometimes criticised for being passive recipients of EU law.<sup>1712</sup> National citizens can influence the involvement of their representatives in EU matters by their votes and through the national public sphere. If closely observed (even mistrusted<sup>1713</sup>) by informed citizens, representatives will be more inclined to use the available tools. Through letters to newspapers, blogs, likes or dislikes in social media, citizens can prompt members of national parliaments to act in EU matters, or to intensify scrutiny of accountability or respect for subsidiarity. Therefore, citizens (and, of course, members of national parliaments) need an understanding of the EU. If national parliaments are empowered to act in the democratic life of the Union, citizens must be empowered to choose representatives fit for these processes. Ideally, taking democracy seriously, journalists and at least a substantive part of the public should be informed about the mechanisms for involving national parliaments in the work of the EU.

Admittedly, the potential role of national parliaments in the EU can be criticised as unsatisfactory.<sup>1714</sup> Yet, the possibilities for action in the cur-

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*Union Law* 741–5; Sprungk, ‘A New Type of Representative Democracy? Reconsidering the Role of National Parliaments in the European Union’, 553; Grimm, *The Constitution of European Democracy*, ch 9.

1711 Kiiver, ‘European Treaty reform and the national parliaments: towards a new assessment of Parliament-friendly Treaty provisions’ 133: the principle of ministerial accountability can be seen as a cornerstone of national parliamentary involvement in EU affairs.

1712 Ibid 134.

1713 I Krastev, ‘Democracy of Rejection’ in L Van Middelaar and P Van Parijs (eds), *After the Storm: How to Save Democracy in Europe* (Lannoo 2015), 149, 161: for the success of democracy, it is vital to organise mistrust; it ‘keeps elected representatives on their toes’; new democratic age gives profound primacy to the individual.

1714 T van den Brink, ‘National Parliaments and EU Economic Governance. In Search of New ways to Enhance Democratic Legitimacy’ in F Goudappel and E Hirsch Ballin (eds), *Democracy and Rule of Law in the European Union: Essays in Honour of Jaap W de Zwaan* (Springer 2015), 15, 19, 22 (the author raises questions about a more substantial role in the field of economics and fiscal sovereignty).



rent state of EU law are not always used to the full. If a more democratic EU is to be achieved, the ball is to a large extent in the court of the Member States (who are, moreover, responsible for education<sup>1715</sup>) and their parliaments.<sup>1716</sup> National EDC must be given an EU dimension which reflects the EU dimension of the role of national parliaments.

227 *The EU dimension of democratic life within the Member State*

The EU dimension of national democracies cannot be denied. Domestic votes have important crossborder repercussions. The whole of Europe attentively follows (and sometimes holds its breath) when national elections take place in Germany, France, Italy, Poland, Greece, Spain, or Hungary, just to cite some examples. Elections for national parliaments and national presidential elections have a crucial EU dimension.<sup>1717</sup> They determine whether more Eurosceptic or Europhile political parties will come to power and who will be the actors in the European Council and the Council. Whether Merkel, Macron, Kaczyński, Tsipras, Orban, or others, are the protagonists on the national political stage is highly relevant for the EU. National voters exert strong influence on the future of the EU by giving support to ideas born of 'illiberal democracy', to inward looking parties, and to exclusionary attitudes, or to the opposite. The ultimate example of the EU's dependence on national voters is the Brexit referendum. The national citizen has the last word. Given the interdependence of national democracies in the EU, the quality of national democracy is decisive for the quality of EU democracy.<sup>1718</sup> In other words, if there is a democratic deficit in the EU, it is related to a democratic deficit in the Member States. How 'democracy' (condition for EU membership) is assured in the Member States depends on the votes of their nationals in national elections. Needless to say, nationals are mostly static EU citizens (iv). Accordingly, applying EDC standards is not only a national matter. Incorporating an

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1715 Part four.

1716 Kiiver, 'European Treaty reform and the national parliaments: towards a new assessment of Parliament-friendly Treaty provisions' 132.

1717 See, e.g., after parliamentary elections in Italy: 'Italian crisis felt in Spain and wider EU', <euobserver.com/economic/141934>.

1718 R Bauböck, 'Still United in Diversity? The State of the Union Address' (Florence, 5 May 2017): '... in a Union of states, the primary level of citizenship is that of the member states. The value of EU citizenship depends on the quality of democracy in the member states'.

EU dimension into EDC in mainstream education for the large majority of (static) citizens is crucial for the future of the EU.

228 *Dual democratic legitimacy calls for an EU dimension to EDC on both tracks of legitimacy*

Dual democratic legitimacy<sup>1719</sup> demands acceptable and adaptable EDC on both tracks of EU legitimacy. Adding an EU dimension to EDC is relevant to both national and European Parliament elections. Given the doubts about the European Parliament as an equivalent track of legitimacy (its characteristics not matching up to those of a national parliament), it is sometimes argued that the legitimacy of the EU is in essence based on that of the Member States.<sup>1720</sup> If this is so, this legitimacy can be questioned to the extent that the citizen's vote in national elections is not based on adequate enlightenment about EU matters. The legitimacy which Member States claim, cannot be based on uninformed citizenship.

Looking at it simplistically, *national* EDC prepares young citizens for democracy at *Member State* level, focusing on elections for the national parliament, and the *EU dimension* of EDC prepares them for democracy at *EU* level, focusing on elections for the European Parliament. In the EU's integrated multilevel system of governance, however, realities are more complex. So far in this study, it has been argued that an EU dimension must be added to national EDC to strengthen *EU* democracy. Paradoxically, adding an EU dimension to EDC is also needed to guarantee *national* democracy.

National parliaments are supposed to represent the will of the citizens. What is the credibility of representatives in national parliaments acting (or failing to act) at EU level if they have been chosen by citizens lacking understanding of EU matters? How legitimate is the mandate given directly by citizens to their parliaments, and indirectly to their governments, to act at EU level, if these citizens have no understanding of the *what*, *why* and *how* questions of the EU system or of the EU issues on which the national actors must adopt a position? Democratic elections of national parliaments presuppose at least minimal insight on the part of nationals as to the involvement of their country in EU matters and EU

1719 Text to n 1701.

1720 See i.a. Weiler, 'In the Face of Crisis: Input Legitimacy, Output Legitimacy and the Political Messianism of European Integration' ('Any solution to the crisis of Europe will have to draw upon the deep legitimacy resources of the national communities, the member states'); *BVerfG*, 2 *BvE* 2/08 (*Lissabon*) 30 June 2009, Absatz-Nr (1-421), i.a. paras 262, 276 ff, 289, 293.

foundational values, objectives and principles. As *economic* actors in the market, citizens can only conclude a contract if they are informed about its constitutive elements and conditions. The consumer has a right to be informed. Before the consumer can be bound by a contract, the trader has an obligation to provide clear and comprehensible information.<sup>1721</sup> As *political* actors, citizens do not enjoy such protection. No prior adequate information seems to be required for the social contract<sup>1722</sup>. Even votes based on fake news and false promises lead to valid votes. Therefore, at least, all reasonable efforts must be made to provide quality EDC in schools, including the EU dimension, to equip nationals with a basic preliminary understanding of the system in which they live and to develop their critical agency. The task of democracy is to educate citizens who will think critically throughout a political campaign and take responsibility for their votes.<sup>1723</sup> Because the Member States are actors in the EU composite legal order through the institutional framework (European Council, Council, national parliaments) and through the many mechanisms for cooperation and administrative entwinement, the national public sphere and national political life should include an informed EU dimension.<sup>1724</sup> On a reading of EU and national law in the light of EDC standards, this requires the incorporation of an EU dimension into EDC, strengthening both tracks of democratic legitimacy.

### 229 Conclusion for representative democracy

As recognised, citizens do not need an EU dimension to EDC in order to tick a box in an electoral list and cast a valid vote. However, it is assumed that democracy is more than procedural or institutional democracy. To

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1721 See i.a. Art 5(1) Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] OJ L304/64.

1722 It would be interesting to explore the political philosophical question on the need for information or for education in the context of 'le contrat social' as understood by Hugo Grotius, Thomas Hobbes, and John Locke.

1723 Oelkers, 'The European Crisis and Education for Democracy'. See also Jackson, '"The Best Education Ever": Trumpism, Brexit, and new social learning'.

1724 See VA Schmidt, *Democracy in Europe: the EU and national polities* (Oxford University Press 2006): the democratic deficit of the EU is mainly due to the sustained failure of political communication at Member State level; national politicians do not explain the supranational level of governance and the new realities.

increase the democratic legitimacy of the EU, it is not sufficient to organise procedurally correct elections or reinforce the institutional role of the European Parliament and the national parliaments in EU decision-making.<sup>1725</sup> To increase democratic legitimacy, these elections must, moreover, be held in conditions of genuine representativeness, that is: based on the votes of informed citizens, who are aware of the EU dimension of their votes. The EU dimension of EDC makes it possible to attain the compulsory educational aim of preparing citizens for effective participation and responsible life in a free society,<sup>1726</sup> in this instance participating by means of voting in elections for the European Parliament and for national parliaments. To the extent that Member States are actors in the EU political processes, the quality of democracy at *EU* level is contingent on the quality of democracy at *national* level, which is in turn contingent on EDC and its EU dimension.

To conclude, the right to vote for the European Parliament and for a national parliament constitutes core content for the EU dimension of EDC, satisfying all the criteria for relevance for mainstream education.

#### *D Rights and opportunities in participatory democracy*

##### *230 Complementarity of EDC for representative and for participatory democracy*

The role of active citizens in the democratic life of the Union is not limited to periodically casting a vote in elections for the European Parliament and for national parliaments. In between elections, EU citizens can observe, blog, twitter, protest, spread their views via the internet.<sup>1727</sup> Besides the participation rights of Article 24 TFEU (ECI, petition, Ombudsman), they can use the additional tools for participation provided by Article 11 TEU as a means of participatory democracy. If representative and participatory democracy are complementary, so is preparing for them in the classroom through EDC. I will explain how the EU dimension of EDC lays the foundations for participatory democracy in a different way than for representative democracy. Participatory democracy starts from a perspective differing

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1725 Neither for the rule of law, nor for democracy do purely formal and procedural requirements suffice; see Commission Communication 'A new EU Framework to strengthen the Rule of Law' COM(2014) 0158 final, para 2.

1726 Aims in Art 13 ICESCR and Art 29 CRC.

1727 Krastev, 'Democracy of Rejection' 149.

from that of representative democracy. While a vote in an election usually expresses general views on society and on the common good (advocated by political parties), participatory democracy is more oriented towards single issues and protection of one's interests, directly and, most often, indirectly via interest groups and civil society organisations.<sup>1728</sup> Representative democracy puts the European Parliament and national parliaments centre-stage; participatory democracy provides EU citizens with opportunities for contact with other institutions, in particular the Commission (Article 11(3) TEU). The question is to what extent the content of Article 11 TEU is relevant for mainstream EDC. The fourth criterion for relevance, in particular, may cause hesitation: does this opportunity to participate affect the large majority of EU citizens (iv)? Is it not, in reality, intended for EU lobbyists in Brussels?

231 (i) *Additional content for EDC*

The first criterion for relevance for mainstream education is satisfied: Article 11 TEU provides additional content for EDC, especially in component (c-3), to play an active part in democratic life. The participatory tools of Article 11 are framed as obligations for the EU institutions: they shall 'by appropriate means, give *citizens and representative associations* the opportunity to make known and publicly exchange their views *in all areas of Union action*' (para 1), 'shall maintain an open, transparent and regular dialogue with *representative associations and civil society*' (para 2), and the Commission 'shall carry out broad consultations with *parties concerned* in order to ensure that the Union's actions are coherent and transparent (para 3).<sup>1729</sup> These provisions do not formulate rights for EU citizens (EDC component (c-1), to exercise and defend their democratic rights). Only the ECI, another expression of participatory democracy (para 4), is generally seen as a citizenship right.<sup>1730</sup> Introduced in the Lisbon Treaty, Article 11 TEU has institutionalised existing practices of civil dialogue and consultation of

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1728 Kohler-Koch, 'Does participatory governance hold its promises?' 268–9, 271. See also Mendes, *Participation in EU Rule-Making: A Rights-Based Approach* 33–5 (participation of citizens can relate to two realities: defending collective interests which may coincide with public interests (*uti cives*), and defending their own private rights and interests where public powers interfere in their legal sphere (*uti singuli*). Mendes also sees the latter as a form of participatory democracy; the distinction is a matter of degree, not clear-cut). Further on complementarity, text to n 1779. See also *BVerfG*, 2 *BvE* 2/08 (*Lissabon*) 30 June 2009, Absatz-Nr (1-421), paras 272–4.

1729 Emphasis added for criterion (iv), see n 1756.

1730 Text to n 1541.

stakeholders in EU governance.<sup>1731</sup> The existing practices were oriented towards higher *output legitimacy*, better policy-making through the external expertise of stakeholders, evidence based, and reducing costs. Governance assigned civil society organisations an instrumental role. Concerned by the interests of stakeholders, these organisations have contributed to efficient problem solving, higher quality and greater compliance.<sup>1732</sup> The inclusion of Article 11 in Title II TEU on democratic principles underscores the additional rationale of *input legitimacy*. Instruments of participatory democracy thus aim to increase both output and input legitimacy. It must be observed that practices of interest representation, consultation and civil dialogue are not situated in the legal field.<sup>1733</sup> The legal aspect of participation is limited to the right to be heard before an individual measure which would affect him or her adversely is taken (Article 41(2)(a) CFR; included in the right to good administration). The right to be heard is not applicable to the public at large seeking to reinforce democratic principles.<sup>1734</sup> The Lisbon Treaty has been criticised for not making participation

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1731 Commission White Paper of 25 July 2001 on European Governance COM(2001) 428 final; Commission Communication ‘The Commission’s contribution to the period of reflection and beyond - Plan-D for Democracy, Dialogue and Debate’ COM(2005) 494; Kohler-Koch, ‘Does participatory governance hold its promises?’ 266 (Art 11 builds further on existing practice); L Bouza García, ‘How Could the New Article 11 TEU Contribute to Reduce the EU’s Democratic Malaise?’ in M Dougan, N Nic Shuibhne and E Spaventa (eds), *Empowerment and Disempowerment of the European Citizen* (Hart 2012), 255 (civil society organisations lobbied for participatory democracy). See for a historical overview and assessment of forms of participation in EU governance: Mendes, *Participation in EU Rule-Making: A Rights-Based Approach* 78 ff (participatory governance in the sense of ‘policy-making underpinned by participation’).

1732 Kohler-Koch and Rittberger, ‘The “Governance Turn” in EU studies’ 270; Bouza García, ‘How Could the New Article 11 TEU Contribute to Reduce the EU’s Democratic Malaise?’ 256. See rationale in recitals 2 and 3 to Commission Proposal for a Interinstitutional Agreement on a mandatory Transparency Register COM(2016) 0627 final.

1733 Difference between concepts of interest representation, consultation and civil dialogue (oriented to different ‘publics’) in D Curtin and J Mendes, ‘Transparence et participation: des principes démocratiques pour l’administration de l’Union Européenne’ (2011) 137 *Revue Française d’Administration Publique* 101, 112–3. Consultation is the most flexible concept.

1734 *Ibid.*, 111. See Mendes, *Participation in EU Rule-Making: A Rights-Based Approach* 161 ff, on the right to be heard and formal boundaries of participation rights. General rule in Case 17/74 *Transocean Marine Paint Association* ECLI:EU:C:1974:106, para 15: ‘a person whose interests are perceptibly affected by a deci-

in civil dialogue a citizens' right.<sup>1735</sup> The participatory democracy instruments described above remain in the vague domain of non-rights and seem still mostly oriented to output efficiency.<sup>1736</sup> To the extent that paras (1) to (3) of Article 11 TEU concern participation *practices* and *opportunities* rather than participation *rights*, it is not in component (c-1) of EDC that Article 11 TEU provides additional content to national EDC (to exercise and defend democratic rights), but in component (c-3) of EDC, i.e. empowering citizens to play an active part in democratic life.

### 232 (ii) *Significant content*

The place of Article 11 in Title II TEU, 'Provisions on democratic principles', proves its significance. It is a supplementary expression of democracy, which is a foundational value, objective and principle. A textual, contextual and teleological interpretation makes a reading in the light of EDC standards a logical next step.

A contextual interpretation based on the place of Article 11 in Title II TEU has normative implications. As Mendes argues:

For the first time at Treaty level participation in decision-making beyond political representation is explicitly linked to democracy. The democracy of the Union now rests, by force of Article 11 TEU, also on the links it establishes directly with its citizens. Participation is therefore one of the foundations of democracy in the EU. As such, it can no longer be approached merely as an aspect of process efficiency and policy outputs, detached from democratic values such as equality and transparency. (...) Article 11 TEU postulates a transition from the instrumental usages of participation typical of participatory gover-

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sion taken by a public authority must be given the opportunity to make his point of view known.'

1735 A contrario Commission Proposal for a Interinstitutional Agreement on a mandatory Transparency Register COM(2016) 0627 final Art 3 (non-applicability with regard to fundamental or procedural rights, such as the right to be heard, the fundamental right of a client to a fair trial, including the right of defence in administrative proceedings). Before 2009: Smismans, 'New governance: the solution for active European citizenship, or the end of citizenship?', 608, 611: 'new governance provides hardly any legally enforceable participation rights', it contributes to participation practice rather than ensuring equal participation rights.

1736 Smismans, 'New governance: the solution for active European citizenship, or the end of citizenship?', 604–5.



nance to participation conceived as a basis of participatory democracy.<sup>1737</sup>

Mendes concludes that the fundamental link between participation and democracy has normative implications and argues for law to have a larger role: the scope of participation rights in EU administrative law should be extended, i.a. in executive rule-making procedures in the EU.<sup>1738</sup> In the same paradigm, I conclude that this fundamental link has normative implications for the field of education and argue that, when reading Article 11 TEU jointly with EDC standards, public and educational authorities have a responsibility to extend the scope of national EDC to include an EU dimension so as to prepare EU citizens for their role in participatory democracy.<sup>1739</sup> The challenge is to turn the participatory governance practices oriented towards an instrumental rationale (output legitimacy) into genuine democratic participation tools for citizens (additional source of input legitimacy).<sup>1740</sup> As Mendes argues, the way participation in the EU

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1737 J Mendes, 'Participation and the role of law after Lisbon: a legal view on Article 11 TEU' (2011) 48 CMLRev 1849, 1850.

1738 See Mendes, *Participation in EU Rule-Making: A Rights-Based Approach*. In this work, participation refers to 'the procedural intervention of natural and legal persons whose substantive rights and interests are potentially affected by EU regulatory measures, irrespective of the form in which the latter are adopted' (p 25, also p 76). This contrasts with a vague concept of 'participation at large', i.e. 'the possibility of taking part in decision-making processes', which can take various forms and degrees (p 27). The author defends two layers of participation rights: 'those of holders of subjective rights and those of holders of legally protected interests' (p 24; no clear cut distinction, see p 42). Participation rights can, from a procedural perspective, be broadly defined as advantageous positions that allow their holders to influence the exercise of decisional power (p 77). The extension of participation rights in EU administrative law is 'required by legal values that underpin the EU legal order, it is coherent with principles and rules of EU law, and it is consonant with the fact that participation is constitutionally relevant feature of the EU legal and political system' (p 469). These arguments are mutatis mutandis valid for the extension of EDC by an EU dimension. See also Mendes, 'Participation and the role of law after Lisbon: a legal view on Article 11 TEU' ('the normative shift which Article 11 TEU postulates, limits the discretion of the institutions in shaping participation practices').

1739 On Member States' competence, obligations, and limitation of the margin of appreciation, see Part four.

1740 Bouza García, 'How Could the New Article 11 TEU Contribute to Reduce the EU's Democratic Malaise?' 274.

is perceived needs to be transformed, to reflect the fact that participation is now a founding legal principle in EU democratic life.<sup>1741</sup>

Normative consequences moreover follow from a teleological interpretation of Article 11 TEU. EDC standards are inextricably linked to any form of democracy. They aim to achieve representative as well as participatory democracy objectives. Article 11 must also be linked to compulsory educational aims in binding international agreements ('to participate effectively').<sup>1742</sup>

### 233 (iii) *Inviting critical thinking*

Article 11 TEU invites critical reflection on EU policies, e.g. environment policy, or on how the EU handles specific single issues. Public debate, starting in the classroom, contributes to a growing European public sphere, as transnational alliances on single issues transcend borders.<sup>1743</sup> It is also possible to think critically about the tools of participatory democracy themselves. The democratic effects of participatory instruments are questioned.<sup>1744</sup> Problematic aspects include short periods of consultation in complex matters, limited feedback after consultations, and the selection

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1741 Mendes, 'Participation and the role of law after Lisbon: a legal view on Article 11 TEU', 1850, 1857: 'the relationships between the citizens and representative associations, on the one hand, and the EU decision-makers, on the other, need to be reconsidered with respect to their value for the individual, so as to ensure voice independently of problem-solving needs as well as equal treatment of participants.' See also Smismans, 'Regulating interest group participation in the European Union: changing paradigms between transparency and representation' (paradigms in participation, evolution).

1742 Art 13 ICESCR.

1743 European Parliament Resolution of 7 September 2010 on journalism and new media - creating a public sphere in Europe [2011] OJ C308E/55 (recital G: 'whereas a public sphere can be understood as a space in which public policies may be better understood by, and discussed with, all EU citizens and all sections of the population, in all its diversity, with a view to meeting their expectations more effectively, and whereas it must be a venue both for the provision of information and for wide-ranging consultations transcending national borders and fostering the development of a sense of shared public interest throughout the EU'; see also para 13 on EU learning); Further, Bouza García, 'How Could the New Article 11 TEU Contribute to Reduce the EU's Democratic Malaise?'; S Smismans, 'Should participatory democracy become the normative model for EU governance?' [2012] Re-Public.

1744 See analysis of Kohler-Koch, 'Does participatory governance hold its promises?'; Mendes, *Participation in EU Rule-Making: A Rights-Based Approach* i.a. 14, 128 ff; Bouza García, 'How Could the New Article 11 TEU Contribute to Reduce the EU's Democratic Malaise?' 258.

of participants (some and not others).<sup>1745</sup> Unequal access to participation instruments is at odds with equality of citizens, which is essential to democracy, and is hardly reconcilable with the aim of increased democratic legitimacy.<sup>1746</sup> If characterised by elitist representation and professional lobbying on the Brussels circuit, participatory governance is not the same thing as participatory democracy.<sup>1747</sup> Several questions can be discussed in the classroom. *Is filling out an online questionnaire without deliberation 'effective participation'?*<sup>1748</sup> *What form can effective participation take in a Union of 500 million citizens? How can more citizens be involved on an equal basis? Are citizens interested at all in these participation tools (or, provocatively, do they prefer to watch television)?*<sup>1749</sup> Citizens may have doubts about the impact of their participation. Institutions have no obligation to meet the demands of civil society. Notwithstanding its enhanced legal status since the Lisbon Treaty—because it is included in Title II TEU—civil dialogue merely results in an invitation to the Commission to act in a certain direc-

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- 1745 Frequently criticised. See i.a. Bouza García, 'How Could the New Article 11 TEU Contribute to Reduce the EU's Democratic Malaise?' 266 (Art 11(3) TEU refers to parties concerned, not 'the' parties concerned). Broad discretion of the Commission, see i.a. Smismans, 'New governance: the solution for active European citizenship, or the end of citizenship?', 604. Assessment of democratic potential, see Kohler-Koch and Rittberger, 'The "Governance Turn" in EU studies'; B Kohler-Koch and B Finke, 'The Institutional Shaping of EU-Society Relations: A Contribution to Democracy via Participation?' (2007) 3 *Journal of Civil Society* 205; Curtin and Mendes, 'Transparence et participation: des principes démocratiques pour l'administration de l'Union Européenne' (analysis as to what extent rules and practices of EU administration encourage realisation of the democratic principles of the TEU); Mendes, *Participation in EU Rule-Making: A Rights-Based Approach*.
- 1746 Kohler-Koch, 'Does participatory governance hold its promises?' 280; Curtin and Mendes, 'Transparence et participation: des principes démocratiques pour l'administration de l'Union Européenne', 118. See earlier: P Magnette, 'European Governance and Civic Participation: Beyond Elitist Citizenship?' (2003) 51 *Political Studies* 144 (practices underpinned by an elitist and functionalist philosophy).
- 1747 Kohler-Koch, 'Does participatory governance hold its promises?' 286 ('Such an elitist system is equal to representation for the people, but not by the people').
- 1748 *Ibid*, 280.
- 1749 Civil dialogues are not always attended by many citizens. See also JW Van Deth, 'In Search of the "Good European Citizen": WYSIWYG?' in B Kohler-Koch and F Larat (eds), *Efficient and democratic governance in the European Union* (CONNEX Report Series No 9, 2008) (What You See Is What You Get): the Good European Citizen seems to be a national citizen who is not interested in participation and EU matters (EDC should awaken him).

tion (like the ECI). The Commission has a wide discretion and is not obliged to give reasons for not taking account of opinions expressed in dialogue or consultations.<sup>1750</sup> Are the tools of ‘democratic’ governance disguised attempts to ‘sell Europe’, a form of window dressing?<sup>1751</sup> Participation may be reduced to ‘public-making’, letting the public know.<sup>1752</sup> Creating a European public space or a European civil society through participatory governance is still work in progress.<sup>1753</sup>

Scepticism also exists about the strengthening of EU legitimacy where interest representation is—not infrequently—based on professional relationships between clients and intermediaries. True, the institutions are quite open about the representative organisations and groups with which they interact. Only after registration in a mandatory Transparency Register can interest representatives engage in activities with the institutions (to promote certain interests ‘with the objective of influencing the formulation or implementation of policy or legislation, or the decision-making process within these institutions’, e.g. participation in public consultations).<sup>1754</sup> However, if mainly representative organisations, stakeholders, experts, or professional actors are involved, the question, critical for EDC in mainstream education, is to what extent the participatory instruments are intended for the ordinary citizen. This leads to the last criterion.

#### 234 (iv) *Affecting the large majority of EU citizens*

The question as to what extent the ordinary citizen is involved in participatory democracy and governance is a matter of debate.<sup>1755</sup>

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1750 Bouza García, ‘How Could the New Article 11 TEU Contribute to Reduce the EU’s Democratic Malaise?’ 258.

1751 Kohler-Koch, ‘Does participatory governance hold its promises?’ 272.

1752 Mendes, *Participation in EU Rule-Making: A Rights-Based Approach* 118, with reference to Neil Walker.

1753 Ibid, 136–8, about participation rationales and results: in fact, under the new legitimacy garment participation remains, as before, essentially output-oriented; ‘pragmatic governance’.

1754 Commission Proposal for a Interinstitutional Agreement on a mandatory Transparency Register COM(2016) 0627 final, i.a. Arts 2, 3(1), 5. See also European Parliament Decision of 15 April 2014 on the modification of the interinstitutional agreement on the Transparency Register [2017] OJ C443/228; Commission Communication ‘Completing the Better Regulation Agenda: Better solutions for better results’ COM(2017) 651 final. Recital 11: This does not affect the rights under Art 11(4) TEU (ECI) and Art 227 TFEU (petition the European Parliament).

1755 See i.a. O De Schutter, ‘Europe in Search of its Civil Society’ (2002) 8 ELJ 198; Smismans, *Law, Legitimacy, and European Governance: Functional Participation*

Article 11 TEU is poorly drafted and gives the impression of a shopping list (see italics above).<sup>1756</sup> Opportunities for the exchange of views shall be given ‘by appropriate means’. Article 11 TEU, secondary legislation, and policy documents refer to a variety of actors, such as citizens, representative associations, civil society, parties concerned, organisations, stakeholders, experts, the public.<sup>1757</sup> While the forms of participation are not always clearly defined (such as interest representation, consultation and civil dialogue), it is nevertheless clear that Article 11 offers participation *opportunities* to many EU citizens, directly or indirectly.

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*in Social Regulation*; Kohler-Koch and Rittberger, ‘The "Governance Turn" in EU studies’; S Borrás and T Conzelmann, ‘Democracy, Legitimacy and Soft Modes of Governance in the EU: The Empirical Turn’ (2007) 29 *Journal of European Integration* 531; S Smismans, ‘New Modes of Governance and the Participatory Myth’ (2008) 31 *West European Politics* 874; A Wimmel, ‘Theorizing the Democratic Legitimacy of European Governance: a Labyrinth with No Exit?’ (2009) 31 *Journal of European Integration* 181; D Curtin, P Mair and Y Papadopoulos (eds), *Accountability and European Governance* (West European politics Series, Routledge 2010); S Bredt, ‘Prospects and Limits of Democratic Governance in the EU’ (2011) 17 *ELJ* 35; Mendes, ‘Participation and the role of law after Lisbon: a legal view on Article 11 TEU’ (‘despite the rhetoric of connecting the EU to its citizens and to civil society, participation kept on serving very much the same purposes as before and maintained fairly the same traits it had acquired in the decades that preceded the White Paper’); Mendes, *Participation in EU Rule-Making: A Rights-Based Approach* 128–130; C Shore, ‘"European Governance" or Governmentality? The European Commission and the Future of Democratic Government’ (2011) 17 *ELJ* 287 (‘far from laying the grounds for a more inclusive, participatory and democratic political order, the Commission’s model to governance represents a form of neoliberal governmentality that is actually undermining democratic government and promoting a politics of exclusion’).

1756 Italics in text to n 1729. See Mendes, ‘Participation and the role of law after Lisbon: a legal view on Article 11 TEU’, 1851, 1854 (shopping list). See also Curtin and Mendes, ‘Transparence et participation: des principes démocratiques pour l’administration de l’Union Européenne’, 112–3 (on the difference between the concepts of interest representation, consultation and civil dialogue; oriented to different ‘publics’, consultation is the most flexible concept).

1757 See also Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making [2016] OJ L123/1, i.a. paras 19 and 28 (public and stakeholder consultation; experts and public consultations).

Directly, citizens can participate in instruments such as online consultations or citizens' dialogues, frequently organised by the Commission.<sup>1758</sup> Interaction of individual citizens with the European Parliament, the Council or the Commission does not require prior registration in the transparency register.<sup>1759</sup>

Indirectly, citizens can participate via their interest representatives. Whereas the original concept of participatory democracy implies the direct participation of citizens, it has evolved to mean participation of citizens through functional representatives. Functional representation allows all citizens to participate indirectly in the complex EU multilevel governance.<sup>1760</sup> It should be noted that here direct democracy has evolved into another form of 'representative' democracy.<sup>1761</sup> Functional interest representation and thus indirect participation of citizens in EU governance also occurs by means of organic participation through the European Economic

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1758 Commission Recommendation (EU) 2018/234 of 14 February 2018 on enhancing the European nature and efficient conduct of the 2019 elections to the European Parliament [2018] OJ L45/40, recital 7: since 2015, 478 Citizens' Dialogues have been held, also in cooperation with institutional partners, and before 9 May 2019, around 500 more will take place. In its priority for 'a Union of Democratic Change', the Commission aims at better law making and refers i.a. to public consultations, including internet based. See Commission Communication 'Commission Work Programme 2017: Delivering a Europe that protects, empowers and defends' COM(2016) 710 final, Section 10; Commission Communication 'Commission Work Programme 2018 An Agenda for a more united, stronger and more democratic Europe' COM(2017) 650 final/2; Section II 'A Union of Democratic Change'; Commission Recommendation (EU) 2018/234 of 14 February 2018 on enhancing the European nature and efficient conduct of the 2019 elections to the European Parliament [2018] OJ L45/40.

1759 Commission Proposal for a Interinstitutional Agreement on a mandatory Transparency Register COM(2016) 0627 final, Art 3(2)(e): does not cover communication of citizens acting solely in their personal capacity. At present: European Parliament Decision of 15 April 2014 on the modification of the interinstitutional agreement on the Transparency Register [2017] OJ C443/228.

1760 See evolution in Smismans, 'Should participatory democracy become the normative model for EU governance?.'

1761 By way of parenthesis, the labels 'representative' and 'participatory' democracy may mislead. Voting in elections (representative democracy) is a form of participation in democratic life and could thus literatim be ranked under 'participatory' democracy. Conversely, participatory practices (participatory democracy) mostly occur via representative organisations and could textually be ranked under 'representative' democracy. However, the usual meaning is to connect representative democracy with official representation in parliaments.

and Social Committee and the Committee of the Regions, representing the economic, social, and regional interests of citizens,<sup>1762</sup> as well as through dialogue with social partners (Article 152 TFEU). In *UEAPME*, the General Court considered that:

the principle of democracy on which the Union is founded requires — in the absence of the participation of the European Parliament in the legislative process — that the participation of the people be otherwise assured, in this instance through the parties representative of management and labour.<sup>1763</sup>

For functional representation, the essential point is a sound connection between the basis and its representatives, and here EDC standards come in. Scholars criticise the level of grass roots input in civil society organisations.<sup>1764</sup> Bouza García points to the distance of participatory tools from ordinary citizens: ‘the civil dialogue scheme does not seem capable of fostering debate beyond the organisations already well established and interested in European policy-making.’<sup>1765</sup> Nor do online consultations easily reach the public. To give Article 11 TEU *effet utile* and reading this provision in the light of EDC standards, an EU dimension must be incorporated in EDC in mainstream education. An EU dimension to EDC prepares citizens for informed participation, direct and indirect, with reliable interaction between the grassroots and the top of civil society organisations, as well as between the top of those organisations and the institutions. Only when they understand what is at stake, can citizens responsibly choose representatives to protect their interests and receive nuanced feedback.<sup>1766</sup>

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1762 Compulsory consultation on various policies (e.g. Art 46, 50, 100, 114 TFEU). See also Lenaerts and Van Nuffel, *European Union Law* 745; Mendes, *Participation in EU Rule-Making: A Rights-Based Approach* 31.

1763 Case T-135/96 *UEAPME v Council* ECLI:EU:T:1998:128, para 89.

1764 Bouza García, ‘How Could the New Article 11 TEU Contribute to Reduce the EU’s Democratic Malaise?’ 270–2.

1765 Conclusion after empirical research, see *ibid.*, 272 (support and control from grassroots citizens is lacking), also 261–2 (‘as legitimate as civil society organisations consultation may be, the involvement of civil society organisations in policy-making is not a form of citizens’ direct participation unless members of the organisations are effectively consulted and involved in the process’). See also Kohler-Koch, ‘Does participatory governance hold its promises?’.

1766 On the distance from grassroots levels in general, see Kohler-Koch, ‘Does participatory governance hold its promises?’ 272, 284 (‘When civil society representatives want to reach down to grassroots activists, arguing across the many



To conclude, paragraphs 1 to 3 of Article 11 TEU affect the large majority of citizens (iv) by giving them an opportunity to participate directly, and mostly indirectly, through representative organisations. To the dual tracks of democratic legitimacy, participatory democracy adds the functional representation of citizens, stakeholders and interests.<sup>1767</sup> The claim that functional representation gives citizens at grassroots level a voice in interaction with the institutions is undermined if the distance between grassroots and the top is widened by a lack of understanding of EU matters.

The affirmation that EU citizens participate in the democratic life of the Union (Article 10(3) TEU) through opportunities based on Article 11 TEU and that the democratic legitimacy of the EU is thus enhanced, sounds hollow if the participating citizens lack the most elementary understanding of the EU's DNA. How meaningful are discussions of citizens with EU officials, when these citizens identify the EU with the Commission (a common perception, even among civic educators) and are unfamiliar with the principle of conferral?

To grow beyond the activities of specialised actors and to increase input legitimacy, participation opportunities require a preparatory EU dimension in EDC.

That the EU dimension implies a different approach to that oriented to representative democracy will now be explained.

### *235 Effective interest protection*

Participatory democracy gives citizens a voice. The EU dimension of EDC gives them an informed and more influential voice. Productive interaction with officials of EU institutions (be it through interest representation, consultations, dialogues, or other participatory opportunities) require prior EU knowledge and understanding. Firstly, the EU dimension of EDC should raise citizens' awareness of the existence of participatory instruments and encourage their use.<sup>1768</sup> Secondly, active and passive members of interest groups need some insight into the EU dimension of their specific interest field. Thirdly, single issue campaigners are handicapped if

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layers of the multi-level system is time and resources consuming. Basic messages travel more easily'.

1767 Ibid, 288 (the author defines participatory democracy by two core components: (1) NGOs, which constitute organised civil society and (2) civil dialogue, which enables them to participate in public policy making, at 274).

1768 Citizens lack motivation, see Van Deth, 'In Search of the "Good European Citizen": WYSIWYG?' (n 1749).

they cannot situate their single issue in the whole EU picture. To defend their cause persuasively, they need an understanding of related cross-cutting issues in other areas of EU policy and of the institutional balance of powers.<sup>1769</sup> A farmer who understands the principles of the common agricultural policy will have more influence than the farmer who only sees the issues affecting his land. The consumer who understands free movement rules in the internal market and knows about the existing consumer rights in EU law, their scope and limits, will have better arguments than the consumer who merely sets out the terms of his complaint. The social activist who understands the principle of conferral and has a view on EU competences in employment and social policy, will be better equipped to argue with the officials of EU institutions than someone who is limited to describing unjust and unfair situations in his own region. The same is true for issues relating to the environment, gender equality, minority protection, etc. In order to counter vested interests, to increase the visibility of particular interests, and to confidently play a role in the EU's participatory governance, citizens and their representatives need to be empowered. They will participate more effectively if the EDC they received at school was not limited to the nation state, but has introduced them to the foundational values, objectives and principles of the EU. Adequate interest representation requires a view on *what* happens at EU level, *why* it happens and *how*. Prior EDC with an EU dimension makes stakeholders and civil society organisations valuable partners for EU institutions in dialogues and consultations. Otherwise, the 'dialogues' or 'consultations' are camouflaged institutional 'communication' and 'information' sessions, with a top down bias.<sup>1770</sup> Certainly, *through* participation in dialogues or consultations, citizens' knowledge and ownership of the EU will increase. Participation has a learning effect.<sup>1771</sup> Yet, EU learning *before* participation will make this participation more effective. Knowledge of EU rights and obligations in relevant fields of interest contributes to the well-founded defence of interests at EU level (or in mixed bodies or agencies).<sup>1772</sup>

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1769 On the so-called 'value and rights based' associations with a narrow focus, yet related to cross-cutting issues, see Kohler-Koch, 'Does participatory governance hold its promises?', 285–7.

1770 Bouza García, 'How Could the New Article 11 TEU Contribute to Reduce the EU's Democratic Malaise?' 272.

1771 *Ibid* 257, 262.

1772 Concept and examples of *EU rights*, Chapter eight.

Not only the EU dimension of *EDC*, but also the EU dimension of *HRE* (human rights education)<sup>1773</sup> is relevant for interest groups. The representatives and the citizens they represent should know about the rights and principles of the CFR which concern them and about the applicability of those rights and principles to EU institutions and Member States when implementing EU law. Examples are: the right to form and to join trade unions; the freedom to conduct a business; non-discrimination rights; the EU obligation to respect cultural, religious and linguistic diversity; the rights of the elderly and of persons with disabilities; workers' right to information and consultation within the undertaking; the right of collective bargaining and action; the right to working conditions which respect health, safety and dignity; rights with regard to social security and social assistance, health care, environmental protection, or consumer protection.<sup>1774</sup> Effective interest representation is a further reason why vocational training, too, should have an EU dimension. In order to defend the interests of their sector, future electricians, carpenters, car mechanics, decorators, cooks, hotel managers, ICT technicians, etc., need to understand the EU dimension of their professional activities. As part of quality education, the EU dimension will give them competitive advantages for work in the internal market, crossborder but also at home (area without internal frontiers). Respect for EU norms on safety, privacy, consumer or environment protection, are examples of horizontal themes relevant to many professions. The EU dimension will moreover empower them to play a role in participatory democracy, i.a. as active or passive members of professional organisations. The ordinary citizen who wants to participate in the democratic life of the Union may be intimidated when surrounded by professional consultancies, law firms, self-employed consultants, trade and business associations, trade unions, professional associations, think tanks, etc.<sup>1775</sup> Equipped with citizenship competence (a combination of knowledge, skills and attitudes<sup>1776</sup>), introduced to the rules of the game, he or she will be better armed to take up the challenges at EU level and to resist

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1773 Defined in para 2(b) of the Charter on EDC/HRE (Part one).

1774 Resp CFR Arts 12, 16, 21, 22, 23, 25, 26, 27, 28, 31, 35, 37, 38. See also below Chapter eight.

1775 See categories of interest representatives signing up to the Transparency Register: Commission Proposal for a Interinstitutional Agreement on a mandatory Transparency Register COM(2016) 0627 final, Annex I.

1776 Council Recommendation of 22 May 2018 on key competences for lifelong learning, Annex: A European Reference Framework, 'Key competences', 6: Citizenship competence.

the temptation to withdraw to the perspective of the individual and the nation state, which only allows a limited response to the issues of globalisation.

### 236 *Effective participation*

The Member States have agreed in binding international agreements that ‘education shall enable all persons to *participate effectively* in a free society’ and ‘shall strengthen the respect for human rights and fundamental freedoms’.<sup>1777</sup> Applying the compulsory educational aims in EU society—consistently with EU law—the opportunities for participatory democracy, including those related to fundamental rights, are relevant to the EU dimension of EDC. The EU dimension of EDC should enable citizens to use the *participation* tools of Article 11 TEU, and even to use them *effectively*. Read in the light of EDC standards, Article 11 TEU and its *effet utile* require an EU dimension to EDC in mainstream education.

In conclusion, an EU dimension of EDC at school is needed if citizens are to use participatory instruments effectively to defend their economic and non-economic interests (in professional and civic life). A general precondition for effective participation is transparency, where that implies intelligibility.<sup>1778</sup> EDC is a necessary step for attaining this. Preparing for participatory democracy thus implies a different and complementary perspective to preparing for representative democracy.<sup>1779</sup> Participatory instruments call for other qualities than are needed to vote in elections. They require more ‘active citizenship’ qualities than merely ticking a box in an electoral list. Acquiring a voice in participatory democracy is more difficult to achieve, influence must be fought for and deserved. To the extent that EU institutions have discretionary powers when organising participatory processes, or choosing and listening to parties<sup>1780</sup>, it is preferable that these partners are well-informed. Adding an EU dimension to EDC to empower citizens for participatory opportunities is therefore at least as important as empowering them to exercise the (automatic) rights of representative democracy. Effective participatory democracy should not be reserved for the happy few, i.e. those who know how the system works, or those who don’t, but can afford to pay intermediaries to represent their professional interests.

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1777 Art 13 ICESCR; see also Art 29 CFR.

1778 Van Parijs, ‘Justifying Europe’ 258.

1779 Text to n 1728.

1780 N 1745.

237 *Conclusion on the democratic participation rights in Title II TEU*

In EU primary law, Title II TEU occupies a central position to which EDC standards must be linked. All EU citizens have the right to participate in the democratic life of the Union (Article 10(3) TEU). This general right is expressed in several specific democratic participation rights. With regard to representative democracy, EU law directly grants all EU citizens a right to vote in elections for the European Parliament (Articles 10(1)(2) and 14(3) TEU and 39(2) CFR). This has repercussions for the relationship of static citizens with their own Member State (*Delvigne*). Furthermore, EU law adds an important EU dimension to the right of citizens to vote for their national parliament (Article 12 TEU). With regard to participatory democracy, Article 11 TEU creates rights and various opportunities for participation by EU citizens.

Reading Title II TEU in conjunction with EDC standards, the democratic participation rights and opportunities described above provide additional (i) and significant (ii) content for national EDC in components (c-1) to exercise and defend democratic rights and responsibilities in society and (c-3) to play an active part in democratic life. They invite critical thinking (iii) and are relevant for the large majority of EU citizens, including static citizens (iv). They thus satisfy the criteria of relevance for mainstream education, moreover in complementary ways. In short, the EU dimension of EDC aims to empower EU citizens to exercise the participation rights based on Title II TEU and thereby to participate in the democratic life of the Union. Including an EU dimension in EDC enhances the quality of democracy at EU level and at national level, broadens the dual track of democratic legitimacy and strengthens social legitimacy.

Title II TEU, which was included in the 2009 Lisbon Treaty, provides the hard core for the EU dimension of EDC as it connects provisions on democratic principles with EU citizenship.<sup>1781</sup> Ten years later, in an evolving process towards more democratic legitimacy, the next step is to connect democratic principles and EU citizenship with EDC standards. Accordingly, young citizens should be systematically informed in main-

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1781 Commission Recommendation of 12 March 2013 on enhancing the democratic and efficient conduct of the elections to the European Parliament [2013] OJ L79/29, recital 3 ('The Treaty of Lisbon enhances the role of citizens of the Union as political actors, establishing a solid link between citizens, the exercise of their political rights and the democratic life of the Union'). See analysis by Shaw, 'Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism', 4.2, 4.3; Lenaerts and Gutiérrez-Fons, 'Epilogue on EU Citizenship: Hopes and Fears' 752, 756.

stream education about the participation rights and opportunities in the EU and invited to reflect on the way forward.